

promise to be kept. This is especially true when the financial institution is acting under the aegis of a federal program that is specifically targeted at preventing foreclosure.

3. As a participating servicer in HAMP, IndyMac has entered into a written agreement with Plaintiffs, in which it agreed to provide Plaintiffs with a permanent loan modification if Plaintiffs made three monthly trial period payments and complied with its requests for accurate documentation. Plaintiffs, for their part, have complied with this agreement by submitting the required documentation and making payments. Despite Plaintiffs' efforts, Defendant IndyMac has ignored its contractual obligation to permanently modify their loans.

4. The same problems affect other members of the putative class. As a result, Plaintiffs and hundreds, if not thousands, of other Massachusetts homeowners are wrongfully being deprived of an opportunity to cure their delinquencies, pay their mortgage loans and save their homes. Defendant's actions thwart the purpose of HAMP and are illegal under Massachusetts law.

JURISDICTION

5. Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1332 because the action is between parties that are citizens of different states and the amount in controversy is greater than \$75,000. For diversity jurisdiction purposes, a national bank is a citizen of the state designated as its main office on its organization certificate. *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 306 (2006). IndyMac is, on information and belief, a citizen of California. Plaintiffs are citizens of Massachusetts.

6. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) in that it is brought as a putative class action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and at least one member of the class of plaintiffs is a citizen of a State different from any defendant.

7. Venue is proper in this Court pursuant to 28 U.S.C. 1391(b) inasmuch as the unlawful practices are alleged to have been committed in this District, Defendant regularly conducts business in this District, and the named Plaintiffs reside in this District.

PARTIES

8. Sayonara Reyes is a divorced custodial parent residing with her children at 13 Lyme Street, Salem, Massachusetts 01970.

9. Carrol Johnson is an individual residing with his girlfriend and 10-year-old daughter at 25 Chestnut Avenue, Jamaica Plain, Massachusetts 02130.

10. Frantz Jean Gilles is an individual residing at 95 Greenwood Street, Dorchester, Massachusetts 02121.

11. OneWest Bank, FSB is a mortgage lender with its headquarters at 888 East Walnut Street, Pasadena, CA 91101.

12. IndyMac Mortgage Servicing, FSB is a division of OneWest Bank, FSB, receiving mail at P.O. Box 4045, Kalamazoo, MI 49003-4045.

FACTUAL BACKGROUND

The Foreclosure Crisis

13. Over the last three years, the United States has been in a foreclosure crisis. A congressional oversight panel has recently noted that one in eight U.S. mortgages is currently in foreclosure or default.¹

14. The number of Massachusetts properties with foreclosure filings in 2008 was 150% higher than in 2007 and 577% higher than in 2006 – a near seven-fold increase in only two years.²

¹ Congressional Oversight Panel, Oct. 9, 2009 report at 3. Available at <http://cop.senate.gov/reports/library/report-100909-cop.cfm>.

² RealtyTrac Staff. Foreclosure Activity Increases 81 Percent in 2008. Jan. 15, 2009. Available at <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=0&itemid=5681>.

15. According to 2009 data, the numbers continue to rise; in the third quarter of 2009, foreclosures were filed on 12,667 Massachusetts properties, a 35% increase over the same period of 2008.³ Overall in 2009, over 36,000 individual properties in Massachusetts had foreclosure filings against them which, while slightly less than 2008, still represents an increase of over 100% from 2007 levels and an increase of more than 400% over 2004.⁴

16. Increased foreclosures have a detrimental effect not just on the borrowers who lose unique property and face homelessness, but also on the surrounding neighborhoods that suffer decreased property values and municipalities that lose tax revenue.

17. State legislative efforts were able to temporarily slow the pace of completed foreclosures in 2009, but toward the end of the year, the number of new filings once again rose, demonstrating that foreclosures were merely delayed, not prevented.⁵

18. The foreclosure crisis is not over. Economists predict that interest rate resets on the riskiest of lending products will not reach their zenith until sometime in 2011. *See* Eric Tymoigne, *Securitization, Deregulation, Economic Stability, and Financial Crisis*, Working Paper No. 573.2 at 9, Figure 30 *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458413 (citing a Credit Suisse study showing monthly mortgage rate resets).

Creation of the Home Affordable Modification Program

19. Congress passed the Emergency Economic Stabilization Act of 2008 on October 3, 2008 and amended it with the American Recovery and Reinvestment Act of 2009 on February 17, 2009 (together, the “Act”). 12 U.S.C.A. §5201 *et. seq.* (2009).

³ RealtyTrac Staff. U.S. Foreclosure Activity Increases 5 Percent in Q3. Oct. 15, 2009. Available at <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&acct=0&itemid=7706>.

