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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, SOUTHERN DIVISION

CEDAR BAND OF PAIUTES; CEDAR
BAND CORPORATION; and CBC
MORTGAGE AGENCY;

Plaintiffs,

v.

U.S. DEPT. OF HOUSING AND URBAN
DEVELOPMENT; DR. BENJAMIN S.
CARSON, SR., in his official capacity as
Secretary of the U.S. Dept. of Housing and
Urban Development; FEDERAL HOUSING
ADMINISTRATION; and BRIAN D.
MONTGOMERY, in his official capacity as
Acting Deputy Asst. Secretary and Asst.
Secretary of Housing and Urban
Development for Housing- Federal Housing
Commissioner;

Defendants.

**AMICI CURIAE BRIEF OF DATA
MORTGAGE, INC. and AMERICAN
FINANCIAL NETWORK IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Case No.: 4:19-CV-30-DN-PK

Hon. Judge David Nuffer

Hon. Magistrate Judge Paul Kohler

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I. INTRODUCTION

On April 18, 2019, the U. S. Department of Housing and Urban Development (“HUD”) published new substantive rules in Mortgagee Letter 19-06 (the “Mortgagee Letter”), relating to down-payment assistance (“DPA”) programs administered by governmental entities. The Mortgagee Letter implements rules never before contemplated by lenders, including Data Mortgage and American Financial Network (collectively “Amici”).

As FHA lenders, Amici are tasked with the responsibility of determining if DPA funds come from an acceptable source and documenting how they draw such a conclusion. Amici have been working with national DPA providers since 2012, and have a growing relationship with CBC Mortgage Agency (“CBCMA”), an instrumentality of The Cedar Band of Paiutes (“Cedar Band”). CBCMA enables Amici to originate DPA loans through CBCMA’s national DPA program (“Chenoa Fund”) when they might otherwise be unable to do so, due to state restrictions as well as the high cost and manpower required to participate in state and local housing finance agencies (“HFAs”) DPA programs. During that time, Amici have been subject to reviews and audits by HUD, state regulators, and their various investors. Up until the present time, none of the foregoing has ever cited Amici for offering DPA through a governmental entity acting outside its governmental capacity or outside any particular ‘jurisdiction.’

HUD acted arbitrarily and capriciously in issuing these substantive rule changes without evidence showing DPA loans provided on a nationwide basis by government entities pose a greater risk to the FHA insurance fund than DPA loans provided on a state or local level. HUD is acting contrary to public interest by creating jurisdictional limits upon governmental entity

provided national DPA programs, thereby depriving Amici of the ability to offer many deserving homebuyers opportunities to obtain DPA loans.

HUD's publishing of the Mortgage Letter violates the requirements of the Administrative Procedures Act ("APA") and related federal regulations, and will cause immediate and potentially irreparable harm to Amici and their clients if this Court does not enter a preliminary injunction. There are borrowers today who are working on loan approvals and those who have been approved that are searching for a home to purchase. Without injunctive relief, Amici will not be able to complete loans for over a hundred clients, who are nervously waiting application approval or to close on loan applications already approved. A preliminary injunction to maintain status quo is in the public's interest, and necessary to prevent potentially immediate and irreparable harm to Amici and their clients.

II. IDENTITY AND INTEREST OF AMICI

Amici are FHA approved, Equal Housing Lender companies who originate residential mortgage loans.¹ Data Mortgage, Inc., dba Essex Mortgage, ("Data Mortgage") founded in 1986, is a California corporation, licensed in 38 states.² Through its retail line of business, Data Mortgage originates and funds residential mortgage loans.³ Through its wholesale line of business, Data Mortgage works with brokers, who originate the residential mortgage loans that

¹ Declaration of Roland Weedon, attached hereto as Exhibit "A" ("Weedon Decl."), ¶ 3; Declaration of Andrew Kalyviaris, attached hereto as Exhibit "B" ("Kalyviaris Decl."), ¶ 3.

² Weedon Decl. ¶¶ 1, 4.

