DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202 STATE OF COLORADO, *ex rel*. John W. Suthers, Attorney General, Plaintiff, v. AMERICAN MORTGAGE CONSULTANTS-AMC, a sole proprietorship; OLIVER PAUL MALDONADO, an individual; and SANTIAGO FABIAN PINEDA, an individual, Defendants.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General JENNIFER MINER DETHMERS, Assistant Attorney General, Reg. No. 32519* ERIK R. NEUSCH, Assistant Attorney General, Reg. No. 33146* 1525 Sherman Street Denver, Colorado 80203 Phone: 303-866-4500 E-mail: jennifer.dethmers@state.co.us E-mail: erik.neusch@state.co.us *Counsel of Record	Case No.: Courtroom:
MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION	

Plaintiff, the State of Colorado, upon relation of John Suthers, Attorney General for the State of Colorado, by and through the undersigned counsel, respectfully requests that this Court issue a temporary restraining order and a preliminary injunction under the Colorado Consumer Protection Act ("CCPA"), § 6-1-110(1), C.R.S. (2009), and C.R.C.P. 65, to enjoin Defendants from engaging in numerous deceptive trade practices as specified in Plaintiff's Complaint,

including violations of the Colorado Foreclosure Protection Act, §§ 6-1-1101 – 6-1-1120, C.R.S. (2009), and for such other relief as this Court deems necessary and appropriate. As grounds in support of this motion, Plaintiff states as follows:

CERTIFICATION OF COMPLIANCE WITH RULE 121, § 1-15(8)

While notice is not required for a temporary restraining order, the undersigned counsel notified and conferred with counsel for Defendants about the relief requested in this motion, and state that at this time the parties cannot reach an agreement regarding the injunctive relief sought herein. A temporary restraining order is therefore necessary to protect consumers from further irreparable harm before Defendants have an opportunity to be heard.

FACTUAL BACKGROUND

Since January 2009, Defendants have misled and deceived a significant number of distressed Colorado homeowners who want to modify their mortgage loan or save their home from foreclosure. Using deceptive advertising by direct mail, telemarketing, the Internet, and radio, Defendants induced approximately 170 Colorado homeowners to pay an upfront fee of $2,500 to American Mortgage Consultants when they could least afford it. American Mortgage Consultants claimed to offer the "official complete" Federal Deposit Insurance Corporation's (FDIC) loan modification program and the Colorado Community Modification Program (CCMP). Its direct mail stated that under the FDIC and CCMP, "Your total principle [sic], interest and monthly payments would be reduced by 30-40% and all late fees and penalties can be forgiven . . . . we can help you keep your home while modifying . . . your terms to a lower payment with a lower principal balance." *See* Exhibit 1 to Complaint. The radio advertisements proclaimed that American Mortgage Consultants "can save your home and lower your monthly

payments up to 40 percent. The FDIC created this modification program to keep Colorado homeowners in their homes . . . ." *See* Exhibit 2 to Complaint. The advertisements also declared: "Once we start the process, your home cannot be lost . . . but time is running out for you to take advantage of this program!" *Id.* Defendants also represented that the upfront fee was a retainer for its attorneys to negotiate the loan modification on the client's behalf.

Such claims were knowingly and intentionally false and made to induce consumers into paying a $2,500 upfront fee. Defendants never provided an FDIC loan modification program to any homeowner. The CCMP did not exist and was thus never provided to any homeowner. No homeowner received a lower principal balance. No attorney worked on a client's loan modification. Numerous Colorado homeowners, however, paid $2,500 based on Defendants' promise to prevent foreclosure and work on a loan modification only to receive a foreclosure notice or lose their home. Because of Defendants' representations, numerous homeowners have become delinquent on their mortgages or gone into foreclosure. It is not until several months of inaction from Defendants that homeowners begin working directly with their lenders or housing counselors to obtain the assistance for which they paid Defendants.

Defendants therefore failed to provide the services promised to homeowners. Indeed, Defendants performed either no work or virtually no work for $2,500. Instead, Defendants collected the upfront fee as part of a purported loan modification application during a single meeting and virtually disappeared. Several weeks later, Defendants might have faxed the client's loan modification application for further processing to an undisclosed third-party company in Ohio. In several cases, though, Defendants never even forwarded the client's information to the third party after collecting the upfront fee—unbeknownst to the homeowner

desperate to avoid foreclosure. In the meantime, Defendants counseled clients to stop working with their lender and even to stop paying their mortgage. Consequently, lenders frequently had no idea that the homeowner sought a loan modification and the lender commenced foreclosure proceedings. Many homeowners thus end up worse off than had they not worked with American Mortgage Consultants.