⁴ RealtyTrac Staff. RealtyTrac Year End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009. Available at <http://www.realtytrac.com/contentmanagement/pressrelease.aspx?channelid=9&itemid=8333>

⁵ For 2007 comparison, see Gavin, Robert. Fewer Lose Their Homes in August. Boston Globe. Sept. 23, 2009. Available at http://www.boston.com/realstate/news/articles/2009/09/23/foreclosures_in_mass_drop_but_petitions_soar/.

20. The purpose of the Act is to grant the Secretary of the Treasury the authority to restore liquidity and stability to the financial system, and ensure that such authority is used in a manner that “protects home values” and “preserves homeownership.” 12 U.S.C.A. §5201.

21. The Act grants the Secretary of the Treasury the authority to establish the Troubled Asset Relief Program, or TARP. 12 U.S.C. § 5211. Under TARP, the Secretary may purchase or make commitments to purchase troubled assets from financial institutions. *Id.*

22. Congress allocated up to \$700 billion to the United States Department of the Treasury for TARP. 12 U.S.C. § 5225.

23. In exercising its authority to administer TARP, the Act mandates that the Secretary “shall” take into consideration the “need to help families keep their homes and to stabilize communities.” 12 U.S.C. § 5213(3).

24. The Act further mandates, with regard to any assets acquired by the Secretary that are backed by residential real estate, that the Secretary “shall implement a plan that seeks to maximize assistance for homeowners” and use the Secretary’s authority over servicers to encourage them to take advantage of programs to “minimize foreclosures.” 12 U.S.C.A. §5219.

25. The Act grants authority to the Secretary of the Treasury to use credit enhancement and loan guarantees to “facilitate loan modifications to prevent avoidable foreclosures.” *Id.*

26. The Act imposes parallel mandates to implement plans to maximize assistance to homeowners and to minimize foreclosures. 12 U.S.C.A. §5220.

27. On February 18, 2009, pursuant to their authority under the Act, the Treasury Secretary and the Director of the Federal Housing Finance Agency announced the Making Home Affordable program.

28. The Making Home Affordable program consists of two subprograms. The first sub-program relates to the creation of refinancing products for individuals with minimal or negative equity in their home, and is now known as the Home Affordable Refinance Program, or HARP.

29. The second sub-program relates to the creation and implementation of a uniform loan modification protocol, and is now known as the Home Affordable Modification Program, or HAMP. It is this subprogram that is at issue in this case.

30. HAMP is funded by the federal government, primarily with TARP funds. The Treasury Department has allocated at least \$75 billion to HAMP, of which at least \$50 billion is TARP money.

31. Under HAMP, the federal government incentivizes participating servicers to enter into agreements with struggling homeowners that will make adjustments to existing mortgage obligations in order to make the monthly payments more affordable. Servicers receive \$1000.00 for each HAMP modification.

Broken Promises Under HAMP

32. The industry entities that perform the actual interface with borrowers – including such tasks as payment processing, escrow maintenance, loss mitigation and foreclosure – are known as “servicers.” Servicers typically act as the agents of the entities that hold mortgage loans. Defendant IndyMac Mortgage Servicing, FSB is a servicer operated by OneWest Bank, FSB and its actions described herein were made as agents for the entities that hold mortgage loans.

33. Should a servicer elect to participate in HAMP,⁶ they execute a Servicer Participation Agreement (“SPA”) with the federal government.

⁶ Certain classes of loans, namely those held by Federal National Mortgage Association (“Fannie Mae”), Federal Home Loan Mortgage Corporation (“Freddie Mac”) or companies that accepted money under the TARP program, are subject to mandatory inclusion in HAMP. Otherwise, participation by servicers in the HAMP program is voluntary.

34. On August 18, 2009, Tony Ebers, Executive Vice President and Chief Operating Officer of OneWest Bank executed an SPA, thereby making IndyMac a participating servicer in HAMP. A copy of this SPA is attached hereto as Exhibit 1.

35. The SPA executed by Mr. Ebers incorporates all “guidelines,” “procedures,” and “supplemental documentation, instructions, bulletins, frequently asked questions, letters, directives, or other communications” issued by the Treasury, Fannie Mae or Freddie Mac in connection with the duties of Participating Servicers. These documents together are known as the “Program Documentation” (SPA at ¶ 1.A.), and are incorporated by reference herein.

36. The SPA mandates that a Participating Servicer “shall perform” the activities described in the Program Documentation “for all mortgage loans it services.” (SPA at ¶¶ 1.A., 2.A.)⁷

37. The Program Documentation requires Participating Servicers to evaluate *all loans* that are 60 or more days delinquent for HAMP modifications. (SD 09-01 at 4.) In addition, if a borrower contacts a Participating Servicer regarding a HAMP modification, the Participating Servicer must collect income and hardship information to determine if HAMP is appropriate for the borrower.