³ *Id.* ¶ 3.

are ultimately funded by Data Mortgage.⁴ Combined, Data Mortgage has originated \$635 million worth of residential mortgage loans in the last 12 months.⁵ Of this total loan production, 34% are loans insured by the FHA.⁶

American Financial Network (“AFN”), founded in 2001, is a California corporation, licensed in 50 states.⁷ AFN originates and funds residential mortgage loans.⁸ AFN is a Direct Endorsement Lender with delegated authorities to underwrite, fund, and service Fannie Mae, Freddie Mac, FHA, USDA, VA, and Jumbo loans products.⁹ AFN has originated approximately \$4.5 billion worth of residential mortgage loans in the last 12 months.¹⁰ Of this total loan production, 36% are insured by the FHA.¹¹

Amici also work with prospective home buyers to obtain DPA for FHA insured mortgages. Many first-time homebuyers do not have the means to make the minimum down-payment required for an FHA-insured loan.¹² Amici rely on the ability to offer DPA programs to

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Kalyviaris Decl. ¶¶ 1, 4.

⁸ *Id.* ¶ 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Weedon Decl. ¶ 6; Kalyviaris Decl. ¶ 6.

provide home mortgage loans for borrowers that do not have funds to cover the required 3.5% down-payment.¹³

There are over 2,500 DPA programs administered by 1,300 different state and local housing finance agencies (“HFAs”).¹⁴ AFN is approved by 88 HFAs offering 140 programs in 24 states.¹⁵ Data Mortgage is approved by only two HFAs, Cal-HFA in California and the Nevada Housing Division in Nevada.¹⁶ Amici, like most regional and national mortgage lenders, cannot dedicate the critical resources to apply to participate in, maintain approvals, and to manage program guidelines for the many state and locally run HFAs.¹⁷

Amici believe that offering CBCMA’s DPA program nationwide is key to its ability to serve lower-income borrowers.¹⁸ Amici believe Chenoa Fund affords borrowers a wider range of financing options and increases success for their clients purchasing homes.¹⁹ Since Chenoa Fund’s entrance into the market, Amici have assisted 985 clients to obtain DPA loans from

¹³ *Id.* See also [12 U.S.C. § 1709\(b\)\(9\)\(C\)](#): In order to qualify for FHA mortgage insurance, borrowers must provide a minimum 3.5% down payment at the time of purchase, that cannot “consist... of funds provided by...(i) The seller or any other person or entity that financially benefits from the transaction. (ii) Any third party or entity that is reimbursed... by any of the parties described in clause (i).”

¹⁴ Weedon Decl. ¶ 12.

¹⁵ Kalyviaris Decl. ¶ 5.

¹⁶ Weedon Decl. ¶ 5.

¹⁷ *Id.*; Kalyviaris Decl. ¶ 5.

¹⁸ Weedon Decl. ¶¶ 12, 16, 29; Kalyviaris Decl. ¶¶ 12, 23.

¹⁹ Weedon Decl. ¶¶ 22, 29; Kalyviaris Decl. ¶ 8.

Chenoe Fund, enabling them to purchase homes, and over 100 borrowers have DPA loans from Chenoe Fund pending approval at the time of this filing.²⁰

The Mortgagee Letter introduces requirements that effectively prohibit Amici from offering DPA programs from CBCMA or from any of the few other national DPA providers, to most borrowers who are eligible for such programs.²¹ Amici would lose an indispensable tool that lets them compete with larger lenders that have the finances and personnel to seek, achieve, and maintain approval in every state, or with local lenders that only require approval in their home state.²²

If this Court does not enter a preliminary injunction, Amici will be prohibited from offering borrowers Chenoe Fund DPA loans, and many of Amici's borrowers will not be able to continue with their efforts to purchase a home, including over a hundred of Amici's clients with applications currently pending.

III. ARGUMENT

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."²³ In the Tenth Circuit, the required elements must be established for injunctive relief: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the

²⁰ Weedon Decl. ¶ 7; Kalyviaris Decl. ¶ 7.

²¹ Weedon Decl. ¶ 24; Kalyviaris Decl. ¶ 19.

²² Weedon Decl. ¶ 24; Kalyviaris Decl. ¶ 19.

