

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

DOREEN EDWARDS
585 Pine Street
Cypress Hill, NY 11208

OLUBUKOLA KESHINRO
226-03 147th Avenue
Rosedale, NY 11413

GARRY BREWSTER
126-11 145th Street
Jamaica, NY 11436

MARIA AND THOMAS VELLUCCI
84-34 Little Neck Parkway
Floral Park, NY 11001

individually and on behalf of all other persons
similarly situated,

Plaintiffs,

- against -

AURORA LOAN SERVICES, LLC
10350 Park Meadows Drive
Littleton, CO 80124

TIMOTHY F. GEITHNER, in his capacity as
United States Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

HENRY ALLISON, JR., in his capacity as
Assistant Secretary for Financial Stability,
U.S. Department of the Treasury,
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Civil Action No.
09-cv- ()

CLASS ACTION COMPLAINT

EDWARD DeMARCO, in his capacity as
Acting Director, Federal Housing Finance Agency,
Federal Housing Finance Agency
1700 G Street, NW
4th Floor
Washington, DC 20552

FEDERAL NATIONAL MORTGAGE
ASSOCIATION
3900 Wisconsin Avenue, NW
Washington, DC 20016-2892

MICHAEL J. WILLIAMS, in his capacity as
President and Chief Executive Officer, Federal
National Mortgage Association,
Federal National Mortgage Association
3900 Wisconsin Avenue, NW
Washington, DC 20016-2892

ERIC SCHUPPENHAUER, in his capacity as Senior
Vice President, Federal National Mortgage
Association,
Federal National Mortgage Association
3900 Wisconsin Avenue, NW
Washington, DC 20016-2892

Defendants.

Plaintiffs Doreen Edwards (“Ms. Edwards”), Olubukola Keshinro (“Ms. Keshinro”),
Garry Brewster (“Mr. Brewster”), and Maria and Thomas Vellucci (the “Velluccis”)
(collectively, “Plaintiffs” or “Representative Plaintiffs”), for their complaint against Defendants
Aurora Loan Services, LLC (“Aurora”), Timothy F. Geithner (“Geithner”), Henry Allison, Jr.
 (“Allison”), Edward DeMarco (“DeMarco”), the Federal National Mortgage Association,
 (“Fannie Mae”), Michael Williams (“Williams”), and Eric Schuppenhauer (“Schuppenhauer”)
(collectively, “Defendants”), on behalf of themselves and all others similarly situated, allege as
follows:

INTRODUCTION

1. This action arises out of breaches by Defendant Aurora, a residential mortgage servicer, of its contractual obligation to consider eligible homeowners, including Plaintiffs, for mortgage modification under the federal Home Affordable Modification Program (“HAMP”), and the failure of responsible officials in the United States Department of the Treasury (“Treasury”), the Federal Housing Finance Agency (“FHFA”), and Fannie Mae, to implement policies and procedures necessary to protect the procedural due process rights of Plaintiffs and other similarly situated borrowers. As a result of Defendants’ misconduct and failure to act, Plaintiffs face a substantially greater risk of losing their homes to foreclosure.

2. In the past year, the United States has faced a daunting and, to many, a devastating economic crisis. As a result of the economic downturn, many homeowners have lost their homes or are at imminent risk of foreclosure. HAMP was launched by the Obama Administration, as part of the Troubled Asset Relief Program (“TARP”), to stem the escalating tide of home foreclosures with its ruinous effects on families and their communities. HAMP’s purpose is to provide eligible homeowners with permanent loan modifications on terms they can afford, to avoid foreclosure of their homes. As the United States Government Accountability Office stated in a recent report (GAO-09-837) on TARP, “HAMP is the cornerstone effort under TARP to meet the act's purposes of preserving home ownership and protecting home values.” (*Id.* at 47 (available at <http://www.gao.gov/new.items/d09837.pdf>.)

3. To participate in HAMP, companies that service mortgages (“Participating Servicers”) not owned by a Governmental Sponsored Enterprise (“non-GSE loans”) enter into a contract (the “HAMP Contract”) with Fannie Mae, as Financial Agent of the United States

Government.¹ Pursuant to the HAMP Contract, Participating Servicers agree to comply with the terms of the HAMP Contract, including the HAMP program guidelines and other program documentation issued by Treasury, the terms of which are expressly incorporated into the HAMP Contract.

4. On April 30, 2009, Aurora entered into a HAMP Contract as a Participating Servicer with Fannie Mae, pursuant to which Aurora agreed to review all eligible borrowers -- those who are either in default on their mortgage loan or at risk of imminent default -- for loan modifications under HAMP, and to confer the benefits of loan modifications to qualified borrowers in compliance with the HAMP Contract and the HAMP program documentation.

5. Plaintiffs and class members are homeowners whose non-GSE mortgages are covered by the HAMP Contract and who meet the HAMP eligibility criteria to have their mortgages reviewed for modification. Plaintiffs each can show that they have suffered financial hardships and have, as a result, defaulted on their mortgages. Absent HAMP modification, these homeowners face foreclosure, the very result that HAMP is intended to prevent.

6. Notwithstanding Aurora's contractual obligations under the HAMP Contract, Aurora has breached that agreement in a number of ways. Among other things, Aurora has (a) wrongfully denied Plaintiffs access to the benefits of HAMP by refusing to evaluate their non-GSE loans for modification, even when Plaintiffs approached Aurora with specific requests to be considered under HAMP; (b) instituted, failed to suspend, or threatened to institute foreclosure proceedings against certain Plaintiffs who asked to be considered under HAMP; and (c) offered Plaintiffs, in some instances, forbearance agreements that violate the HAMP program guidelines

¹ Servicers of loans guaranteed or owned by Government Sponsored Enterprises ("GSEs"), such as the Federal Home Loan Mortgage Corporation ("Freddie Mac") or Fannie Mae, are required to participate in HAMP. Therefore, with respect to so-called "GSE loans," no HAMP Contract is required.

by not lowering Plaintiffs' monthly payments, requiring Plaintiffs to waive substantial legal rights, and not guaranteeing a modification even if the Plaintiff fully complies with the terms of the forbearance agreement.

7. Officials at Treasury and Fannie Mae have adopted and implemented procedures for the HAMP program that have been inadequate to protect the due process rights of borrowers. Specifically, until a recent supplemental directive, which will take effect January 1, 2010, the HAMP procedures have failed to require that homeowners be notified by their Participating Servicer in writing of the reasons for a denial of their loan modification with sufficient detail to challenge an erroneous determination. Officials at Treasury and Fannie Mae have made no provision to protect homeowners who were harmed by the inadequate procedures currently in place. Additionally, the HAMP procedures continue to provide no viable process to obtain review of the denial of a loan modification before an impartial decision-maker.

8. The actions of Fannie Mae, currently under FHFA conservatorship, as Financial Agent under the HAMP Contract and as one of the parties responsible for working with the United States Government to develop, implement, and administer HAMP, are so intertwined with the federal government as to constitute acting under the color of federal law. Likewise, as a signatory to the HAMP Contract and the party directly responsible for implementing HAMP's directives with respect to the eligible mortgages it services, Aurora is so intertwined in the administration of the HAMP program that it is acting under color of federal law. Aurora has violated and continues to violate Plaintiffs' procedural due process rights by failing to provide Plaintiffs and other similarly situated homeowners with written notice of its determinations concerning eligibility for HAMP modifications and the reasons for its determinations with sufficient detail to permit a borrower to challenge an erroneous decision. In addition, Aurora has

violated and continues to violate Plaintiffs' procedural due process rights by failing to provide Plaintiffs and other similarly situated homeowners access to a viable procedure to contest Aurora's denial of a borrower's access to HAMP benefits before an impartial decision-maker.

9. Plaintiffs bring this action, on behalf of themselves and a class of others similarly situated, as third-party beneficiaries of the HAMP Contract between Aurora and Fannie Mae. Plaintiffs seek declaratory and injunctive relief to end Aurora's improper practices and compel Aurora's compliance with the HAMP Contract and its requirements. Plaintiffs further seek declaratory and injunctive relief directing Treasury officials, FHFA officials and Fannie Mae and its officers and employees to require Participating Servicers to provide proper notice to all Borrowers – including those who were denied modifications before the new procedures take effect – of the grounds for the servicer's denial in sufficient detail to allow the borrower to challenge an erroneous determination. In addition, plaintiffs seek an order directing federal officials to establish an appeals procedure under HAMP for Borrowers who are denied modifications, in order to enable borrowers to contest before an impartial decision-maker a Participating Servicer's denial of access to HAMP benefits.

JURISDICTION AND VENUE

10. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331, because Plaintiffs' claims arise under the Constitution and the laws of the United States, and with regard to defendant Aurora, pursuant to 28 U.S.C. §§ 1332(d)(2)(a) and 1332(d)(6), because Plaintiffs and class members are citizens of a State different from Aurora and the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

11. Personal jurisdiction as to Defendant Aurora is appropriate because, under the terms of the HAMP Contract, Aurora consented to the personal jurisdiction of this Court.

Personal jurisdiction over Defendants Geithner, Allison, DeMarco, Williams, and Schuppenhauer is appropriate pursuant to D.C. Code § 13-423(a) and (b), because each conducts business in this Judicial District and has sufficient contacts with this Judicial District relating to the facts giving rise to this action.