38. A HAMP Modification consists of two stages. First, a Participating Servicer is required to gather information and, if appropriate, offer the homeowner a Trial Period Plan (“TPP”).⁸ The

⁷ The Program Documentation also includes Supplemental Directive 09-01 (“SD 09-01,” attached hereto as Exhibit 2), Home Affordable Modification Program; Base Net Present Value (NPV) Model Specifications (“NPV Overview,” attached hereto as Exhibit 3) and Supplemental Documentation—Frequently Asked Questions (“HAMPFAQS,” attached hereto as Exhibit 4) and Supplemental Directive 09-08 (“SD 09-08,” attached hereto as Exhibit 5). These documents together describe the basic activities required under HAMP and are incorporated by reference in both of the TPP Agreements signed by Plaintiffs as well as herein.

⁸ The eligibility criteria for HAMP, as well as the formula used to calculate monthly mortgage payments under the modification, are explained in detail in SD 09-01, attached hereto as Exhibit 2. Generally speaking, the goal of a HAMP modification is for owner-occupants to receive a modification of a first-lien loan by which the monthly mortgage payment is reduced to 31% of their monthly income for the next five years.

TPP consists of a three-month period in which the homeowner makes mortgage payments based on a formula that uses the initial financial information provided.

39. IndyMac offers TPPs to eligible homeowners by way of a TPP Agreement, which describes the homeowner's duties and obligations under the plan and promises a permanent HAMP modification for those homeowners that execute the agreement and fulfill the documentation and payment requirements.

40. If the homeowner executes the TPP Agreement, complies with all documentation requirements and makes all three TPP monthly payments, the second stage of the HAMP process is triggered, in which the homeowner is offered a permanent modification.

41. IndyMac has routinely failed to live up to their end of the TPP Agreement and offer permanent modifications to homeowners. In February 2010, the U.S. Treasury reported that IndyMac's parent company had 112,200 HAMP-eligible loans in its portfolio. Of these loans, just 3,087 resulted in permanent modifications (approximately 2.75%) even though many more homeowners had made the payments and submitted the documentation required by the TPP Agreement. The Treasury Report is attached hereto as Exhibit 6.

42. By failing to live up to the TPP Agreement and convert TPPs into permanent modifications, IndyMac is not only leaving homeowners in limbo, wondering if their home can be saved. IndyMac is also preventing homeowners from pursuing other avenues of resolution, including using the money they are putting toward TPP payments to fund bankruptcy plans, relocation costs, short sales or other means of curing their default.

Sayonara Reyes

43. Sayonara Reyes (“Reyes”) has been the owner of Lyme Street since March 1, 2007. She works for the City of Salem’s School Department as an Assignment Coordinator. She has worked there for over 10 years.

44. On March 1, 2007 Reyes took out a \$166,800 mortgage loan for the purchase of her residence at Lyme Street from IndyMac Bank, F.S.B.

45. The servicing of Reyes’s mortgage loan was transferred to Defendant IndyMac sometime around April 11, 2009 and continues to be serviced by Defendant to this date.

46. After taking out the mortgage loan, Reyes began experiencing various financial hardships that combined to cause her to have difficulty making payments on her mortgage loan and resulted in her falling behind on her payments.

47. Reyes made multiple requests for help from her loan servicer began at or around December 2008 and continued to April 2009 when Reyes applied to Defendant for a HAMP loan modification and sent in documentation.

48. On May 20, 2009 IndyMac sent a letter to Reyes asking for even more documentation.

49. On June 22, 2009 Reyes sent the requested additional documentation to IndyMac.

50. By letter dated July 17, 2009 IndyMac acknowledged that Reyes had completed the required steps to be considered for a loan modification and that they had received all of the information they needed at that time.

51. By letter dated September 2, 2009, IndyMac offered Reyes a TPP Agreement entitled *Home Affordable Modification Trial Period Plan* (hereinafter “Trial Period Plan” or “TPP”).

52. Reyes timely accepted the offer by executing the TPP Agreement and returning it to IndyMac, along with the completed Hardship Affidavit, IRS Form 4506-T, and other supporting

documentation on September 10, 2009. A copy of the signed TPP Agreement is attached hereto as Exhibit 7.

53. The TPP Agreement provided that the plan was effective October 1, 2009 and would run from October 2009 to December 2009. Reyes' monthly mortgage payments were \$964.76 under the TPP Agreement.