²³ [*University of Texas v. Camenisch*, 451 U.S. 390, 395 \(1981\).](#)

harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.²⁴

A. Substantial Likelihood of Success on the Merits

The Mortgagee Letter is a substantial rule change that HUD issued arbitrarily and capriciously, without going through the required notice and comment period, in violation of the APA and related federal regulations.

1. Mortgagee Letter 19-06 dramatically changed current policy

As FHA approved lenders, Amici are tasked with the responsibility of determining if DPA funds come from an acceptable source and documenting how they draw such a conclusion.²⁵ While FHA maintains a list of approved non-profit entities that can provide DPA, it does not maintain a list of approved government entities.²⁶ The tools Amici have to make the determination are: the National Housing Act, HUD Handbook 4000.1, Mortgagee Letters, and HUD Office of Inspector General Audits.²⁷ In addition, CBCMA sent Amici a letter, dated August 6, 2018, to assist them in their review of its structure, to ensure they could fully understand and properly document how FHA requirements are being met by the Chenoa Fund.²⁸ The letter thoroughly articulated the statutory grounds for why CBCMA is a governmental

²⁴ [*General Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 \(10th Cir. 2007\).](#)

²⁵ Weedon Decl. ¶ 17; Kalyviaris Decl. ¶ 13.

²⁶ Kalyviaris Decl. ¶ 13.

²⁷ *Id.*; Weedon Decl. ¶ 17.

²⁸ *Id.* ¶ 14; Weedon Decl. ¶ 18 and CBCMA letter attached thereto as Exhibit “A.”

agency with the authority to provide DPA to our borrowers, and Amici have never heard of CBCMA's authority being in question until now.²⁹ Since 2013, HUD approved 14,000 mortgages, with Chenoa Fund DPA loans, including 985 originated by Amici, almost none of which were to tribal members or for property located on Cedar Band's reservation.³⁰

The Mortgagee Letter inserts a new jurisdictional requirement that effectively prohibits Amici from offering DPA programs from CBCMA or from any of the few other national DPA providers.³¹ The Mortgagee Letter also creates new requirements upon Amici to prove compliance with these new restrictions.³² Prior to the Mortgagee Letter, none of the foregoing sources provided any indication that national DPA programs, such as the Chenoa Fund, were proscribed.

In 2012, HUD published an interpretative rule, stating: "section 203(b)(9)(C) of the National Housing Act does not prohibit FHA from insuring mortgages originated as part of the homeownership programs of Federal, State, or local governments or their agencies or instrumentalities when such agencies or instrumentalities also directly provide funds toward the required minimum cash investment."³³ HUD policy allows "Governmental Entities" to provide

²⁹ *Id.*

³⁰ [ECF No. 2-3](#), Declaration of Michael Whipple ("Whipple Decl.") ¶¶ 9, 29–35; Weedon Decl. ¶ 7; Kalyviaris Decl. ¶ 7.

³¹ Weedon Decl. ¶ 24; Kalyviaris Decl. ¶ 19.

³² Weedon Decl. ¶ 25; Kalyviaris Decl. ¶ 22.

³³ *Federal Housing Administration: Prohibited Sources of Minimum Cash Investment Under the National Housing Act—Interpretive Rule*, 77 Fed. Reg. 72219, 72222 (Dec. 5, 2012).

DPA in connection with originating a first mortgage, as a gift, and as secondary financing.³⁴ The HUD Handbook defines “Governmental Entity” as “any federal, state, or local government agency or instrumentality.”³⁵

In 2013, HUD approved CBCMA as a Governmental Mortgagee.³⁶ A “Governmental Mortgagee” is defined to include “a federal, state, or municipal governmental agency....”³⁷ At that time, HUD received CBCMA’s Federal Charter of Incorporation, and Section 7.01 clearly states CBCMA’s purpose is to provide financial assistance for mortgages, including programs that comply with FHA loan requirements “anywhere in the United States and its territories.”³⁸ Since 2013, HUD’s Quality Assurance Division performed multiple reviews on CBCMA DPA loans for non-tribal member borrowers on properties located outside of tribal land, specifically reviewing governmental status of CBCMA, and ultimately endorsed those loans because CBCMA met the definition of government entity.³⁹

Nowhere does the National Housing Act explicitly or implicitly restrict where assistance may be provided, and HUD never previously cited ‘jurisdiction’ as a requirement for CBCMA

³⁴ See [HUD Handbook 4000.1](#), Section II.A.4.d.ii.(B), p. 225–26, Section II.A.4.d.iii.(F).(2).(a), p. 229–30, Section II.A.4.d.iii.(J).(1), p. 235–36 (Mar. 27, 2019).