Such delay and inaction are inexcusable and costly to the homeowner. It is inexcusable because both the advertisements and the sales presentation conveyed a sense of urgency to induce an immediate payment of an upfront fee. It is costly because Defendants not only deprived homeowners of an upfront fee they could not afford but also wasted several months of their time that could have been used more effectively by working directly with their lenders or obtaining advice from a qualified housing counselor. Even for the files actually sent to the third party, Defendants failed to monitor the status or notify their clients as to the negotiations, if any.

Fearing the loss of their home to foreclosure and hearing nothing from Defendants for months, homeowners constantly sought updates from Defendants largely to no avail. When Defendants actually returned phone calls, it was to provide empty, and unsupported, assurances that the process was proceeding properly. Rather than work with their clients to advise and assist them with a loan modification as expressly promised, Defendants worked only in finding the next victim. Colorado homeowners have suffered greatly as a result of these deceptive, predatory practices and they will continue to suffer if Defendants remain in business. Such conduct has come at a time when Coloradans can least afford it, because they are desperate to save their homes and need competent and honest assistance.

LEGAL ARGUMENT

This Court is expressly authorized by section 6-1-110(1) to issue a temporary restraining order and preliminary injunction to enjoin ongoing violations of the CCPA:

> Whenever the attorney general or a district attorney has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 6-1-105 or part 7 of this article, the attorney general or district attorney may apply for and obtain, in an action in the appropriate district court of this state, a temporary restraining order or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice or which may be necessary to completely compensate or restore to the original position of any person injured by means of any such practice or to prevent any unjust enrichment by any person through the use or employment of any deceptive trade practice.

§ 6-1-110(1), C.R.S (2009).

As detailed in the Complaint, the State of Colorado has cause to believe that Defendants are engaging in numerous deceptive trade practices proscribed by the CCPA, including violating the Colorado Foreclosure Protection Act by collecting an upfront fee and using a contract that does not contain the requisite safeguards; performing loan modifications without a mortgage loan originator's license; failing to disclose material information in an advertisement; advertising services with the intent not to sell them as advertised; knowingly making false representations as to the characteristics or benefits of services; and knowingly making false representations as to source, affiliation, connection, or association with or certification by the federal government.

Both a temporary restraining order and preliminary injunction are designed to preserve

the status quo or protect a party's rights pending the final determination. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). A temporary restraining order is to prevent "immediate and irreparable harm." *Id.* (quoting *Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n*, 38 Colo. App. 519, 559 P.2d 1120, 1121 (1977)). Like a temporary restraining order, a preliminary injunction is to prevent irreparable harm before a decision on the merits of a case. *Id.* Granting preliminary injunctive relief is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is manifestly unreasonable, arbitrary or unfair. *Board of County Commissioners v. Fixed Base Operators*, 939 P.2d 464, 467 (Colo. App. 1997).

The Court may grant a preliminary injunction when:

a) there is a reasonable probability of success on the merits;

b) there is a danger of real, immediate and irreparable injury which may be prevented by injunctive relief;

c) there is no plain, speedy and adequate remedy at law;

d) the granting of the preliminary injunction will not disserve the public interest;

e) the balance of the equities favors entering an injunction; and

f) the injunction will preserve the status quo pending a trial on the merits.

Rathke v. MacFarlane, 648 P.2d 648, 653–654 (Colo. 1982); *see also Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

The temporary restraining order and preliminary injunction are sought by the Colorado Attorney General on behalf of the State of Colorado to enforce state laws affecting the public interest. Under Colorado law, Plaintiff is not required to plead or prove immediate or irreparable injury when a statute concerning the public interest is implicated. *Kourlis v. District Court*, 930 P.2d 1329, 1335 (Colo. 1997) ("Special statutory procedures may supersede or control the more

general application of a rule of civil procedure."). *See also Baseline Farms Two, LLP v. Hennings*, 26 P.3d 1209, 1212 (Colo. App. 2001); *Lloyd A. Fry Roofing Co. v. State Department of Health Air Pollution Variance Board*, 191 Colo. 463, 553 P.2d 800 (1976).

Nevertheless, Defendants' deceptive practices are injurious to the public and should be enjoined immediately to prevent further irreparable harm to consumers. The CCPA is designed to protect fair competition and safeguard the public from financial loss. *Dunbar v. Gym of America*, 493 P.2d 660, 667 (Colo. 1972). For this reason, when there is evidence that a person has committed a deceptive trade practice, there is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition. § 6-1-105(2), C.R.S. (2009). Here, if Defendants are not enjoined, Colorado homeowners will continue to be victimized into providing substantial upfront fees in return for no or wholly inadequate services. Moreover, if not enjoined, Defendants will preclude homeowners from working directly with their lenders or with housing counselors, which would prove vastly more effective than working with Defendants. Accordingly, the public interest is served by enjoining this deceptive scheme.