54. The first sentence of the TPP Agreement provides: "If I am in compliance with this Trial Period Plan and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement, as set forth in Section 3 [below], that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage."

55. The TPP states "I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of the Plan if I qualify for the Offer or will send me written notice that I do not qualify for the offer." Nevertheless, IndyMac has sent neither a signed copy of the Plan, nor a written rejection.

56. Reyes timely made each of the payments contemplated in the TPP Agreement due in October, November and December 2009. She has also timely made payments for January through April 2010, consistent with her TPP payment amount.

57. The TPP Agreement promises "[a]s long as you comply with the terms of the Trial Period Plan, we will not start foreclosure proceedings or conduct a foreclosure sale if foreclosure proceedings have started."

58. Despite Reyes' compliance with the TPP Agreement, IndyMac, through its attorney, proceeded with foreclosure activity. IndyMac caused to have served on Reyes the following:

- a. on October 24, 2009, a letter containing an *Order of Notice*; and

b. on November 3, 2009, a *Notice of Mortgage Foreclosure Sale, Notice of Mortgagee's Sale of Real Estate* to be held on December 3, 2009 at 10:00 AM, and *Notice of Intention to Foreclose Mortgage and of Deficiency After Foreclosure of Mortgage*.

59. Upon receipt of the October 24, 2009 *Order of Notice*, Reyes called IndyMac and was assured by IndyMac representatives that it still considered her TPP Agreement valid, that it was not going to conduct a foreclosure sale so long as she was still in her Trial Period and that she should keep making her TPP payments on time as agreed.

60. Based on IndyMac's assurances and the express terms of the TPP Agreement, Reyes took no action to stop foreclosure when served with the November 3, 2009 Notice.

61. Notwithstanding the terms of the TPP Agreement and its additional assurance to Reyes that it would not conduct a foreclosure sale while she was still in her Trial Period, IndyMac through its attorney and agents conducted a foreclosure sale on December 3, 2009. On information and belief, the high bidder was the Federal Home Loan Mortgage Corporation (hereinafter Freddie Mac) (the holder of the loan). Reyes did not witness the foreclosure sale and she remained unaware that it had occurred until she received the letters described below.

62. Reyes timely made her TPP payment due on December 1, 2009. IndyMac returned her December 2009 TPP payment by letter dated December 8th, 2009, stating that the check could not be accepted because "the amount received does not represent the total amount due at this time."

63. Reyes also received a letter from Carlson GMAC Real Estate, dated December 8, 2009, stating that Freddie Mac was in legal possession of the property and beginning the eviction process

64. Reyes received two letters dated December 11, 2009, from Harmon Law Offices, P.C., purporting to represent Freddie Mac, and also for the purpose of beginning the process of evicting Reyes from her home.

65. Upon receipt of the returned TPP payment, the Carlson GMAC Real Estate letter and the two Harmon Law Offices letters, Reyes realized that something was terribly wrong. At this point, she sought legal representation.

66. By letter dated December 17, 2009, counsel for Reyes wrote to Harmon Law Office for an explanation of the foreclosure sale and to demand that it be voided.

67. On January 8, 2010, counsel for Freddie Mac informed Reyes's counsel that the foreclosure sale was rescinded.

68. Based on the representations of Freddie Mac's counsel, on January 8, 2010, Reyes re-sent her December TPP payment and sent her TPP payment for January. Indymac accepted both payments.

69. On January 25, 2010 IndyMac requested additional documentation concerning Reyes's application for a permanent loan modification including documentation previously provided (a copy of her divorce judgment). Reyes provided the documentation by fax the same day.

70. Despite Reyes's compliance with the terms of the TPP Agreement, timely provision of all documents requested by IndyMac, and timely payment of her TPP payments, on January 29, 2010, IndyMac sent her a letter stating:

Thank you for submitting your application for a permanent loan modification.

You recently received a letter informing you that your permanent loan modification application is incomplete due to the following reasons(s):

- One or more of your trial payments have not been received. In order for us to continue the review of your modification request, you will need to remit all past due trial modification payments and make timely future payments as outlined in your trial modification agreement. Payments may

be mailed using the enclosed prepaid envelope or remitted online at www.indymacmortgageservices.com.

If you wish to be considered for a permanent loan modification, please submit the above requirement(s) by the expiration date of 2/26/2010....

Failure to satisfy these requirements(s) by 2/26/2010 will result in the denial of your permanent loan modification request. (emphasis in original)

71. The January 29, 2010 letter from IndyMac shows three payments of \$964.76 and one payment of \$1929.52 (reflecting the simultaneous payment for December and January). Despite the fact that the letter itself acknowledges IndyMac's receipt of five months of TPP payments, the letter indicates that one payment is missing.