³⁵ *Id.*, Section II.A.4.iii.(J).(1).(a), p. 234; See also [HUD Handbook 4000.1 Glossary](#) at 13.

³⁶ [Whipple Decl.](#) ¶ 20.

³⁷ See [HUD Handbook 4000.1 Glossary](#) at 13.

³⁸ [Whipple Decl.](#) ¶ 50, [ECF No. 2-5](#), “CBCMA Charter Inc.” and [ECF No. 2-6](#), “Letter from CBCMA to HUD.”

³⁹ [Whipple Decl.](#) ¶ 9.

DPA loans 985 loans originated by Amici, that were insured by HUD.⁴⁰ Mortgagee Letter 19-06 dramatically changes long-standing policy and practice.

2. *Mortgagee Letter 19-06 is a substantive rule change, requiring notice and comment*

Given the massive sweeping prohibition upon national DPA programs by government agencies, impacting Cedar Band, Amici and their clients, the Mortgagee Letter is a substantive rule change.⁴¹ “A substantive rule has the force of law, while an interpretive rule is merely a clarification or explanation of an existing statute or rule and is issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.”⁴² HUD defines “rule” to mean “all or part of any Departmental statement of general or particular applicability and future effect designed to: (1) Implement, interpret, or prescribe law or policy, or (2) describe the Department's... practice requirements.”⁴³ HUD’s written regulations governing rule changes, states that “[i]t is the policy of [HUD] to provide for public participation in rulemaking with respect to all HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or contracts even though such matters would not

⁴⁰ Weedon Decl. ¶ 7; Kalyviaris Decl. ¶ 7.

⁴¹ [Patriot, Inc. v. HUD, 963 F. Supp. 1, 4-5 \(D.D.C. 1997\)](#) (Mortgagee letter seeking to regulate reverse mortgage fees had “binding effect of terminating [challenger’s] business” and was a substantive rule subject to notice-and-comment.)

⁴² [La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 \(1st Cir. 1992\)](#) (internal quotation marks and citation omitted).

⁴³ [24 CFR § 10.2](#)

otherwise be subject to rulemaking by law or Executive policy.”⁴⁴ HUD’s regulations provide that generally HUD will publish an advanced notice of proposed rulemaking (“ANPRM”) with an opportunity for comment.⁴⁵ If HUD issues a letter where the “interpretation [of a regulation] has the practical effect of altering the regulation, a formal amendment-almost certainly prospective and after notice and comment-is the proper course.”⁴⁶

HUD contemplated making substantive rule changes about DPA loans. In spring 2018, the Office of Information and Regulatory Affairs (“OIRA”) published its bi-annual agenda, including notice that HUD was drafting an ANPRM that would “seek comment on the use of downpayment assistance from a source other than a family member, including from tribal providers, state housing finance agencies, local housing finance agencies, entities acting in a governmental capacity... in satisfying the statutorily required minimum investment... needed to close the insured mortgage transaction.”⁴⁷ To date, no ANPRM has been published.⁴⁸

In fall 2018, OIRA’s published agenda again noted that HUD was drafting an ANPRM. This time, the ANPRM would seek comment on “the source of the borrower’s [minimum required investment], including sources other than the borrower or the borrower’s family

⁴⁴ [24 CFR § 10.1](#)

⁴⁵ [24 CFR § 10.8](#)

⁴⁶ [United States v. Hoyts Cinemas Corp.](#), 380 F.3d 558, 569 (1st Cir. 2004)

⁴⁷ Spring 2018 [Unified Agenda of Regulatory and Deregulatory Actions, Office of Mgmt. & Budget, RIN No. 2502-AJ44](#).