12. Venue with respect to Aurora is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c) because Aurora is a corporation that has subjected itself to personal jurisdiction in the District of Columbia by consent, pursuant to the HAMP Contract. Moreover, pursuant to the HAMP Contract, Aurora agreed that the United States District Court for the District of Columbia would have venue over all disputes thereunder. Venue with respect to Defendants Geithner, Allison and DeMarco is proper in this Judicial District pursuant to 28 U.S.C. § 1391(e)(2) because each is an officer or employees of the United States or agencies thereof acting in his official capacity or under color of legal authority, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this Judicial District. Venue with respect to Defendants Williams and Schuppenhauer is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) because "a substantial part of the events or omissions" alleged herein took place in this Judicial District.

13. Jurisdiction and venue with respect to Fannie Mae is appropriate under 12 U.S.C. § 1717(a)(2)(B), pursuant to which Fannie Mae is "deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation."

PARTIES

14. Plaintiff Doreen Edwards owns a two-family home at 585 Pine Street, Cypress Hill, New York. This home is the primary residence of Ms. Edwards and her disabled son. Ms. Edwards is employed as a home care attendant.

15. Plaintiff Olubukola Keshinro owns a single family home at 226-03 147th Avenue, Rosedale, New York. This home is the primary residence of Ms. Keshinro and her three children. Ms. Keshinro is employed as a registered nurse.

16. Plaintiff Gary Brewster owns a single family home at 126-11 145th Street, Jamaica, New York. This home is his primary residence. Mr. Brewster is employed as a luggage screener at LaGuardia Airport.

17. Plaintiffs Maria and Thomas Vellucci own a two-family home at 84-34 Little Neck Parkway, Floral Park, New York. This home is their primary residence. Mr. Vellucci is disabled and receives a small pension and social security benefits. His wife works part-time as a home care attendant.

18. Defendant Aurora is a Delaware limited liability company, with its principal place of business in Littleton, Colorado. Aurora entered into the HAMP Contract on April 30, 2009 to administer the HAMP program with respect to the non-GSE loans serviced by Aurora.

19. Defendant Timothy F. Geithner is Secretary of the United States Department of the Treasury. He is sued in his official capacity as Secretary of the Treasury. His office is located at 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

20. Defendant Henry Allison, Jr. is the Assistant Secretary of Financial Stability in the Office of Financial Stability at Treasury. He is responsible for developing and coordinating Treasury's policies on matters affecting financial stability, including overseeing the TARP program. He is sued in his official capacity as Assistant Secretary. His office is located at 1500 Pennsylvania Avenue, NW, Washington, D.C. 20220.

21. Defendant Edward DeMarco is the Acting Director of FHFA, which has been designated as the conservator for Fannie Mae. Mr. DeMarco is sued in his official capacity as Acting Director. His office is located at 1700 G Street, Washington, D.C. 20552.

22. Defendant Fannie Mae is a government-chartered, publicly-traded entity. Fannie Mae is the Financial Agent for the United States Government under the HAMP contract and has acted closely with and as an agent of the United States Government in developing, implementing and administering HAMP. Fannie Mae's offices are located at 3900 Wisconsin Avenue, NW, Washington, D.C. 20016-2892.

23. Defendant Michael Williams is the President and CEO of Fannie Mae. He is sued in his capacity as President and CEO. His office is located at 3900 Wisconsin Avenue, NW, Washington, D.C. 20016-2892.

24. Defendant Eric Schuppenhauer is a Senior Vice President of Fannie Mae. He is the Program Executive for the Homeowner Affordability and Stability Plan ("HASP"), of which HAMP is a part, and leads Fannie Mae's efforts relating to the Making Home Affordable Program. He is sued in his capacity as Senior Vice President. His office is located at 3900 Wisconsin Avenue, NW, Washington, D.C. 20016-2892.

STATEMENT OF FACTS

A. The Homeowner Affordability and Stability Plan

25. The economic downturn in the United States has resulted in millions of homeowners falling behind in their mortgage payments, and facing foreclosure and the risk of losing their homes.

26. In early 2009, the Obama administration took action to stem the tide of what had become a national foreclosure crisis, through enactment of the Homeowner Affordability and

Stability Plan (“HASP”). HASP is authorized by the Emergency Economic Stabilization Act of 2008 and was developed “to provide assistance for up to 7 to 9 million homeowners by reducing monthly mortgage payments to sustainably affordable levels, preventing avoidable foreclosures and helping millions of Americans keep [their] homes.” (U.S. Dep’t of Treasury, 100 Days Progress Report, at 4 (Apr. 29, 2009) (available at http://www.treas.gov/press/releases/reports/100daysreport_042909.pdf.)

B. The Home Affordable Modification Program (HAMP)

27. As part of HASP, Treasury established the Home Affordable Modification Program. HAMP’s primary purpose is to assist the millions of homeowners in default or at imminent risk of default on their home mortgages “by establishing a standardized and streamlined process for servicers (including lenders or investors that service their own loans) to follow in evaluating and conducting modifications of existing mortgages, and by providing meaningful incentives to servicers, investors and borrowers to encourage loan modifications.” (Financial Stability Oversight Board, Quarterly Report to Congress Pursuant to § 104(g) of the Emergency Economic Stabilization Act of 2008, at 31 (Mar. 31, 2009).) Treasury has committed \$50 billion to finance modifications under HAMP. Funding for HAMP began on April 13, 2009.

28. The HAMP Contract incorporates by reference documents issued by Treasury and designated in the HAMP Contract as “Program Documentation.” These documents include uniform “Home Affordable Modification Program Guidelines” for modifying loans under HAMP (the “Guidelines”); subsequent Supplemental Directives; and “Frequently Asked Questions” (“FAQs”) intended to further clarify HAMP program requirements.

29. The HAMP Contract provides homeowners with significant benefits. Principally, the reduction of borrowers’ monthly loan payments to affordable and sustainable levels is

intended to allow borrowers to avoid foreclosure and retain their home. HAMP accomplishes these goals by reducing borrowers' monthly payments toward principal, interest, taxes and insurance to 31% of their gross income. In addition, HAMP provides reductions in mortgage principal for five years to borrowers who remain current in their modified payments.

30. HAMP also offers homeowners protection against foreclosure. No foreclosure proceedings may be commenced against homeowners so long as they meet the HAMP minimum eligibility requirements and are being assessed for modification, and any foreclosure proceedings commenced before they were considered for HAMP modifications are to be suspended.

31. Homeowners also are protected from having mortgage servicers condition a loan modification upon waiver of the borrower's legal rights -- a common demand from servicers in non-HAMP loan modification or forbearance programs -- or a cash contribution from the borrower in addition to the trial modification loan payments.

32. Since the inception of HAMP, over sixty Participating Servicers, including defendant Aurora, have executed a HAMP Contract with Fannie Mae.

33. In consideration of performing the agreed-upon services under the HAMP Contract, Fannie Mae, acting as financial agent of the United States, compensates Participating Servicers and investors for successful modifications. Participating Servicers receive \$1,000 for each completed modification, payable upon the borrower's successful completion of the 90-day trial period, as well as up to \$1,000 each year (for up to three years) provided the Participating Servicer reduces a borrower's monthly payment for principal, interest, taxes and insurance by six percent or more and the borrower remains in good standing. Investors who hold a particular mortgage receive matching funds (for up to five years) to offset in part the cost of reducing a borrower's debt-to-income ("DTI") ratio from 38% (or lower, if the unmodified DTI is below

38%) to 31% by applying the “Standard Modification Waterfall” calculation, described below, promulgated by Treasury in the Program Documentation. Moreover, where a borrower was current in his or her mortgage payments prior to the start of the trial period, Participating Servicers receive an additional compensation of \$500 and investors an additional \$1,500 for each executed modification agreement.

C. Aurora’s Obligations Under the HAMP Contract

34. Under the terms of its HAMP Contract, Aurora must consider for loan modification all minimally-eligible non-GSE loans it services that are either in default or at risk of imminent default.

35. To be eligible for an assessment under HAMP, a borrower need only meet the following minimum eligibility criteria: (1) the borrower’s mortgage is a first lien originated before January 1, 2009; (2) the mortgage has not been previously modified under HAMP; (3) the borrower has defaulted (*i.e.*, is 60 days or more delinquent) or default is reasonably foreseeable; (4) the mortgage is secured by a one- to four-unit property (including a cooperative or condominium), one unit of which is the borrower’s principal residence; (5) the borrower’s monthly payments toward principal, interest, taxes, insurance, and association fees where applicable (“PITIA”) exceed 31% of his or her gross monthly income; (6) the borrower has experienced financial hardship; (7) the borrower lacks the liquid assets to meet his or her monthly mortgage payments; and (8) the unpaid principal balance on the mortgage is less than or equal to \$729,750 for one unit (if the mortgage covers more than one unit, the cap on the unpaid balance increases: 2-unit, \$934,200; 3-unit, \$1,129,250; 4-unit, \$1,403,400).