72. Reyes had not received any prior letter informing her that her loan modification application was incomplete, and had made all three payments under the TPP Agreement, as well as all subsequent payments.

73. On February 5, 2010, counsel for Reyes called IndyMac concerning the January 29, 2010 letter from IndyMac and was assured that Reyes was current on her TPP payments, that there were no outstanding documents and that she could disregard the January 29, 2010 letter.

74. As of this date, Reyes is in compliance with her TPP Agreement and her representations to the Defendant continue to be true in all material respects.

75. Despite having timely provided IndyMac with all documentation it requested, IndyMac did not provide Reyes with a permanent loan modification by the end of her Trial Period (December 31, 2009).

76. Despite Reyes's continued compliance in all material respects with the terms of the TPP Agreement, Reyes has still not been offered a permanent loan modification under the HAMP Program guidelines.

77. Defendant has therefore breached the provision of the TPP Agreement that compliance with the TPP Agreement for the three-month trial period would result in a permanent loan modification. At this point, the TPP is now in its eighth month.

78. Like the other borrowers in this matter, Reyes has been living in limbo, without any assurances that her home will not be foreclosed, despite her compliance with HAMP requirements and her continued monthly payments under the TPP Agreement.

Carrol Johnson

79. Carrol Johnson (“Johnson”) has been the owner of his three-unit home since 1998. Johnson is self-employed. Johnson and his family live in one unit and rent the other two.

80. Sometime in 2007, Johnson refinanced his home with a mortgage loan from IndyMac Bank, FSB.

81. Defendant IndyMac is the servicer of Johnson’s mortgage loan.

82. In March 2009, Johnson began experiencing various financial hardships that combined to cause him to have difficulty making payments on his mortgage.

83. Johnson requested help from Defendant IndyMac, but was told that no help was available since he was current on his mortgage.

84. By July 2009, Johnson had fallen behind on his mortgage payments.

85. In August 2009, Johnson applied to IndyMac for a HAMP loan modification and sent in documentation.

86. By letter dated August 17, 2009, IndyMac offered Johnson a TPP Agreement entitled *Home Affordable Modification Trial Period Plan*.

87. Johnson timely accepted the offer by executing the TPP Agreement and returning it to IndyMac, along with the completed Hardship Affidavit, IRS Form 4506-T, the first payment under

the TPP, and other supporting documentation by August 24, 2009. A partial copy of this TPP Agreement is attached as Exhibit 8.

88. The TPP Agreement provided that the plan was effective September 1, 2009 and would run from October 2009 to December 2009. The monthly mortgage payments were \$1,357.80 under the TPP Agreement.

89. The first sentence of the TPP Agreement provides: “If I am in compliance with this Trial Period Plan and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement, as set forth in Section 3 [below], that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.”

90. The TPP states “I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of the Plan if I qualify for the Offer or will send me written notice that I do not qualify for the offer.” Nevertheless, IndyMac has sent neither a signed copy of the Plan, nor a written rejection.

91. Johnson timely made each of the payments contemplated in the TPP Agreement due in September, October, and November 2009.

92. Despite Johnson’s compliance with the TPP Agreement, IndyMac sent him a letter, dated October 2, 2009, stating that he was delinquent on his mortgage payments.

93. By letter dated November 11, 2009, IndyMac offered Johnson another TPP Agreement (“second TPP Agreement”), to run from December 1, 2009 through February 28, 2010.

94. Johnson timely accepted this second TPP Agreement by executing the second TPP Agreement and returning it to IndyMac, along with the completed Hardship Affidavit, IRS Form 4506-T, the first payment under the TPP, and other supporting documentation by November 23,

2009. The monthly mortgage payments were \$1,209.00 under the second TPP Agreement. A copy of the second TPP Agreement is attached hereto as Exhibit 9.

95. Although the monthly payments are lower in the second TPP, it is identical to the original TPP in all material respects and contains identical promises on the part of IndyMac.

96. Since November 2009, Johnson has made a payment every month as contemplated in the second TPP Agreement.

97. Despite Johnson's compliance with the second TPP Agreement, IndyMac sent him a letter, dated January 13, 2010, stating that he was delinquent on his mortgage payments.

98. At the end of January 2010, Johnson called IndyMac to inquire into the status of his permanent HAMP modification. An IndyMac representative told him that he was still under review and to continue making payments consistent with the second TPP.

99. As of this date, Johnson is in compliance with his second TPP Agreement and his representations to the IndyMac continue to be true in all material respects.

100. Despite having timely provided IndyMac with all documentation it requested, IndyMac did not provide Johnson with a permanent loan modification by the end of the second Trial Period (February 28, 2010).