⁴⁸ [ECF No. 2](#), Complaint ¶ 47.

members, e.g., downpayment assistance (DPA) or secondary financing from governmental entities and nonprofit organizations.”⁴⁹ To date, no ANPRM has been published.⁵⁰

Instead of following through with providing notice of substantive rule changes regarding DPA assistance from governmental agencies and, more particularly, Tribal Authorities, on April 18, 2019, HUD published Mortgagee Letter 19-06, purporting to clarify documentation requirements to adequately demonstrate that governmental entities providing DPA are “operating in their governmental capacity.”⁵¹ However, HUD redefines Tribal Authorities’ jurisdictional limits and imposes prohibitions on common methods utilized by HFAs for raising funds for its DPA programs. The Mortgagee Letter is not interpreting existing policy. It is enacting new substantive rules that dramatically change long-standing policies.

3. Mortgagee Letter 19-06 violates the APA and related federal regulations.

a. HUD failed to comply with notice and comment procedures

The Mortgagee Letter is a legislative rule that was required to go through the APA’s notice-and-comment procedure.⁵² The APA defines “rule” to mean “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice

⁴⁹ Fall 2018 [Unified Agenda of Regulatory and Deregulatory Actions, Office of Mgmt. & Budget, RIN No. 2502-AJ44](#)

⁵⁰ [ECF No. 2](#), Compl. ¶ 38.

⁵¹ [ECF No. 2-2](#), Mortgagee Letter 19-06.

⁵² [5 U.S.C. § 553\(b\)–\(c\)](#).

requirements of an agency....”⁵³ The Supreme Court has a “stated preference for rulemaking.”⁵⁴ If there were any doubt about the need for notice-and-comment rulemaking, it must be resolved in favor of such procedures. HUD violated the APA by not publishing a notice of its proposal to change its policies and by not allowing a period for public comment on the change.⁵⁵ Furthermore, HUD violated the enabling statute by not providing Congress with notice of the rule before it was published in the Federal Register.⁵⁶

b. Mortgagee Letter is arbitrary and capricious and should be set aside

The Mortgagee Letter is subject to review under the APA⁵⁷, and should be deemed unlawful because HUD acted arbitrarily and capriciously in publishing these substantive rule changes. The APA empowers this Court to “hold unlawful and set aside” agency action that is “arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law.”⁵⁸ Agency action is “arbitrary and capricious” if the action was not based on a “reasoned analysis” that indicates the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”⁵⁹ The

⁵³ [5 U.S.C. § 551](#)

⁵⁴ [De Niz Robles v. Lynch](#), 803 F.3d 1165, 1173 (10th Cir. 2015)

⁵⁵ See [5 U.S.C. § 706\(2\)\(A\), \(C\)–\(D\)](#).

⁵⁶ [42 U.S.C. § 3535\(o\)](#).

⁵⁷ [5 U.S.C. § 704](#).

⁵⁸ [5 U.S.C. § 706\(2\)\(A\)](#).

⁵⁹ [Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.](#), 463 U.S. 29, 57 (1983) (internal quotation marks omitted); see also [Republican Nat’l Comm. v. FEC](#), 76 F.3d 400, 407 (D.C. Cir. 1996); [Safari Club Int’l v. Zinke](#), 878 F.3d 316, 324-25 (D.C. Cir.

Mortgagee Letter, irrespective of it being couched as a letter providing interpretation of existing policy, “upset . . . settled legal expectations,”⁶⁰ and “create[d] . . . new duties” in providing DPA.⁶¹

It is clear the Mortgage Letter enacts new substantive rules that dramatically alter existing policy. This was done without submitting changes to Congress, publishing rules for public comment, and following federally mandated procedures. The Mortgage Letter only references unsubstantiated suspicions of concern about programmatic risks. HUD neither articulates nor relies upon evidence or factors the law requires it to consider for issuing the Mortgage Letter, and its action is arbitrary and capricious. Thus, this Court should conclude the Mortgage Letter violates federal law. The issuance of a preliminary injunction to preserve status quo is in the interests of fairness and equity, especially where there is a substantial likelihood of success on the merits, as is the case here.