36. Once Aurora has determined that a borrower meets these basic eligibility criteria, Aurora is required under the HAMP Contract to conduct a “net present value” (“NPV”) test. The

NPV test compares the net present value of cash flow from the borrower's loan if modified under HAMP to the net present value of cash flow without a modification. In other words, the test looks to see if a loan as modified yields a more positive financial outcome to the investor or other holder of the note secured by the mortgage than a foreclosure on the property would yield.

37. In order to determine if a mortgage modification would be positive or negative under the NPV test, Aurora must apply the Standard Modification Waterfall calculation, to establish the cash flow that would result from modification. The goal of the Standard Modification Waterfall is to reduce to 31% the borrower's monthly "Front-End Debt-to-Income Ratio" ("Front-End DTI"). This ratio is defined as the ratio of the borrower's payment for principal, interest, taxes and insurance ("PITI") and, where applicable, homeowner association fees, to the borrower's monthly gross income. The unpaid principal and costs associated with other loans and the mortgage insurance premiums applicable to the qualifying loan are not included in the calculation of Front-End DTI.

38. If the NPV test yields a positive outcome (*i.e.*, the value of a performing modified loan exceeds the value of foreclosing on the property), Aurora must offer the borrower a modification under HAMP. If the NPV test is negative, Aurora has the option to offer the borrower a HAMP modification. In the case of investor-owned mortgages, express investor approval is required to modify a loan where the NPV test is negative.

39. If the NPV test is negative and Aurora does not offer a HAMP modification to the borrower, Aurora still is required under the HAMP Contract to consider the borrower for other foreclosure prevention measures, including other mortgage modification programs, such as Hope for Homeowners, or other loss mitigation programs.

40. If a non-GSE mortgage is investor-owned under terms that would prohibit loan modification absent investor approval (for example, restrictions contained in a servicer's pooling and servicing agreement with an investor), Aurora has an affirmative obligation under the HAMP Contract to take reasonable steps to obtain waivers or approvals from investors to carry out modifications under HAMP. Participating Servicers who modify investor-owned loans pursuant to HAMP are offered certain safe harbor protections from lawsuits by investors to the extent that the servicer complies with HAMP guidelines: "A servicer that is deemed to be acting in the best interests of all investors or other parties under this section shall not be liable to any party who is owed a duty under subsection (a)(1), and shall not be subject to any injunction, stay, or other equitable relief to such party, based solely upon the implementation by the servicer of a qualified loss mitigation plan." (15 U.S.C. § 1639a(b))

41. Following a positive NPV test (or if Aurora chooses to modify a negative NPV mortgage) Aurora must, consistent with the HAMP Contract and HAMP requirements, offer a 90-day trial modification period with payments based on the Standard Modification Waterfall calculation approximating the payments required under any final loan modification. If an eligible borrower successfully completes the trial period by making the required payments, the modification becomes permanent.

D. Protections for Third-Party Beneficiary Homeowners

42. The primary purpose of HAMP is to benefit eligible homeowners by preventing avoidable foreclosures.

43. The HAMP Contract contains significant provisions for the benefit of eligible homeowners that further HAMP's goal of preventing avoidable foreclosures.

44. First, Aurora covenants in the HAMP Contract, among other things, that “(i) it will perform its obligations in accordance with the agreement. . . ; [and] (ii) all Services will be offered to borrowers, fully documented and serviced, or otherwise performed, in accordance with the applicable Program Documentation.” (HAMP Contract, Ex. A, Financial Instrument, at ¶5(c).)

45. Second, HAMP reduces an eligible borrower’s monthly payments toward principal, interest, taxes and insurance to 31% of the borrower’s gross income.

46. Third, the HAMP Contract requires a moratorium on foreclosure actions during the HAMP process:

- (a) The HAMP Contract requires that “[f]oreclosure actions . . . , including initiation of new foreclosure actions, must be postponed for all borrowers that meet the minimum HAMP eligibility criteria.” (Frequently Asked Questions, at 2 (August 19, 2009).) Further, Aurora “must not conduct foreclosure sales on loans previously referred to foreclosure or refer new loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the Trial Period Plan offer. (Supp. Direct. 09-01, at 14 (available at https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0901.pdf)).
- (b) The HAMP Contract also prohibits foreclosure sales during the three-month trial period preceding any permanent loan modification.
- (c) Even if a borrower defaults after receiving a permanent HAMP modification, the HAMP Contract states that Aurora “must work with the borrower to cure the modified loan, or if that is not feasible, evaluate the

borrower for any other available loss mitigation alternatives prior to commencing foreclosure proceedings.” (*Id.*, at 19.)

- (d) Moreover, because an eligible borrower who is not offered a HAMP modification must be considered for “other foreclosure prevention alternatives, including alternative modification programs, deed-in-lieu and short sale programs,” the HAMP Contract requires that “[a]ny foreclosure action will be temporarily suspended . . . while borrowers are considered for alternative foreclosure prevention options.” (Guidelines, at 3, 6 (available at http://www.treas.gov/press/releases/reports/modification_program_guidelines.pdf.)

47. Fourth, the HAMP Contract prohibits Aurora from requiring borrowers to waive their legal rights as a condition to obtaining a loan modification under HAMP.

48. Fifth, the HAMP Contract prohibits Aurora from charging fees for HAMP modification, requires that Aurora waive any late fees, and forbids Aurora from requiring borrowers to make an up-front cash contribution to participate in HAMP.

49. Sixth, the HAMP Contract requires Aurora to timely provide “clear and understandable written information about the material terms, costs and risks of the modified mortgage loan” to allow borrowers to engage in informed decision-making. (Guidelines, at 13.)

50. Seventh, on November 3, 2009, Treasury issued Supplemental Directive 09-08, which takes effect January 1, 2010. Participating Servicers will be required to provide mortgagors with a written notice setting forth in detail some, but not all, of the grounds for the denial of a HAMP trial or permanent modification. The notice allows the borrower to contact

their Participating Servicer in order to correct some errors. This notice also advises borrowers to call the HOPE Hotline. (Supp. Direct. 09-08 (available at https://www.hmpadmin.com/portal/docs/hamp_servicer/sd0908.pdf.) This hotline does not function as an appeals process, but rather connects borrowers with HUD-approved counselors. Hotline staff do not have the power to reverse a Participating Servicer's denial of eligibility for a mortgage modification or to compel a Participating Servicer to take, modify or withdraw any action.

51. Despite willingly entering into the HAMP Contract, Aurora has failed to abide by its terms in several respects. Aurora has breached the HAMP Contract by refusing to comply with HAMP requirements, and improperly denying review of eligibility for HAMP benefits and modifications under HAMP for qualified borrowers. Instead, since executing the HAMP Contract, Aurora has offered certain borrowers whose loans are serviced by Aurora improper special forbearance agreements, and has continued to commence and/or prosecute foreclosure proceedings against HAMP-eligible borrowers, or has threatened to commence foreclosure proceedings against them.

E. The Representative Plaintiffs' Denial of Access to HAMP

52. Rather than properly evaluating each of the Representative Plaintiffs for HAMP modification, as it is required to do, Aurora summarily has refused each Representative Plaintiff access to the HAMP program.

53. As demonstrated below, although the Representative Plaintiffs meet the minimum HAMP eligibility requirements, Aurora refused to evaluate their loans for HAMP modification, and as a result, failed to apply the Standard Modification Waterfall calculation and the NPV test

to their mortgages, and did not offer either a trial period modification or a permanent modification.

54. Moreover, when Aurora denied the Representative Plaintiffs access to the HAMP program, it gave no written notice of the basis for its denial, no details concerning the denial, and no procedure by which the Representative Plaintiffs could contest Aurora's refusal to consider them for any HAMP modification

55. Despite entering into the HAMP Contract, in which it expressly agreed to evaluate non-GSE loans for modification, Aurora has, in some instances, erroneously claimed that Plaintiffs' mortgages are not HAMP-eligible because they are not owned or guaranteed by Fannie Mae or Freddie Mac, and has wrongfully asserted that HAMP only applies to GSE loans.

56. Moreover, more than six months after Aurora entered into the HAMP Contract, Aurora's website still implies that HAMP applies only to GSE loans. As of the date of this Complaint, Aurora's website states that borrowers with GSE loans may be HAMP-eligible, but informs non-GSE borrowers: "If you don't have a Fannie Mae or Freddie Mac loan, visit our Web site in the coming weeks for additional eligibility updates"

(<https://myauroraloan.com/Message.aspx>) (last visited Nov. 6, 2009). The Aurora website further directs non-GSE borrowers to "visit our home retention Web page to learn about our current loan workout programs." (*Id.*)

57. Further, Aurora has made the spurious claim to Ms. Edwards, Ms. Keshinro, Mr. Brewster, and the Velluccis that they are not eligible for HAMP because their mortgages are investor-owned. If indeed an investor's agreement with Aurora imposed restrictions on Aurora's ability to offer HAMP modifications, the HAMP Contract expressly requires Aurora to make reasonable efforts to obtain waivers of such restrictions from those investors.

58. The obligation to make reasonable efforts includes informing each investor whether modifying the loan would be more beneficial to the investor than foreclosing on the property. To provide such information, it is necessary for Aurora to determine, before contacting each investor, whether a loan modification would be more beneficial than foreclosing on the property. On information and belief, Aurora has neither made such determinations nor used reasonable efforts to obtain waivers from the applicable investors.