101. Despite Johnson's continued compliance in all material respects with the terms of the second TPP Agreement, he has still not been offered a permanent loan modification under the HAMP Program guidelines.

102. IndyMac has therefore breached the provision of the TPP Agreement that compliance with the TPP Agreement for the three-month trial period would result in a permanent loan modification. At this point, the second TPP Agreement is now in its sixth month with no end in sight.

103. Like the other borrowers in this matter, Johnson has been living in limbo, without any assurances that his home will not be foreclosed, despite his compliance with HAMP requirements and his continued monthly payments under the TPP Agreement.

Frantz Jean Gilles

104. Frantz Jean Gilles (“Gilles”) has been the owner of his three-unit home since 1997. Gilles lives in one unit and rents out the other two.

105. Sometime in 2005, Gilles refinanced his home with a \$305,000 adjustable rate loan from IndyMac.

106. In 2007, Gilles began experiencing various financial hardships that combined with the adjustable characteristics of his loan to cause him to have difficulty making payments on his mortgage.

107. Sometime in 2009, Gilles applied to Defendant for a *Making Home Affordable* loan modification and sent in documentation.

108. On or about October 6, 2009, Defendant offered Gilles a TPP Agreement entitled *Home Affordable Modification Trial Period Plan*.

109. Gilles timely accepted the offer by executing the TPP Agreement and returning it to IndyMac, along with the completed Hardship Affidavit, IRS Form 4506-T, the first payment under the TPP, and other supporting documentation by August 24, 2009. A copy of the TPP Agreement executed by Gilles is attached hereto as Exhibit 10.

110. The TPP Agreement provided that the plan was effective November 1, 2009 and would run from November 2009 to January 2010. The monthly mortgage payments were \$1263.87 under the TPP Agreement.

111. The first sentence of the TPP Agreement provides: “If I am in compliance with this Trial Period Plan and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement, as set forth in Section 3 [below], that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.”

112. The TPP states “I understand that after I sign and return two copies of this Plan to the Lender, the Lender will send me a signed copy of the Plan if I qualify for the Offer or will send me written notice that I do not qualify for the offer.” Nevertheless, IndyMac has sent neither a signed copy of the Plan, nor a written rejection.

113. Gilles timely made each of the payments contemplated in the TPP Agreement due in November and December 2009 and January 2010.

114. Despite Gilles’ compliance with the TPP Agreement, IndyMac sent him a letter, dated December 2, 2009, stating that he was delinquent on his mortgage payments.

115. In January 2010, Gilles called IndyMac to inquire into the status of his permanent HAMP modification. An IndyMac representative told him that he should not send in a fourth payment at the amount specified in the TPP Agreement, because his application had been rejected.

116. Gilles requested that IndyMac provide him with written notice that his application had been denied. IndyMac refused to do so and has not done so to date.

117. In February 2010, Gilles again called IndyMac to inquire about his status. During this phone call, he was told that his HAMP application had not been rejected and was still under review. The IndyMac representative suggested to Gilles that he continue making payments. Gilles referenced the January phone call and agreed to resume making payments once he had written confirmation that his application had not been rejected. IndyMac has not provided such written

confirmation and Gilles has not resumed payment, fearful that IndyMac does not intend to offer him a permanent modification.

118. Gilles complied with his TPP Agreement by making the three payments described in the Agreement and providing all requested documentation.

119. Despite having timely provided IndyMac with all documentation it requested, IndyMac did not provide Gilles with a permanent loan modification by the end of the Trial Period (January 31, 2010).

120. IndyMac therefore breached the provision of the TPP Agreement that compliance with the TPP Agreement for the three-month trial period would result in a permanent loan modification.

121. Like the other borrowers in this matter, Gilles has been living in limbo, without any assurances that his home will not be foreclosed, despite his compliance with HAMP requirements and the initial terms of the TPP Agreement.

Class Allegations

122. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

123. The Plaintiffs, on behalf of themselves and all Massachusetts homeowners whose loans have been serviced by Defendant and who, since August 18, 2009, have complied with their obligations under a written TPP Agreement, but have not received a permanent HAMP modification, bring this class action.

124. Plaintiffs sue on their own behalf and on behalf of a class of persons under Rules 23(a) and (b) of the Federal Rules of Civil Procedure.

125. Plaintiffs do not know the exact size or identities of the members of the proposed class, since such information is in the exclusive control of Defendant. Plaintiffs believe that the class encompasses many hundreds of individuals whose identities can be readily ascertained from

Defendant's books and records. Therefore, the proposed class is so numerous that joinder of all members is impracticable.