B. Balancing of Harms Compel Injunctive Relief

1. No harm to Defendants if injunction issued.

No harm will come to Defendants if the injunction is issued. Chenoa Fund program guidelines comply with FHA underwriting guidelines, including FHA recent changes to

[2017](#))(noting that “[a] disputed action also may be set aside as arbitrary and capricious if the agency has acted ‘without observance of procedure required by law.’” (citing [5 U.S.C. § 706\(2\)\(D\)](#))).

⁶⁰ [Ballesteros v. Ashcroft](#), 452 F.3d 1153, 1159 (10th Cir. 2006)

⁶¹ [Sorenson Commc’ns, Inc. v. FCC](#), 567 F.3d 1215, 1223 (10th Cir. 2009).

underwriting using TOTAL Scorecard to improve credit quality of loans.⁶² CBCMA also employs other default mitigation efforts to ensure loan quality including limiting credit scores, providing post-closing homebuyer education for a year for all borrowers, and mandating and paying for home buyer education for borrowers with lower credit scores.⁶³ No evidence exists that CBCMA presents a risk to the FHA Mutual Mortgage Insurance Fund (“MMIF”) or that state and local HFAs are better equipped to handle DPA loans.

Rather, HUD is attempting to limit Tribal Authorities from providing nationwide DPA loans, without any reasonable explanation, and without any data whatsoever that show DPA provided by governmental agencies on a nationwide basis poses a risk to the MMIF. HUD creates no standardization policies among programs, allows HFAs to structure their DPA programs to meet their individual needs, and there is no uniformity amongst the many agencies.⁶⁴ Moreover, HUD does “not review the funding structure of HFA downpayment assistance programs to determine compliance with FHA requirements and guidelines.”⁶⁵

HUD cannot claim to have any evidence to support its position because it does not track DPA loans with any detail. The OIG audit found: “HUD’s data systems did not track FHA loans in sufficient detail to easily identify loans that contained downpayment assistance from HFAs. The data captured detailed only which loans contained downpayment assistance from a

⁶² Weedon Decl. ¶ 20; Kalyviaris Decl. ¶ 16.

⁶³ Weedon Decl. ¶ 21; Kalyviaris Decl. ¶ 17.

⁶⁴ Office of Inspector General, [Audit Report Number 2017-LA-0003](#), “HUD Failed To Adequately Oversee FHA-Insured Loans With Borrower-Financed Downpayment Assistance,” p. 8 (March 3, 2017).

⁶⁵ *Id.* at p. 10.

government entity and “did not include the type of government entity, government entity name, whether the loan included a higher than market interest rate, or whether the lender provided the downpayment assistance funds at closing on behalf of the HFA.”⁶⁶ As a result of these deficiencies, “audit, management reviews, and risk assessments could not be easily or fully conducted.”⁶⁷ Nowhere does the report reference jurisdiction of HFAs or Tribal Authorities, much less indicate that was of any concern.

There is no evidence that Tribal Authorities, operating on a national level, are increasing risk to the MMIF or operating against the public interest. On the other hand, state HFAs, that receive federal funding for their programs, should not be presumed to be acting in the public interest, because there is concrete evidence to the contrary. The Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”), audited the use of federal funding from the Hardest Hit Fund (“HHF”) to support state housing agencies’ programs including DPA programs, and specifically found state HFA abuse and mismanagement.⁶⁸ It also found deliberate denial of assistance to otherwise qualified borrowers, or a general severe underperformance to its citizens’ detriment.⁶⁹

⁶⁶ *Id.*

⁶⁷ *Id.* at p. 19.

⁶⁸ [Special Inspector General For The Troubled Asset Relief Program Quarterly Report To Congress I](#) (“SIGTARP 2019 Report”), p. 12 (April 30, 2019).

⁶⁹ [Special Inspector General for the Troubled Asset Relief Program report, “Unnecessary Expenses Charged to the Hardest Hit Fund,”](#) (“SIGTARP 2017 Report”), pp. 12, 33 (August 25, 2017).