59. When contacted by Ms. Edwards, Ms. Keshinro, Mr. Brewster, and a representative of the Velluccis, Aurora informed each of them without any hesitation that their loans are not HAMP-eligible because of investor ownership. Aurora's response with respect to each of these Plaintiffs indicates that Aurora did not make an initial determination as to whether modifying any individual loan would be more beneficial to the investors who own the loan than foreclosing on the property, and it further failed to take any reasonable steps, as required by HAMP, to obtain an investor waiver for any of these loans.

60. Moreover, Aurora's claims that the mortgages at issue are investor-owned are contradicted by Aurora's pleadings in the foreclosure actions it commenced against Ms. Keshinro, Mr. Brewster and the Velluccis, which aver that Aurora -- not an investor -- is the owner and holder of each applicable note and mortgage.

1. Doreen Edwards

61. Plaintiff Doreen Edwards is a borrower who meets the minimum criteria to be considered for HAMP modification: (a) she defaulted on her mortgage due to financial hardship; (b) the mortgaged property is her primary residence; (c) her mortgage originated before January 2009; (d) the balance owed on her mortgage does not exceed the limits set forth by HAMP; and (e) her monthly payments on her mortgage for principal, interest, property taxes, and insurance exceed 31% of her gross monthly income.

62. Despite Ms. Edwards meeting the minimum HAMP criteria, Aurora has denied her access to HAMP and has told her that it may commence foreclosure proceedings.

63. Ms. Edwards lives with her disabled son at 585 Pine Street, Cypress Hill, New York, a two-family home she purchased together with her daughter and son-in law in 2000. She now rents out the upstairs apartment and one room in her apartment, thus receiving rental income in addition to her earnings as a home care attendant.

64. In 2002, Ms. Edwards transferred her interest in the home to her daughter and son-in-law. In 2005 they sold it back to Ms. Edwards for \$500,000, financed with two mortgages. In April 2007, Ms. Edwards had to refinance the mortgages with two new loans, one for \$500,000 and a second for \$67,000.

65. Both of the 2007 loans were made to Ms. Edwards by Lehman Brothers Bank, FSB and serviced by Aurora, which was, on information and belief, then a subsidiary of Lehman Brothers Bank. The first loan is an adjustable rate mortgage with an initial rate of 7.750%, with a current monthly payment of \$3,228.75. After including monthly amounts due for property taxes and insurance, her PITI payment on the first loan exceeds 31% of her gross income.

66. The second loan carries an interest rate of 13.5%, requiring monthly payments of \$767.43.

67. Ms. Edwards started to fall behind in her mortgage payments in January 2008, because her tenant unexpectedly moved out after causing significant damage to the apartment. Consequently, Ms. Edwards not only lost rental income for a period of time, but incurred substantial repair costs for the apartment. It took Ms. Edwards until May 2008 to repair the apartment and find a new tenant. In addition, in February 2008, Ms. Edwards' hours as a home care attendant were reduced.

68. In August 2008, Ms. Edwards entered into repayment plans with Aurora to catch up on her arrears for both mortgage loans. However, her payment for the first loan increased from \$3,228.75 to \$3,510.56 (excluding taxes and insurance) and for the second loan, increased from \$767.43 to \$835.98.

69. Ms. Edwards is determined to save her home for herself, her son and her tenant, and has struggled to make the payments required under the repayments plans. Currently, she is about five months behind in her payments.

70. Throughout this period, Ms. Edwards has been in touch with Aurora and has sought the assistance of a community-based organization, requesting that her mortgages be modified under the "Obama" plan. Repeatedly, Aurora told her that she would not qualify for HAMP, but without providing a clear explanation.

71. In September 2009, Aurora sent a letter to Ms. Edwards, stating that she might be eligible for HAMP. However, when Ms. Edwards subsequently contacted Aurora and provided updated financial information, she was told that while she might qualify for an in-house modification, she would not qualify for HAMP. When Ms. Edwards asked why she would not

qualify, she was told that her loan is investor-owned. When Ms. Edwards requested that her denial be put in writing, she was told that Aurora does not provide written modification denial notices to its borrowers.

2. Olubukola Keshinro

72. Plaintiff Olubukola Keshinro is a borrower who meets the minimum criteria to be considered for HAMP modification: (a) she defaulted on her mortgage due to financial hardship; (b) the mortgaged property is her primary residence; (c) her mortgage originated before January 2009; (d) the balance owed on her mortgage does not exceed the limits set forth by HAMP; and (e) her monthly payments on her mortgage for principal, interest, property taxes, and insurance exceed 31% of her gross monthly income.

73. Despite Ms. Keshinro meeting the minimum HAMP criteria, Aurora has denied her access to HAMP, and has commenced foreclosure proceedings against her in clear violation of the HAMP Contract.

74. Ms. Keshinro financed the 2006 purchase of her home in Rosedale, New York with a mortgage loan of \$479,000 from Reliable Mortgage Bankers Corp. Her monthly payments for interest, insurance and taxes, totaled \$3,407.36, representing approximately 42% of her gross income.

75. Ms. Keshinro is employed as a registered nurse and works two jobs in order to support her three children.

76. In November 2008, Ms. Keshinro defaulted on her mortgage as a result of financial difficulties including a temporary loss of income from her second job, and unforeseen emergency expenses.

77. Ever since her default, Ms. Keshinro has made every effort to save her home from foreclosure.

78. First, in December 2008, she contacted her mortgage servicer, Aurora, and arranged to make a late payment.

79. Starting in January 2009, prior to the commencement of HAMP, Ms. Keshinro tried to obtain a loan modification. Through a company that provides loan modification services for a fee, Ms. Keshinro submitted an application to Aurora, including income and expense documentation. By letter dated February 25, 2009, Aurora denied her application, stating as the reason for the denial: “Financially unable to afford monthly payments.”

80. On or about May 13, 2009, Ms. Keshinro received a letter from Aurora, dated May 11, 2009, stating: “You may be eligible for the Home Affordable Modification program, part of the initiative announced by President Obama to help homeowners.”

81. However, only a few days later, on May 15, 2009, Ms. Keshinro was served with a Summons and Complaint in a foreclosure action filed by Aurora on May 5, 2009 in New York State Supreme Court, Queens County.

82. Afraid of losing her home, Ms. Keshinro called Aurora again, requesting a loan modification. Despite its contractual obligation to assess Ms. Keshinro for HAMP eligibility, Aurora failed to do so. Instead, on May 28, 2009, Aurora sent Plaintiff a special forbearance agreement captioned “Workout Agreement” (the “Workout Agreement”).

83. The Workout Agreement accomplishes none of HAMP’s purposes, and is in violation of the HAMP Contract because it contains demands prohibited by HAMP, including improper payments, admissions, and waivers of legal rights, as described below.

84. First, the payments required under the Workout Agreement failed to comply with the Standard Modification Waterfall calculation which would have reduced her monthly payments to approximately \$2,503.33. Instead, the Workout Agreement demanded that she make four payments at the level of her prior payments -- the first for \$3,406.16, followed by three additional payments of \$3,432.00 each -- payments she previously had struggled to afford .

85. Moreover, as a condition to suspend temporarily the foreclosure proceeding on her property, the Workout Agreement required Ms. Keshinro to agree to the arrears as alleged and to admit “that there are no defenses, offsets, or counterclaim of any nature whatsoever to any of the Loan Documents or any of the debt evidenced or secured thereby.” The demands are directly in conflict with Aurora’s contractual HAMP obligations.

86. In addition, under the Workout Agreement, even after making the required payments, Ms. Keshinro still would have to cure her default “through either full reinstatement, payment in full, loan modification agreement or other loan workout option that Lender may offer (emphasis supplied). “Loan modification” is only mentioned as one possible option at the end of the payment plan under the Workout Agreement, with no guarantee that any modification would be offered and no discussion of any possible modification terms.

87. After reviewing the onerous terms of the Workout Agreement, Ms. Keshinro contacted Aurora again, to request that Aurora review her eligibility for HAMP. Aurora, in violation of the HAMP Contract, insisted that Ms. Keshinro’s loan was not eligible for a loan modification under HAMP because it is a non-GSE loan, and also claimed that her loan was ineligible under HAMP because it is investor-owned.

88. Contrary to Aurora's representation to Ms. Keshinro that her loan is investor-owned, Aurora pled in the complaint it filed in the foreclosure action against Ms. Keshinro that Aurora is the owner of the note secured by her mortgage.

3. Garry Brewster

89. Plaintiff Garry Brewster is an eligible borrower who is in default and who meets the minimum criteria for HAMP modification: (a) he defaulted on his mortgage due to financial hardship; (b) the mortgaged property is his primary residence; (c) his mortgage originated before January 2009; (d) the balance owed on his mortgage does not exceed the limits set forth by HAMP; and (e) his monthly payments on his mortgage for principal, interest, property taxes, and insurance exceed 31% of his gross monthly income.

90. Despite Mr. Brewster meeting the minimum HAMP criteria, Aurora has denied him access to HAMP, and has commenced foreclosure proceedings against him in clear violation of the HAMP Contract.

91. Mr. Brewster has been living at 126-11 145th Street in Jamaica, Queens, a single-family home that his parents purchased in 1982.