The balance of the equities also overwhelmingly favors the entry of an injunction. An injunction will serve the public interest by protecting Colorado consumers from significant harm. These consumers are desperately trying to save their homes from foreclosure with a loan modification. Defendants prey on this vulnerability by making knowingly false and intentionally misleading statements to induce distressed homeowners to provide $2,500 when they cannot afford it and instead need real and immediate help from a competent person or company. Equity favors an injunction that halts this predatory conduct and protects consumers.

For all of the same reasons, there is no adequate remedy at law. A law enforcement

action under the CCPA is equitable in nature. *State ex rel. Salazar v. General Steel*, 129 P.3d 1047, 1050 (Colo. App. 2005). There is an immediate need to stop this conduct to prevent additional homeowners from being victimized by Defendants' deception. Absent injunctive relief, Defendants may continue to solicit new victims, will refuse to notify existing clients that no work has been or will be done on their files, and will refuse to issue refunds to their numerous existing clients. For example, Defendants still maintain an active Web site advertising their services and were accepting new clients even after learning that the third-party processing company was not working on any of their files. And some existing customers might still believe that Defendants are actually processing a loan modification on their behalf when no work has been done for months, if at all. Given the importance of saving consumers' homes from foreclosure, Colorado homeowners deserve accurate and competent information.

The injunction should preserve the status quo by forcing Defendants to comply with the law. Because of the real harm to homeowners facing foreclosure, there is a need to restore the status quo to a circumstance where Defendants are adhering to the requirements in the CCPA that serve to protect consumers and fair competition. If Defendants' unlawful scheme proceeds it will only promote further consumer losses, greater delinquencies and foreclosures, which may be avoided or reduced if Defendants complied with the CCPA.

Finally, there is a reasonable probability that the State of Colorado will prove its claims. The State of Colorado has asserted in the Complaint twelve claims for relief under the CCPA. The victim affidavits and the affidavit of Investigator Eric Gutzait in support of this motion amply demonstrate the misleading, deceptive and false claims made by Defendants and the harm inflicted on numerous Colorado homeowners, who have not only lost $2,500 to Defendants but

have relied on Defendants to their detriment, leading many homeowners to further delinquency on their mortgage loans, foreclosure proceedings and, at times, the loss of their home.

Plaintiff's claims under the CCPA are as follows: (1) knowingly makes a false representation as to the source, sponsorship, approval, or certification of services in violation of § 6-1-105(1)(b); (2) knowingly makes a false representation as to affiliation, connection, or association with or certification by another in violation of § 6-1-105(1)(c); (3) knowingly makes a false representation as to the characteristics, uses, or benefits of services in violation of § 6-1-105(1)(e); (4) represents that services are of a particular standard, quality, or grade, if he knows or should know that they are of another in violation of § 6-1-105(1)(g); (5) advertises goods and services with intent not to sell them as advertised in violation of § 6-1-105(1)(i); (6) fails to disclose material information concerning goods and services which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction in violation of § 6-1-105(1)(u); (7) refuses or fails to obtain all governmental licenses or permits required to perform the services or to sell the services as agreed to or contracted for with a consumer in violation of § 6-1-105(1)(z); (8) violating the Colorado No-Call List Act in violation of § 6-1-105(1)(tt); (9) violating section 38-40-105 proscribing acts by participants in mortgage loan transactions in violation of § 6-1-105(1)(uu); (10) violating the Colorado Foreclosure Protection Act in violation of § 6-1-105(1)(xx); (11) violating section 12-61-904.5 regarding the mortgage loan originator's relationship to a borrower in violation of § 6-1-105(1)(aaa); and (12) violating provisions of section 12-61-911 prohibiting certain conduct and fraud by mortgage loan originators in violation of § 6-1-105(1)(bbb).