"SIGTARP previously reported on scores of people who earn under \$30,000 a year, but were turned down for the Hardest Hit Fund," Special Inspector General for the Troubled Asset Relief Program Christy Goldsmith Romero said in a statement.⁷⁰ "Now we find that some state housing agencies are more willing to keep TARP dollars for themselves than distribute it to low-earning homeowners, a violation of TARP contracts and inconsistent with TARP law."⁷¹ In August 2017, SIGTARP issued a special audit report, and found state HFAs deliberately charged \$3 million "in unnecessary expenses," while denying homeowners admission to the program.⁷² In its most recent quarterly report, SIGTARP identified \$11 million in wasteful and unnecessary spending by state housing agencies in 2016 and 2017, including, for example, catered barbeques, parties, country club events, leasing a Mercedes, cash bonuses, gym memberships, gifts, free parking, settlements and legal fees in discrimination cases.⁷³

Meanwhile, mortgage loan originator ("MLO") compensation rules require that MLOs are paid the same no matter the loan program chosen by the borrower, so MLOs, such as those who work for Amici, offer the programs that best suit the borrowers and their circumstances.⁷⁴

⁷⁰ [Special Inspector General for the Troubled Asset Relief Program formal press release, "State Housing Agencies Charged \\$3 Million In Unnecessary Expenses To The Hardest Hit Fund,"](#) (August 25, 2017).

⁷¹ *Id.*

⁷² [SIGTARP 2017](#) Report at p.1.

⁷³ [SIGTARP 2019](#) Report at p. 4.

⁷⁴ Weedon Decl. ¶ 22; Kalyviaris Decl. ¶ 18.

Amici have found that Chenoa Fund offers competitive terms to that of other HFA programs, which affords borrowers a wider range of financing options thereby increasing their success for becoming homeowners.⁷⁵ For instance, in California and Nevada, where Amici are able to offer borrowers both an HFA program and Chenoa Fund, the HFA program interest rates often exceed Chenoa Fund rates.⁷⁶ Moreover, since Chenoa Fund became a competitor in the DPA market, Amici have noticed improvements in the offerings of the HFAs, including reduced interest rates and improved customer service.⁷⁷

There is no evidence that Defendants will be harmed by a preliminary injunction.

2. *Irreparable Harm to Plaintiffs, Amici and lower-income homebuyers*

While no discernable parties will be harmed if an injunction is issued, CBCMA, Amici, and many of their clients will be immediately and irreparably harmed if injunctive relief is not granted. Moreover, injunctive relief is in the public interest because it will uphold reasonable reliance interests based on HUD's previous policy, as well as ensure access to affordable housing for low-income and other disadvantaged individuals, especially the 102 borrowers with loans currently pending through Amici.⁷⁸ Due to the costs and complexities of applying for and maintaining state and local HFA programs, Amici, like many lenders, cannot afford to participate in most of these programs, thus frequently denying borrowers the opportunity to participate in

⁷⁵ Weedon Decl. ¶ 8; Kalyviaris Decl. ¶ 8.

⁷⁶ Weedon Decl. ¶ 15.

⁷⁷ Weedon Decl. ¶ 17; Kalyviaris Decl. ¶ 11.

⁷⁸ Weedon Decl. ¶ 7; Kalyviaris Decl. ¶ 7.

such programs and possibly causing them to lose out on the opportunity of becoming homeowners.⁷⁹

Data Mortgage was approved as a DPA provider by the Nevada Housing Division in May 2010.⁸⁰ The approval took three months to complete and cost approximately \$1,500.⁸¹ Data Mortgage was then approved as a provider of CalHFA in July 2012.⁸² The approval took 14 months to complete and cost approximately \$3,500, and maintaining approval costs \$500 annually.⁸³ Data Mortgage attempted approval with Utah Housing, and after expending significant resources on the application, was rejected for failing to meet the requirement of closing 60 first mortgage loans, half of which must be FHA-insured loans, in Utah within the 12 months preceding application.⁸⁴ Utah Housing did not grant Data Mortgage consideration for having a lower number of loans closed, as stated in its documentation that it may do for smaller lenders.⁸⁵ As a result of the rejection, a high-volume MLO in Utah turned down an employment offer from Data Mortgage because without Utah Housing approval, the MLO would be unable to provide his usual clientele with the DPA programs that many of them relied upon.⁸⁶ Data Mortgage contemplated approval with programs in other states, but often could not meet the

⁷⁹ Weedon Decl. ¶¶ 5, 29; Kalyviaris Decl. ¶¶ 5, 23.