92. After his father passed away in 2004, his mother, Kathryn Brewster, added Mr. Brewster to the deed.

93. In 2004, Mr. Brewster and his mother were persuaded by a home improvement contractor to take out a mortgage for home improvements for \$196,000. The same home improvement contractor arranged to refinance that mortgage in 2005 for \$222,000 with Wilmington Finance, resulting in monthly principal and interest payments of \$1,277.96. Payments for taxes and insurance added an additional approximately \$200 per month, for a total of \$1,477.96.

94. In November 2006, the Brewsters defaulted on their mortgage. At the time of the default, Ms. Brewster was 75 years old and suffering from multiple ailments, including early dementia and a heart condition. She was living on a fixed income, most of which went to medical care. Her son, Mr. Brewster, works as a luggage screener at La Guardia airport. His take home pay of about \$2,500 per month was not sufficient to cover household bills and carry the mortgage on his own.

95. In 2007, Citigroup/Consumer Finance Inc. (as successor-in-interest to Wilmington Finance) commenced a foreclosure action against the Brewsters. Kathryn Brewster tried to obtain a reverse equity mortgage from Citigroup, which did not respond to her requests. Eventually Citigroup discontinued the foreclosure action.

96. In 2008, Aurora, as assignee of Citigroup/Consumer Finance Inc., filed another foreclosure action but never served the Brewsters.

97. After his mother passed away in January 2009, Mr. Brewster tried to resolve the mortgage default with Aurora, and in the course of several phone conversations told an Aurora representative about his income and expenses.

98. In late March 2009, Aurora offered Mr. Brewster a “Workout Agreement” which required an initial payment of \$2,500, due before April 12, 2009. The agreement further stated that “[c]onsecutive monthly payments each in the amount of \$1,699.01 will be due on or before the 12th of each month . . . commencing 051209 continuing through and including 071209, with the last installment in the amount of \$42,035.76.”

99. The Workout Agreement sent to Mr. Brewster required him to admit the arrears as alleged and waive his legal defenses or claims with respect to the loan documents.

100. After reviewing the proposed Workout Agreement, Mr. Brewster concluded that on his limited income he could not afford the payments as proposed, especially the final installment of over \$40,000 that Aurora demanded that he pay in order to reinstate the loan. He therefore did not sign the Workout Agreement.

101. Meanwhile, Mr. Brewster had heard about the “Obama plan,” or HAMP, and contacted Aurora to request that he be considered for HAMP eligibility. However, he was told by Aurora that he was not eligible because his loan was owned by an investor. Aurora failed to assess Mr. Brewster for HAMP eligibility despite its contractual obligation to do so.

102. On August 11, 2009, Mr. Brewster was served with a summons and complaint in a foreclosure action commenced by Aurora. The complaint pleads that Aurora is the owner and holder of the note secured by Mr. Brewster’s mortgage, contrary to Aurora’s statement to Mr. Brewster that the loan is investor-owned.

4. Maria and Thomas Vellucci

103. Maria and Thomas Vellucci are borrowers who meet the minimum criteria to be considered for HAMP modification: (a) they defaulted on their mortgage due to financial hardship; (b) the mortgaged property is their primary residence; (c) their mortgage originated before January 2009; (d) the balance owed on their mortgage does not exceed the limits set forth by HAMP; and (e) their monthly payments on their mortgage for principal, interest, property taxes, and insurance exceed 31% of their gross monthly income.

104. Despite meeting the minimum HAMP criteria, Aurora has denied the Velluccis access to HAMP and has commenced foreclosure proceedings against them.

105. Thomas Vellucci and Maria Vellucci live with their two adult sons in a two-family home which they purchased in 2003.

106. Mr. Vellucci was forced to take early retirement from his job as a maintenance worker due to kidney failure. He receives a pension and social security disability payments. His wife, who takes care of him, is able to work only part-time as a home care attendant. The Velluccis receive additional income by renting out the upstairs apartment of their home.

107. The Velluccis have two loans secured by their home, both of which originated with Homecomings Financial Network, Inc. The first loan is a \$520,000 Option ARM, which in March 2009, was assigned to Aurora, the loan's servicer. The Velluccis also have a second credit line mortgage of \$50,000.

108. In October 2008, the Velluccis defaulted on their first mortgage because they lost their rental income. Their tenant at the time was in arrears on rent and the Velluccis had to commence eviction proceedings. The evicted tenant left the apartment in disrepair and it took until April 2009 for the Velluccis to fix the apartment and to find a new tenant.

109. In an attempt to save their home, the Velluccis responded to a solicitation by a so-called mortgage modification company, which took a fee but failed to help them. In March 2009, Aurora commenced a foreclosure proceeding against the Velluccis.

110. Even though the Velluccis were in foreclosure and met all other minimum HAMP eligibility requirements, Aurora failed to contact the Velluccis about the possibility of a HAMP modification. Instead, in June 2009, Aurora sent the Velluccis a Workout Agreement that was similar to the agreements sent to Ms. Keshinro and Mr. Brewster. Under their workout agreement, the Velluccis were required to agree to the arrears as stated in the agreement and to waive any and all legal claims or defenses they may have to the loan transaction. The agreement further required them to make payments as high as -- and eventually higher than -- their original loan payments, including an initial payment of \$2,334.00 and three additional payments of

\$2,510.28. Finally, despite requiring numerous concessions from the Velluccis in the agreement, Aurora did not commit to modifying the Velluccis' loan after they completed the required payments.

111. Afraid of losing their home and without advice of counsel, the Velluccis signed the agreement and made all four payments. With the assistance of not-for-profit mortgage counselors the Velluccis have submitted information to Aurora to apply for a loan modification. However, the Velluccis recently learned that Aurora would not review their loan for HAMP modification, claiming that the loan is investor-owned.

112. Contrary to Aurora's representation that the Velluccis' loan is investor-owned, Aurora pled in the complaint it filed in the foreclosure action against them that Aurora is the owner of the note secured by their mortgage.

F. Facts Applicable to Plaintiffs and Others Similarly Situated

113. The allegations in Paragraphs 114-120 are likely to have evidentiary support after a reasonable opportunity for class-wide investigation and discovery.

114. Aurora has a pattern and practice of failing properly to determine whether non-GSE mortgagors whose loans it services meet minimum HAMP eligibility requirements and may therefore qualify for a HAMP mortgage modification.

115. For non-GSE mortgagors who meet the minimum HAMP eligibility requirements, Aurora has a pattern and practice of failing to determine if those borrowers qualify for HAMP modification, and, if qualified, failing to offer modifications required by the HAMP Program Documentation, and instead, in some instances, offering onerous forbearance agreements that do not comply with HAMP.

116. For non-GSE mortgagors who meet the minimum HAMP eligibility requirements and whose mortgages Aurora claims are investor-owned, Aurora has a pattern and practice of failing to make any initial determination as to whether the modification of such a loan potentially would result in a greater benefit to investors than foreclosing on the property, and failing to take reasonable steps to obtain waivers or approvals from investors where necessary to carry out modifications under HAMP.

117. Aurora has a pattern and practice of failing to notify non-GSE mortgagors in writing of its determinations regarding eligibility for a mortgage modification under HAMP or the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct.

118. Aurora has no procedure in place by which borrowers may challenge an erroneous determination to deny a mortgage modification before an impartial decision-maker.

119. Aurora has a pattern and practice of initiating new foreclosure actions, continuing foreclosure actions that had been previously commenced or threatening to commence foreclosure proceedings against borrowers who meet the minimum HAMP eligibility criteria.

120. Aurora has a pattern and practice of failing to suspend temporarily foreclosure actions while borrowers who are not entitled to mortgage modifications under HAMP are considered for alternative foreclosure prevention options.

G. Defendants are Acting Under Color of Federal Law in Implementing HAMP

121. Although a private actor in certain respects, Aurora's actions and failures to act in implementing the HAMP program are so pervasively intertwined with requirements imposed and oversight conducted by Treasury and its financial and administrative agents, Fannie Mae and Freddie Mac, as to constitute action under color of federal law. Similarly, the actions of Fannie

Mae, currently under FHFA conservatorship, as Financial Agent under the HAMP Contract and as one of the parties responsible for working with the United States Government to develop, implement, and administer HAMP, are so intertwined with the federal government as to constitute acting under the color of federal law.

122. The Emergency Economic Stabilization Act of 2008 (“EESA”) provides that the Secretary of the Treasury shall implement a plan to maximize assistance for homeowners and to coordinate his efforts with other federal agencies, including the FHFA, as Conservator for Fannie Mae. The EESA requires FHFA, as Conservator for Fannie Mae, to create and implement a plan to minimize avoidable foreclosures.

123. Pursuant to this statutory mandate, the Secretary of the Treasury and FHFA jointly created the Making Home Affordable Program, which they jointly oversee and administer. HAMP is one of two sub-programs comprising the Making Home Affordable Program.

124. The Treasury Department, FHFA and Fannie Mae are responsible for jointly developing the policies, procedures and requirements for HAMP. Fannie Mae also acts as the financial agent of the federal government for HAMP. Since March 4, 2009, the Treasury Department and Fannie Mae have issued a series of guidelines and directives to mortgage loan servicers relating to the implementation of HAMP.