The evidence submitted with this motion is sufficient to prove these claims and demonstrates the following:

- Defendants violated the Colorado Foreclosure Protection Act by collecting upfront fees from homeowners in foreclosure and from homeowners who are at least thirty days delinquent or in default;

- Defendants violated the Colorado Foreclosure Protection Act by failing to comply with the contractual requirements and other safeguards intended to protect consumers from the type of conduct engaged in by Defendants;

- Defendants violated the CCPA by originating loan modification applications without a mortgage loan originator's license, because Mr. Maldonado never had a license, American Mortgage Consultants used a representative to originate loan modification applications who was rejected for a license, and Mr. Pineda operated for several months with an inactivated license;

- Defendants knowingly made false, misleading and deceptive claims regarding their connection to or affiliation with the FDIC's loan modification program when they never offered such a program;

- Defendants knowingly made false, misleading and deceptive claims regarding the benefits and characteristics of their services, such as claiming that they retain attorneys to negotiate loan modifications and could lower a borrower's principal loan balance when there were no attorneys and no principal reductions;

- Defendants knowingly made false, misleading and deceptive claims regarding their services to homeowners, including the contractual claim and advertised claim that they have the CCMP program under the FDIC, which never existed and was thus not provided to any homeowner;

- Defendants knowingly made false, misleading and deceptive claims regarding the advertised claim that when a homeowner works with American Mortgage Consultants he will not lose his home to foreclosure, when homeowners who paid Defendants received a foreclosure notice or lost their homes;

- Defendants knowingly made false, misleading and deceptive claims regarding the status of a homeowner's loan modification without knowing whether the homeowner's file had even been worked on; and

- Defendants knowingly made false, misleading and deceptive claims by collecting upfront fees from homeowners for loan modification services without submitting

those loan modification applications to lenders.

The thirteen victim affidavits and the affidavit of Investigator Eric Gutzait establish that Defendants engaged in a pattern and practice of deceptive trade practices at a significant cost to consumers. *See Affidavit of Investigator Gutzait and victim affidavits, attached.* As such, this evidence demonstrates a substantial probability of success on the CCPA claims.

Defendants will suffer no undue hardship by the entry of a temporary restraining order or a preliminary injunction because Defendants have no right to continue to engage in unlawful and deceptive trade practices or to collect money from consumers as a result of such unlawful and deceptive conduct. Moreover, Defendants have no right to unjustly benefit from such deceptive trade practices. Absent an injunction, the State of Colorado will be unable to adequately protect the public from Defendants' ongoing unlawful activities and to ensure that the public receives honest assistance with their loan modifications.

WHEREFORE, Plaintiff, the State of Colorado, respectfully requests that this Court enter a temporary restraining order and preliminary injunction that:

A. Enjoins Defendants, and any other persons under their control or in active concert or participation with Defendants who receive actual notice of this Court's order, from:

(1) Soliciting or accepting payment for services of any kind in connection with American Mortgage Consultants or any other company or person relating to mortgage assistance, mortgage relief, foreclosure consulting, loan modifications, mortgages, real estate, debt or credit relief or counseling, credit repair, lead generation, or any other investments or financial services or products offered or provided to Colorado consumers;

(2) Advertising, selling, marketing, displaying, offering or performing mortgage

assistance, mortgage relief, foreclosure consulting, loan modifications, mortgages, real estate, debt or credit relief or counseling, credit repair, lead generation, or any other investments or financial services or products offered or provided to Colorado consumers;

(3) Publishing, distributing or disseminating any information, including written, oral, or video, relating to mortgage assistance, mortgage relief, foreclosure consulting, loan modifications, mortgages, real estate, debt or credit relief or counseling, credit repair, lead generation, or any other investments or financial services or products offered or provided to Colorado consumers; and

(4) Performing, supervising, or otherwise participating in mortgage loan origination or processing mortgage loans.

B. Requires Defendants, and any other persons under their control or in active concert or participation with Defendants who receive actual notice of this Court's order, to:

(a) Deactivate within forty-eight (48) hours of the order all Internet sites, domain names, URL addresses, registrations, and any other forms or materials that advertise, market or solicit any business relating to mortgages, loan modifications, foreclosures, or any other mortgage relief services;

(b) Notify in writing by e-mail sent no later than May 6, 2010 and United States mail, first-class postage prepaid, postmarked no later than May 6, 2010 all American Mortgage Consultants' clients of the order and attaching and enclosing the order and a letter from the Colorado Attorney General's Office to notify each client that no one is working on their loan modification and to contact the Colorado Foreclosure Hotline at 1-877-601-HOPE (4673) for assistance and www.coloradoforeclosurehotline.org/;

(c) Provide to the Colorado Attorney General's Office within forty-eight (48) hours of the order a complete list by name, address and telephone number of each client from whom American Mortgage Consultants received any upfront fee at any time;

(d) Return by letter postmarked no later than May 6, 2010 to every American Mortgage Consultants' client by United States mail, first-class postage prepaid, all originals and all copies of their respective documents containing personal and financial information in the possession of American Mortgage Consultants; and

(e) Provide a status report and certification to the Court by May 7, 2010 that Defendants have complied with the foregoing (a) through (e).

Respectfully submitted this 28th day of April, 2010.

JOHN W. SUTHERS
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/s/
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