⁸⁰ Weedon Decl. ¶ 9.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* ¶ 10.

⁸⁵ *Id.*

⁸⁶ *Id.*

minimum loan requirements, and believes that its inability to provide DPA in these states has kept it from growing in these states, which in turn, keeps it ineligible for approval with the HFAs.⁸⁷

While AFN is approved in considerably more state HFA programs than Data Mortgage, there are over 1,300 providers with more than 2,500 DPA programs, of which AFN is approved by only 88 HFAs with 140 programs in 24 states.⁸⁸ Due to the costs and complexities of applying for and maintaining these programs, AFN, like many lenders, cannot undertake to participate in enough programs to cover the needs of all of its borrowers in every state.⁸⁹

Amici know that offering DPA from a national provider enables their companies to grow and be more competitive with larger lenders in states where they currently have a limited presence. If not for Chenoa Fund, borrowers, particularly those that are lower-income, would also have significantly limited access to DPA programs in states where Amici have not or cannot get state HFA approval.⁹⁰ The option to work with one national DPA provider enables Amici to offer DPA to clients, very manageably, in every state in which Amici are licensed. Amici's MLOs and processing personnel are able to know and understand the available programs thoroughly and with acuity, making them better equipped to advise their borrowers on whether the program is right for them.⁹¹

⁸⁷ *Id.* ¶ 11.

⁸⁸ *Id.* ¶ 12; Kalyviaris Decl. ¶ 5.

⁸⁹ *Id.*

⁹⁰ *Id.* ¶¶ 9-12, 24; Weedon Decl. ¶¶ 11-16, 29.

⁹¹ *Id.*

Amici believe that CBCMA's entrance into the marketplace has also driven down state housing agencies' rates and caused them to improve customer service.⁹² For instance, in Nevada where Data Mortgage is approved by the Nevada Housing Division, SIGTARP found: "The Nevada state agency contractor NAHAC charged TARP for bonuses/awards/gifts despite having a 94% drop in the number of homeowners helped from 2013 to 2015, despite a great need in the state, and was further specifically found to be deliberately denying qualified borrowers."⁹³ Similarly, in Florida, where AFN is approved with the Florida Housing Finance Corporation, as well as numerous local HFAs, audits have revealed gross abuse of funds and severe performance issues for its citizens. "Also egregious was more than \$100,000 in bonuses to Florida agency employees, including bonuses to senior Florida officials that doubled and tripled after SIGTARP issued an audit in December 2015 on the state agency's severe underperformance in HHF."⁹⁴

In these situations, Data Mortgage has been able to offer borrowers a choice between Nevada's HFA program and the Chenoa Fund, and AFN likewise can do the same in Florida. Competition in the DPA field only improves the market for both lenders and borrowers.

Together, Amici have over 100 nervous prospective homebuyers waiting to see if their paperwork will be rejected as a result of this new rule change. These individuals who have not yet closed on their new homes are in a particularly precarious situation, because Amici cannot close on the transaction until they have provided the documentation required by the Mortgagee

⁹² *Id.*

⁹³ [SIGTARP 2017](#) Report at p.12.

⁹⁴ [SIGTARP 2017](#) Report at p. 33.

Letter. These individuals face losing their earnest money deposit and the heartache and headache of watching homeownership slip through their fingers.

The Mortgagee Letter harms Cedar Band, Amici, and other similarly situated Equal Housing Lenders, and lower-income prospective homebuyers while failing to protect the FHA insurance fund. If this Court does not grant a preliminary injunction, Amici will not be able to complete loans for its borrowers, who in turn will be unable to purchase their homes. Amici further will not be able to remain competitive with larger lenders.

IV. CONCLUSION

For the foregoing reasons, Amici respectfully request this Court enter a preliminary injunction, preserving status quo for the parties, Amici and other similarly situated Equal Housing Lenders, and especially for all the homebuyers who are actively working with Amici and other lenders on obtaining DPA through the Chenoa Fund.

Respectfully submitted this 11th day of June, 2019.

CANNON LAW GROUP

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