125. The HAMP program is one component of a massive, coordinated federal effort to stabilize U.S. financial markets in the wake of the most severe economic downturn since the Great Depression. Implementation and oversight of the program are heavily regulated and controlled by Treasury and its financial and administrative agents, Fannie Mae and Freddie Mac.

126. As documented in a July 2009 report by the U.S. Government Accountability Office, the Homeownership Preservation Office (HPO) of Treasury's Office of Financial Stability (OFS) has primary responsibility for HAMP oversight and implementation. (GAO-09-837, at 38.) HPO is responsible for audit oversight, Congressional and regulatory liaisons, communications and marketing, policy development, data analysis, and operations. HPO officials rely on several other OFS and Treasury support offices, including those involved with compliance and risk, internal controls, cash management, and human resources to assist HPO with various aspects of HAMP governance. (*Id.* at 38-39.)

127. Treasury has delegated certain HAMP administrative and oversight responsibilities to Fannie Mae and Freddie Mac. (*Id.* at 38.)

128. As the HAMP administrator, Fannie Mae, through its President and CEO, Michael Williams, and its Senior Vice President, Eric Schuppenhauer, is responsible for developing and administering HAMP program operations, including registering, executing participation agreements with, and collecting data from Participating Servicers. (*Id.* at 38.)

129. As the HAMP compliance agent, Freddie Mac is responsible for compliance and auditing of HAMP, including on-site and remote servicer reviews and audits. Freddie Mac responsibilities include conducting announced and unannounced information technology testing, security reviews, and audits. In addition, Freddie Mac officials are responsible for reporting compliance violations to Treasury and other regulatory agencies and for managing corrective action. (*Id.* at 38.)

130. Fannie Mae has begun mapping out the overall HAMP program process -- including registration and data collection set up for Participating Servicers -- and assessing potential risks in the overall processes to specify points for internal control. Treasury officials

are currently reviewing with Fannie Mae its documentation of the processes around the calculation of incentive payments and the invoicing process. (*Id.* at 41.)

131. In addition, Fannie Mae has provided Treasury for its review and comment the most recently available draft internal control documentation for HAMP processes for which controls have been designed, completed or executed. Treasury officials are participating in regular meetings with Fannie Mae personnel to discuss the different HAMP processes and associated internal controls. (*Id.* at 41.)

132. Working with Treasury and other agencies, Fannie Mae officials have developed automated edit checks for loans that were being electronically evaluated for HAMP eligibility. Fannie Mae has also documented certain internal controls, including those that focus on registering, executing contracts with, and setting up Participating Servicers in HAMP electronic systems; the HAMP payment process; and the HAMP reporting process. Fannie Mae is working with Treasury to develop processes and internal control documentation for additional steps in the HAMP process, including, for example, trial modification administration and data collection and reporting. (*Id.* at 41.)

133. Fannie Mae, in coordination with Treasury, performs effectiveness testing for three areas: servicer set-up, servicer caps, and incentive accruals (calculations of HAMP payments owed to each servicer in the immediate future). (*Id.* at 42.)

134. Treasury has adopted detailed reporting requirements for all Participating Servicers. As set forth in Home Affordable Modification Program, Supplemental Directive 09-01, at 19 (April 6, 2009), Participating Services are required to register with Fannie Mae and to provide periodic HAMP loan level data to Fannie Mae that is “accurate, complete, and in agreement with the servicer’s records.” Participating Servicers are required to report selected

data during the modification trial period and when the modification has been approved. Once the modification has been approved, Participating Servicers must begin reporting activity on HAMP loans on a monthly basis. These data reports are submitted to Fannie Mae in its role as HAMP program administrator and record keeper, and include loan identifiers, Participating Servicer registration and bank account information, and loan-level data such as borrower identification information and NPV test results. (GAO-09-837, at 45-46; *see* Supp. Dir. 09-01, at 19-21.)

135. Freddie Mac has begun defining and documenting its HAMP compliance testing program. Compliance reviews will take three approaches:

- (a) announced reviews (remote and onsite), which will provide a structured and consistent process to assess servicer compliance;
- (b) unannounced reviews (remote and onsite), which will provide the ability to review any loan at any time; and
- (c) data analysis, including third-party data verification, which will provide ongoing analyses of servicers to identify patterns or trends that require investigation.

(GAO-09-837, at 42; *see* Supplemental Directive 09-01, at 25-26.)

136. Freddie Mac plans to use these three approaches to verify Participating Servicers' adherence to program guidelines and has begun to consider how potential areas of non-compliance will be identified. (GAO-09-837, at 42.)

137. Freddie Mac will use performance reporting data to track modification volume against expectations. Freddie Mac will also develop a "second look" process, whereby it will audit modification applications that have been declined. (*Id.* at 42.)

138. Fannie Mae and Freddie Mac share responsibilities for the enforcement of all HAMP requirements. Under the HAMP Contract, the servicer is considered in default if Freddie Mac specifically finds that the servicer's performance is materially insufficient. Additionally, the servicer is considered in default if it fails to comply with any directive issued by Fannie Mae or Freddie Mac with respect to the program's performance criteria. (HAMP Contract, ¶ 6(A))

139. In the event of a Participating Servicer default, Fannie Mae has the authority to reduce the amounts payable to that servicer, require repayment of previous payments made under HAMP under certain circumstances, require the Participating Servicer to submit to additional oversight, or terminate the Participating Servicer's participation agreement. (*Id.* at ¶ 6(B).)

140. Treasury has drafted flow charts that delineate aspects of the overall HAMP process, using key internal control points with corresponding narrative descriptions. (GAO-09-837, at 40.)

141. Treasury officials, under the guidance and oversight of Secretary Geithner and Assistant Secretary Allison, have developed and issued extensive requirements concerning the NPV model that Participating Servicers are required to follow in evaluating borrower eligibility for a mortgage modification. (Home Affordable Modification Program, Base Net Present Value (NPV) Model v.3.0 Model Documentation, Updated August 7, 2009).

142. Participating Servicers with less than a \$40 billion servicing book must implement the Base NPV Model developed by Treasury. Participating Servicers with at least a \$40 billion servicing book may build and implement a proprietary NPV model or implement the Base NPV Model; however, any proprietary NPV model so developed "must adhere to the guidelines and framework outlined in" Treasury's Model Documentation for the Base NPV Model v.3.0. (*Id.* at 33.) Participating Servicers that implement the base NPV model or, where eligible, create

a customized version, must first successfully pass an NPV output test to ensure that the Servicer's NPV model outputs are consistent with those of the Base NPV Model. (*Id.* at 35.)

143. Freddie Mac is to administer and evaluate the results of all Participating Servicer NPV output tests and provide the necessary clearance for servicers to begin using their own NPV models. (*Id.*)

144. Treasury officials, under the guidance and oversight of Secretary Geithner and Assistant Secretary Allison, are also developing performance measures for HAMP, which in draft form include process measures such as the number of servicers participating in the program and the number of borrowers being reached, as well as outcome measures such as average debt-to-income ratios (pre and post modification) and redefault rates. (GAO-09-837, at 40.)

145. Treasury officials, under the guidance and oversight of Secretary Geithner and Assistant Secretary Allison, indicated that they will work with Participating Servicers to set more precise process measures for the program, including average borrower wait time for inbound borrower inquiries, the completeness and accuracy of information provided to applicants, and response time for completed applications. (*Id.* at 40-41.)

146. Treasury officials, under the guidance and oversight of Secretary Geithner and Assistant Secretary Allison, issue monthly reports with servicer-specific performance measures, including the number of trial modifications each Participating Servicer has extended to eligible borrowers, the number of trial modifications that are underway; the number of final modifications and the long term success of those modifications. (*Id.* at 41.)

147. On July 9, 2009, the Secretaries of the Treasury and HUD sent a letter to Participating Servicers that identified a general need for servicers to devote substantially more resources to HAMP's loan modification program. In this letter, the Secretaries asked that

Participating Servicers appoint a high-level liaison to be the point of contact for implementation of HAMP, expand their servicing capacity, and improve the execution quality of loan modifications. (*Id.* at 44.)

148. Following the announcement of HAMP, Fannie Mae contracted with a not-for-profit organization that operates a nationwide foreclosure hotline to establish a team of counselors. Counselors who staff this hotline provide advice and advocacy for borrowers. However, this hotline does not function as an appeals process. In particular, hotline staff do not have the power to reverse a servicer's denial of eligibility for a mortgage modification or to compel a servicer to take, modify or withdraw any action.

149. Between September and November 2009, Treasury issued additional guidelines requiring Participating Servicers to increase the amount of information reported to Fannie Mae and to the Borrowers. 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. (Supp. Directs. 09-06, 09-07, and 09-08.)

CLASS ACTION ALLEGATIONS

150. Plaintiffs bring this action on behalf of themselves and others similarly situated as a class action pursuant to Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure.

151. A class action is a superior means, and likely the only means, by which Plaintiffs and class members – all of whom are homeowners in default on their mortgages -- can litigate these claims and protect their interests and the interests of all class members in saving their homes from avoidable foreclosure.