126. Based on the size of the modifications at issue, Plaintiffs believe the amount in controversy exceeds \$5 million.

127. All members of the class have been subject to and affected by the same conduct. The claims are based on form contracts and uniform loan modification processing requirements. There are questions of law and fact that are common to the class, and predominate over any questions affecting only individual members of the class. These questions include, but are not limited to the following:

- a. the nature, scope and operation of Defendant's obligations to homeowners under HAMP;
- b. whether Defendant's receipt of an executed TPP Agreement, along with supporting documentation and three monthly payments, creates a binding contract or otherwise legally obligates Defendant to offer class members a permanent HAMP modification;
- c. whether Defendant's failure to provide permanent HAMP modifications in these circumstances amounts to a breach of contract and/or a breach of the covenant of good faith and fair dealing; and
- d. whether the Court can order Defendant to pay damages and what the proper measure of damages is, and also whether the Court can enter injunctive relief.

128. The claims of the individual named Plaintiffs are typical of the claims of the class and do not conflict with the interests of any other members of the class in that both the Plaintiffs and the

other members of the class were subject to the same conduct, signed the same agreement and were met with the same absence of a permanent modification.

129. The individual named Plaintiffs will fairly and adequately represent the interests of the class. They are committed to the vigorous prosecution of the class' claims and have retained attorneys who are qualified to pursue this litigation and have experience in class actions – in particular, consumer protection actions.

130. A class action is superior to other methods for the fast and efficient adjudication of this controversy. A class action regarding the issues in this case does not create any problems of manageability.

131. This putative class action meets both the requirements of Fed. R. Civ. P. 23(b)(2) and Fed. R. Civ. P. 23(b)(3).

132. The Defendant has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

COUNT I
Breach of Contract

133. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

134. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

135. As described above, the TPP Agreement sent by Defendant to Plaintiffs constitutes a valid offer.

136. By executing the TPP Agreements and returning it to Defendant along with the supporting documentation, Plaintiffs accepted Defendant's offers.

137. Alternatively, Plaintiffs' return of the TPP Agreements constituted offers. Acceptances of these offers occurred when Defendant accepted Plaintiffs' TPP payments.

138. Plaintiffs' TPP payments to Defendant constitute consideration. By making those payments, Plaintiffs gave up the ability to pursue other means of saving their home, and Defendant received payments it might otherwise not have.

139. Plaintiffs and Defendant thereby formed valid contracts.

140. To the extent that the contract was subject to a condition subsequent providing IndyMac an opportunity to review the documentation submitted by Plaintiffs when they returned the signed TPP Agreements, this condition was waived by IndyMac and/or it is estopped to assert it as a defense to Plaintiffs claims.

141. By failing to offer Plaintiffs permanent HAMP modifications, Defendant breached those contracts.

142. Plaintiffs remain ready, willing and able to perform under the contracts by continuing to make TPP payments and provide documentation.

143. Plaintiffs have suffered harms and are threatened with additional harms from Defendant's breach. By making TPP payments both during and after the TPP, Plaintiffs forewent other remedies that might be pursued to save their homes, such as restructuring their debt under the bankruptcy code, or pursuing other strategies to deal with their defaults, such as selling their homes. Some plaintiffs also suffered additional harm in the form of foreclosure/ collection activity against their homes.

COUNT II

Breach of the Implied Covenant of Good Faith and Fair Dealing

144. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

145. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

146. Defendant is obligated by contract and common law to act in good faith and to deal fairly with each borrower.

147. “[T]he purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance.” *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004).

148. Defendant routinely and regularly breaches this duty by:

- a. failing to perform loan servicing functions consistent with its responsibilities to Plaintiffs;
- b. failing to properly supervise its agents and employees including, without limitation, its loss mitigation and collection personnel and its foreclosure attorneys;
- c. routinely demanding information it has already received;
- d. making inaccurate calculations and determinations of Plaintiffs’ eligibility for HAMP;
- e. failing to follow through on written and implied promises;
- f. failing to follow through on contractual obligations; and
- g. failing to give permanent HAMP modifications and other foreclosure alternatives to qualified borrowers.

149. As a result of these failures to act in good faith and the absence of fair dealing, Defendant caused Plaintiffs harm.

COUNT III
Promissory Estoppel, in the alternative

150. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

151. Plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

152. Defendant, by way of its TPP Agreements, made a representation to Plaintiffs that if they returned the TPP Agreement executed and with supporting documentation, and made their TPP payments, they would receive permanent HAMP modifications.