152. Plaintiffs seek to maintain a class action and represent a class consisting of:

Borrowers in the State of New York whose first mortgage loans are: (a) serviced by Aurora; (b) in default; and (c) non-GSE loans

secured by a one- to four-unit property, of which one unit is the borrower's principal residence and which the borrower currently occupies. Specifically excluded from the class are borrowers: (a) who otherwise fit the class definition but have received a trial or permanent HAMP modification from Aurora; (b) with GSE loans serviced by Aurora; or (c) with second mortgages or lines of credit serviced by Aurora.

A. The Prerequisites Of Rule 23(a) Are Satisfied

153. **Numerosity.** The class is so numerous that joinder is impracticable. As Aurora's website, www.myauroraloan.com, states, Aurora services over 500,000 loans nationwide of which, upon information and belief, many thousands are to New York borrowers.

154. **Commonality.** The relief sought is common to all members of the class, and material questions of law and fact are common to the class, including but not limited to, whether Aurora:

- (a) violated the terms of the HAMP Contract;
- (b) failed to consider for modification eligible non-GSE loans;
- (c) failed to offer HAMP-eligible borrowers trial modifications under HAMP;
- (d) offered forbearance agreements not in compliance with HAMP or, alternatively, failed to offer any assistance to homeowners who, for whatever reason, were told they did not qualify for either HAMP eligibility determination or HAMP modifications;
- (e) is obligated to notify all borrowers in writing as to the specific basis for their denial of access to the HAMP program; and
- (f) is obligated to provide a means for the homeowners to challenge the denial before an impartial decision-maker;

and whether the Defendants Geithner, Allison, DeMarco, Fannie Mae, Williams, and Schuppenhauer:

- (a) failed to require Participating Servicers to provide borrowers with written notification with all the reasons for a denial of a mortgage modification under HAMP in sufficient detail to appeal an erroneous determination ;
- (b) failed to require Participating Servicers to provide adequate notice to all borrowers who were previously denied a modification based on inadequate notices issued before Supplemental Directive 09-08 became effective;
- (c) failed to require Participating Servicers to provide borrowers with a meaningful opportunity for appeal and review of a servicer's denial of a modification before an independent, impartial decision-maker.

155. **Typicality.** The Representative Plaintiffs' claims are typical of the claims of the class and the Representative Plaintiffs have the same interests in this case as all other members of the class.

156. **Adequacy of Representation.** The Representative Plaintiffs will fairly and adequately protect the interest of the class and are committed to doing so. The interests of the Representative Plaintiffs are coexistent with and not antagonistic to the absent members of the potential class. There are no known conflicts of interest among members of the potential class. The Representative Plaintiffs have retained attorneys with The Legal Aid Society, who have extensive experience in litigating class actions and other complex matters against private and governmental actors.

B. The Prerequisites Of Rule 23(b)(2) Are Satisfied

157. Class Action status is appropriate here because the Defendants have acted and/or refused to act on grounds generally applicable to the class. Therefore, injunctive and declaratory relief with respect to all class members is appropriate.

FIRST CAUSE OF ACTION
(Against Aurora for Breach of Contract)

158. Plaintiffs repeat and reallege paragraphs 1 through 157 as though fully set forth herein.

159. On April 30, 2009, Aurora and the United States (through Fannie Mae acting as Financial Agent of the United States) entered into the HAMP Contract, which is a valid and enforceable contract.

160. Plaintiffs and all class members are intended third-party beneficiaries under the HAMP Contract.

161. By entering into the HAMP Contract, Aurora agreed to comply with the requirements set forth in the HAMP Contract and the Program Documentation incorporated by reference into the HAMP Contract. In exchange, Treasury agreed to pay certain amounts set forth in the HAMP Contract and the Program Documentation to Aurora in consideration of its compliance with the HAMP Contract.

162. The central purpose of HAMP and the HAMP Contract is to ensure that borrowers whose loans are serviced by Aurora and who potentially are eligible for loan modifications under HAMP are properly considered for modification in compliance with the Program Documentation requirements incorporated in the HAMP Contract.

163. As shown above, Aurora has breached the HAMP Contract by:

- (a) Failing properly to determine whether borrowers meet minimum HAMP eligibility requirements and may therefore be eligible for a mortgage modification in accordance with the Program Documentation requirements set forth in the HAMP Contract;
- (b) For non-GSE mortgagors who meet the minimum HAMP eligibility requirements, failing to determine if those borrowers qualify for HAMP modification and failing to offer modifications required by HAMP Program Documentation, and instead, in some cases, offering onerous forbearance agreements that are not in compliance with HAMP;
- (c) For non-GSE mortgagors who meet the minimum HAMP eligibility requirements and whose mortgages are investor-owned, failing to take reasonable steps to make even an initial determination of whether modification of a loan would benefit the investors more than foreclosing on a property, and failing to obtain waivers or approvals from investors where necessary to carry out modifications under HAMP;
- (d) Failing to notify non-GSE mortgagors in writing of its determinations regarding eligibility for mortgage modification under HAMP and the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct;
- (e) Initiating new foreclosure actions or continuing foreclosure actions that had previously been commenced against borrowers who meet the minimum HAMP eligibility criteria; and

- (f) Failing to suspend temporarily foreclosure actions while borrowers who are not entitled to mortgage modifications under HAMP are considered for alternative foreclosure prevention options.

164. Plaintiffs have no adequate remedy at law and do not seek damages. As a direct result of Aurora's breaches of the HAMP Contract, Plaintiffs and all class members have suffered and will continue to suffer harm, including the potential loss of their homes through foreclosure.

SECOND CAUSE OF ACTION
(Against Aurora for Violation Of Due Process)

165. Plaintiffs repeat and reallege paragraphs 1 through 164 as though fully set forth herein.

166. The Fifth Amendment to the United States Constitution is clear in its mandate to the federal government that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

167. The actions and failures to act of defendant Aurora challenged in this Complaint are so pervasively intertwined with requirements imposed and oversight conducted by the Department of the Treasury, its financial and administrative agents, Fannie Mae and Freddie Mac, and FHFA as to constitute action under color of federal law.

168. Aurora's discretion to grant or deny a non-GSE borrower a modification under HAMP is strictly limited by HAMP program rules set forth in the Program Documentation. If a borrower meets the HAMP minimum eligibility criteria -- and, for investor-owned mortgages, the servicer is not barred by its investors from offering modification following reasonable efforts by Aurora to remove such impediments -- then Aurora is required to conduct a "net present

value” (“NPV”) test. If the NPV test yields a positive outcome, Aurora must offer the borrower a modification under HAMP.

169. These substantive constraints on Aurora’s discretion to grant or deny non-GSE borrowers a modification under the HAMP program create a property interest on behalf of the borrower protected by the Fifth Amendment to the United States Constitution.

170. Procedural due process requires Aurora to provide meaningful written notice to the borrower regarding its decision to grant or deny a borrower’s request for HAMP modification and the reasons for that decision stated with sufficient specificity to determine whether the decision is correct. The notice must identify the factors that went into Aurora’s decision and demonstrate how it applied the NPV test and Standard Modification Waterfall to a particular borrower’s application.

171. Procedural due process further requires that, following notice of the reasons for their denial, borrowers be given access to a process by which they can challenge Aurora’s determination before an impartial decision-maker.

172. In violation of Plaintiffs’ and class members’ procedural due process rights, Aurora has failed to provide adequate notice to Plaintiffs and members of the class and has failed to provide Plaintiffs and members of the class a procedure to challenge and correct an erroneous decision to deny a mortgage modification under HAMP before an impartial decision-maker.

THIRD CAUSE OF ACTION

(Against Geithner, Allison, DeMarco, Fannie Mae, Williams, and Schuppenhauer for Violation Of Due Process)

173. Plaintiffs repeat and reallege paragraphs 1 through 172 as though fully set forth herein.

174. The Fifth Amendment to the United States Constitution is clear in its mandate to the federal government that “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”

175. The actions of Fannie Mae, currently under FHFA conservatorship, as one of the parties responsible for working with the United States Government to develop, implement, and administer HAMP, are so intertwined with the federal government as to constitute action under the color of federal law.

176. The actions and failures to act of defendants Geithner, as Treasury Secretary; Allison, as Assistant Secretary of Financial Stability in the Office of Financial Stability of the Treasury; DeMarco, as Director of the FHFA and conservator of Fannie Mae; Williams, as President and CEO of Fannie Mae; and Schuppenhauer, as Senior Vice President of Fannie Mae, challenged in this Complaint have all been taken under color of federal law.

177. Participating Servicers’ discretion to grant or deny a non-GSE borrower a modification under HAMP is strictly limited by HAMP program rules set forth in the Program Documentation. If a borrower meets the HAMP minimum eligibility criteria -- and, for investor-owned mortgages, the servicer is not barred by its investors from offering modification following reasonable efforts by the servicer to remove such impediments -- then the Participating Servicer is required to conduct a “net present value” (“NPV”) test. If the NPV test yields a positive outcome, the Participating Servicer must offer the borrower a modification under HAMP.

178. These substantive constraints on the servicer’s discretion to grant or deny non-GSE borrowers a modification under the HAMP program create a property interest on behalf of the borrower protected by the Fifth Amendment to the United States Constitution.

179. Procedural due process requires adequate written notice from the servicer to the borrower regarding the servicer's decision to grant or deny a borrower's request for HAMP modification and the reasons for that decision stated with sufficient specificity to determine whether the decision is correct. The notice must identify the factors that went into the decision and demonstrate how the servicer applied the NPV test and Standard Modification Waterfall to a particular borrower's application.

180. Procedural due process further requires that, following the provision of adequate notice of the reasons for the denial of a mortgage modification, borrowers be given access to a procedure by which they can challenge the servicer's determination before an impartial decision-maker.

181. Although Treasury and Fannie Mae have issued directives to require Participating Servicers to provide borrowers with notice of some of the grounds for servicers' denial of HAMP review and/or HAMP modification, these directives have been inadequate to afford borrowers with full procedural due process as follows:

- (a) Until the issuance of Supplemental Directive 09-07 on October 8, 2009, federal HAMP directives failed to require written notice by a Participating Servicer's of the denial of HAMP benefits. Borrowers who were denied HAMP benefits before that date were not under a requirement to receive written notification of the determination regarding their eligibility.
- (b) Until the issuance of Supplemental Directive 09-08 on November 3, 2009, federal HAMP directives failed to require a written statement by a Participating Servicer of reason(s) for the denial of HAMP benefits. Borrowers who were denied HAMP benefits before that date were not under a

requirement to receive written notification of the reason(s) for the determination regarding their eligibility.

- (c) Supplemental Directive 09-08 will become effective on January 1, 2010. The Directive fails to require Participating Servicers to issue new, adequate notices to borrowers who previously received inadequate notices before January 1, 2010.
- (d) Supplemental Directive 09-08 requires Participating Servicers to notify borrowers of some grounds for the denial of HAMP benefits, but fails to require other critical information necessary to enable a borrower to contest a denial. That information includes, but is not limited to, the nature of any investor restrictions and steps the Participating Servicer took to comply with the requirement that servicers make reasonable efforts to obtain investor waivers.
- (e) The HAMP Contracts and HAMP program guidelines fail to establish or require a procedure by which borrowers can challenge an erroneous denial of a modification before an independent and impartial decision-maker.

FOURTH CAUSE OF ACTION

(Against Aurora for Breach of the Covenant of Good Faith and Fair Dealing)

182. Plaintiffs repeat and reallege paragraphs 1 through 181 as though fully set forth herein.

183. Every contract carries with it an implied covenant of good faith and fair dealing, obligating the contracting parties to perform their obligations under the contract fairly and in good faith, to refrain from engaging in acts that impede others from performing under the contract or deprive others of the benefits of the contract.

184. Inherent in the contractual covenant to engage in good faith and fair dealing is Aurora's obligation to give borrowers meaningful notice of its determination of their HAMP eligibility and the facts underlying that decision, as well as to provide borrowers meaningful access to a procedure by which borrowers can challenge an erroneous decision. Neither notice nor a means of redress was provided by Aurora. Without this right, Plaintiffs and members of the class cannot meaningfully determine if they were wrongfully denied access to this important governmental program.

185. The purpose of the HAMP Contract and HAMP is to protect homeowners. By failing to comply with the HAMP Contract, and given the HAMP Contract's purpose and the current state of the economy, Aurora knew that its breaches would cause severe harm and hardship, including the loss of homes.

186. As a direct result of Aurora's breach of the covenant of good faith and fair dealing, Plaintiffs and members of the proposed class have been damaged and are at risk for losing their homes.

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Certify this case as a class action pursuant to Fed. R. Civ. Proc. 23(a) and 23(b)(2), on behalf of the plaintiff class defined above.
- (2) Designate Ms. Edwards, Ms. Keshinro, Mr. Brewster, and the Velluccis as the representatives of the class, and their attorneys as class counsel; and
- (3) Enter an Order declaring that:
 - (a) Plaintiffs and the class members are third-party beneficiaries of the HAMP Contract between Aurora and Fannie Mae, as Financial Agent for the United States;

- (b) The following practices of Aurora are in breach of the HAMP Contract and violate the rights of Plaintiffs and all members of the class:
- (i) Failing properly to determine whether non-GSE mortgagors meet minimum HAMP eligibility requirements and may therefore be eligible for a mortgage modification, and failing to determine the borrower's eligibility for a loan modification under HAMP;
 - (ii) For non-GSE mortgagors who meet the minimum HAMP eligibility requirements, failing to determine if those borrowers qualify for HAMP modification, and failing to offer trial modifications required by the HAMP Program Documentation and, instead, offering onerous forbearance agreements that are not in compliance with HAMP;
 - (iii) For non-GSE mortgages who meet the minimum HAMP eligibility requirements and that are investor-owned, failing to take reasonable steps to obtain waivers or approvals from investors where necessary to carry out modifications under HAMP;
 - (iv) Failing to notify non-GSE mortgagors in writing of its determinations regarding eligibility for a mortgage modification under HAMP and the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct;
 - (vi) Initiating new foreclosure actions or continuing foreclosure actions that previously have been commenced against borrowers who meet the minimum HAMP eligibility criteria;
 - (vii) Failing to suspend temporarily foreclosure actions while borrowers who are not entitled to mortgage modifications under HAMP are considered for alternative foreclosure prevention options.

- (c) The following practices of Aurora deny Plaintiffs and members of the plaintiff class procedural due process, and are in breach of the implied covenant of good faith and fair dealing:
 - (i) Failing to notify non-GSE mortgagors in writing of its determinations regarding eligibility for a mortgage modification under HAMP and the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct.
 - (ii) Failing to implement a procedure by which borrowers may challenge an erroneous determination to deny a mortgage modification before an impartial decision-maker.
- (4) Issue a preliminary and permanent injunction requiring Aurora to take the following actions:
 - (a) Determining whether all class members meet minimum HAMP eligibility requirements and may therefore be eligible for a mortgage modification;
 - (b) Applying the NPV test for all class members who meet the minimum HAMP eligibility requirements;
 - (c) Offering modifications as required by HAMP to all class members who pass the NPV test, and to prohibit offering workout/forbearance agreements that are not in compliance with HAMP;
 - (d) Determining whether the mortgage loans of eligible class members are investor-owned for all eligible class members who pass the NPV test, and for those mortgages that are investor-owned, to take reasonable steps to obtain waivers or approvals from investors where necessary to carry out modifications under HAMP;

- (e) For class members for whom the NPV test is negative, considering the class members for HAMP modification and/or for other foreclosure prevention measures, including other mortgage modification programs, such as Hope for Homeowners, or other loss mitigation programs;
 - (f) Refraining from initiating new foreclosure actions against class members who meet the minimum HAMP eligibility criteria and not suspending foreclosure actions during the 30-day period that the borrower has to accept a HAMP modification on a trial basis;
 - (g) Suspending temporarily foreclosure actions while class members who are not entitled to mortgage modifications under HAMP are considered for alternative foreclosure prevention options;
 - (h) Notifying all class members, including those denied modifications before January 1, 2010, in writing of Aurora's determinations regarding eligibility for a mortgage modification under HAMP and the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct, including identification of the factors that went into Aurora's decision and an explanation of how it applied the NPV test and Standard Modification Waterfall to a particular borrower's application;
 - (i) Implementing a procedure by which class members may challenge a determination to deny a mortgage modification before an impartial decision-maker;
 - (j) Refraining from pursuing foreclosure actions against the Representative Plaintiffs pending compliance with Aurora's obligations under the HAMP Contract.
- (5) Enter an Order declaring that HAMP program guidelines violate due process insofar as they:

- (a) fail to require notification in writing to non-GSE mortgagors following a Participating Servicer's determination regarding eligibility for a mortgage modification under HAMP with all the reasons for those determinations in sufficient detail to enable the mortgagor to determine whether the decision is correct;
 - (b) fail to implement a procedure to notify homeowners who were denied a HAMP modification before January 1, 2010 with adequate notice in writing of a servicer's determination regarding eligibility for a mortgage modification under HAMP and the reasons for those determinations with sufficient detail to enable the mortgagor to determine whether the decision is correct; and
 - (c) fail to implement a procedure by which borrowers may challenge an erroneous determination to deny a mortgage modification before an impartial decision-maker.
- (6) Issue a preliminary and permanent injunction requiring Defendants Geithner, Allison, DeMarco, Fannie Mae, Williams, and Schuppenhauer, and their agents, agencies, offices, departments, attorneys, employees, representatives and anyone acting in concert or participation with them to promulgate regulations, guidelines, or rules:
- (a) Requiring Participating Servicers to provide borrowers with written notification with all the reasons for a servicer's denial of a mortgage modification in sufficient detail to challenge the servicer's determination;
 - (b) Requiring Participating Servicers to provide borrowers who were denied modifications before January 1, 2010 with written notification of the reasons for a servicer's denial of a mortgage modification under HAMP and other loan modification or loss mitigation programs offered by the servicer with sufficient detail to enable the mortgagor to determine whether the decision was correct and to appeal an erroneous determination;

- (c) Requiring Participating Servicers to provide borrowers with a meaningful opportunity for appeal and review of a servicer's denial of a modification before an independent, impartial decision-maker.
- (7) Award Plaintiffs their reasonable costs and expenses incurred in this action, including counsel fees and expert fees.
- (8) Grant such other and further relief as the Court deems just and proper.

Dated: Washington, D.C.
November 9, 2009

Respectfully submitted,

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