153. Defendant's TPP Agreements were intended to induce Plaintiffs to rely on them and make monthly TPP payments.

154. Plaintiffs did indeed rely on Defendant's representation, by submitting TPP payments.

155. Given the language in the TPP Agreements, Plaintiffs' reliance was reasonable.

156. Plaintiffs' reliance was to their detriment. Plaintiffs have yet to receive permanent HAMP modifications and have lost the opportunity to fund other strategies to deal with their default and avoid foreclosure.

COUNT IV

Violation of the Massachusetts Consumer Protection Act and Applicable Regulations

On behalf of Carrol Johnson and Frantz Jean Gilles and a class of similarly situated Massachusetts homeowners ("the enumerated plaintiffs")

157. Plaintiffs repeat and re-allege every allegation above as if set forth herein in full.

158. The enumerated plaintiffs bring this claim on their own behalf and on behalf of each member of the Class described above.

159. Defendant has violated and continues to violate the Massachusetts Consumer Protection Act, G.L. c. 93A, §2 and applicable regulations promulgated by the Massachusetts Attorney General pursuant to G.L. c. 93A, §2(c) including, without limitation:

- a. 940 C.M.R. § 3.16, in that its conduct was unfair, deceptive, oppressive, unconscionable, and contrary to public policy and generally recognized standards applicable to the consumer lending business;
- b. 940 C.M.R. § 3.16, in that its conduct violated the requirement of good faith and fair dealing applicable to contracts under G.L. c. 106, §1-203;
- c. 940 C.M.R. § 3.16, in that its conduct violated existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety or welfare, as detailed below;
- d. 940 C.M.R. § 3.05, in that it made deceptive representations or failed to disclose relevant information as to loan modifications offered to borrowers;
- e. 940 C.M.R. § 8.06, in that it is a Mortgage Lender and made false or misleading representations to borrowers; and
- f. 940 C.M.R. § 25.03, because it offers Foreclosure-related Services within the meaning of 940 C.M.R. § 25.01 without adequately describing the services offered.

160. The enumerated plaintiffs have been injured by virtue of Defendant's violations. Said injuries include, but are not limited to:

- a. wrongful foreclosures;
- b. otherwise avoidable losses of homes to foreclosure;
- c. less favorable loan modifications;
- d. increased fees and other costs to avoid or attempt to avoid foreclosure;
- e. loss of savings in fruitless attempts to secure loan modifications;

- f. loss of opportunities to pursue other refinancing or loss mitigation strategies; and
- g. significant stress and emotional distress.

161. Defendant's conduct was and is willful or knowing within the meaning of the Massachusetts Consumer Protection Act, G.L. c. 93A, §9.

162. Defendant's refusal to grant relief upon demand was and is in bad faith, with knowledge or reason to know that the act or practice complained of violated G.L. c. 93A, §2.

163. On March 8, 2010, Ms. Reyes sent IndyMac a demand for relief pursuant to G.L. c. 93A on her own behalf and on behalf of a group of similarly situated individuals. A copy of this letter is attached as Exhibit 11. Although IndyMac made an offer of settlement to Ms. Reyes as an individual, it made no offer of settlement to the class of similarly situated individuals identified in the March 8, 2010 letter in accordance with G.L. c. 93A, § 9(2).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests the following relief:

- a. Certify this case as a class action and appoint the named Plaintiffs to be class representatives and their counsel to be class counsel;
- b. Enter a judgment declaring the acts and practices of Defendant complained of herein to constitute a breach of contract and a breach of the covenant of good faith and fair dealing, as well as a declaration that they are required by the doctrine of promissory estoppel to offer permanent modifications to class members on the terms promised in class members' temporary modifications;

- c. Grant a permanent or final injunction enjoining Defendant's agents and employees, affiliates and subsidiaries, from continuing to harm Plaintiffs and the members of the Class;
- d. Order Defendant to adopt and enforce a policy that requires appropriate training of their employees and agents regarding their duties under HAMP;
- e. Order specific performance of Defendant's contractual obligations together with other relief required by contract and law;
- f. Award actual and/or statutory minimum damages pursuant to M.G.L. c. 93A § 9(3) to the Plaintiffs and the class;
- g. Award multiple damages pursuant to M.G.L. c. 93A § 9(3) to the Plaintiffs and the class;
- h. Award Plaintiffs the costs of this action, including the fees and costs of experts, together with reasonable attorneys' fees pursuant to M.G.L. c. 93A § 9(3);
- i. Grant Plaintiffs and the Class such other and further relief as this Court finds necessary and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all issues so triable.

Respectfully Submitted,
On behalf of the Plaintiffs

/s/ Gary Klein
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DATE: May 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) and paper copies will be sent to those indicated as non-registered participants on May 4, 2010.

/s/ Gary Klein

Gary Klein