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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

CEDAR BAND OF PAIUTES; CEDAR BAND CORPORATION; and CBC MORTGAGE AGENCY; Plaintiffs, v.	Case No. Case No. 4:19-cv-30-DN

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DR. BENJAMIN S. CARSON, SR., in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; FEDERAL HOUSING ADMINISTRATION; and BRIAN D. MONTGOMERY, in his official capacity as Acting Deputy Assistant Secretary and Assistant Secretary of Housing and Urban Development for Housing-Federal Housing Commissioner; Defendants.	MOTION FOR *EX PARTE* TRO/TRO/AND PRELIMINARY INJUNCTION **HEARING REQUESTED** Judge David Nuffer

Pursuant to Federal Rule of Civil Procedure 65(a) and (b), Plaintiffs Cedar Band of Paiutes ("the Band"), Cedar Band Corporation ("CBC"), and CBC Mortgage Agency ("CBCMA") (collectively, "Plaintiffs") respectfully but urgently move this Court for:

1. **An *ex parte* temporary restraining order** against Defendants U.S. Department of Housing and Urban Development ("HUD"), Dr. Benjamin S. Carson, Sr. in his official capacity as Secretary of HUD, the Federal Housing Administration ("FHA"), and Brian D. Montgomery in his official capacity as Acting Deputy Assistant Secretary and Assistant Secretary of HUD for Housing-Federal Housing Commissioner, enjoining the issuance, implementation, enforcement, effective date, and any and all other legal effects of Mortgagee Letter 19-06, dated April 18, 2019 (the "Mortgagee Letter"), attached as Exhibit A.

For the reasons given in this Motion, and affirmed in the declaration of Michael Whipple, Exhibit B, Defendants' issuance of the Mortgagee Letter threatens the existence of Plaintiff CBC Mortgage Agency ("CBCMA"), and is thus causing Plaintiffs immediate and irreparable injury that will continue and indeed worsen before Defendants can be heard on the matter. *See* Fed. R. Civ. P. 65(b)(1). Every reasonable effort was made to contact Defendants and alert them to the filing of this action. *See infra* p.1.

Plaintiffs request that the Court issue the TRO today, April 22, 2019, or as soon as possible, and note the hour of its issuance, that it was issued without notice,

the efforts of counsel to provide notice, the basis for irreparable injury as set forth in this Motion and accompanying exhibits, and set the time for expiration of the TRO for 14 days from the entry of the TRO on the docket. *See* Fed. R. Civ. P. 65(b)(1).

2. **An order expediting the hearing and briefing to convert the TRO to a preliminary injunction**, consistent with Fed. R. Civ. P. 65(b)(3).

3. **A preliminary injunction** pursuant to Fed. R. Civ. P. 65(a). For the reasons stated in this Motion, Plaintiffs are entitled to a preliminary injunction to maintain the *status quo* pending resolution of the merits of the contemporaneously filed Complaint.

No security is necessary for the granting of this motion, as Defendants will not suffer any loss or damage through a temporary restraining order or injunction. Fed. R. Civ. P. 65(c).

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RULE 65(b)(1)(B) CERTIFICATION OF COUNSEL

Counsel hereby certifies:

1. On Thursday, April 18, 2019, Defendants issued Mortgagee Letter 19-06, which, effective immediately, purports to prohibit Plaintiffs' operations with respect to the provision of downpayment assistance for certain loans.

2. As detailed in the affidavit of Michael Whipple, Ex. B, the impact of the Mortgagee Letter is destroying CBCMA's operations, and will terminate the primary governmental revenue source that the Cedar Band, a federally recognized American Indian tribe, relies on to operate and provide governmental social services.

3. Contemporaneous with the filing of the Complaint in this action and this Motion, Plaintiffs alerted Defendants that Plaintiffs were seeking *ex parte* relief with this Court, and provided courtesy copies via email to Paul Compton, General Counsel for HUD. Process servers are serving papers on Defendants contemporaneously with this filing.

4. Providing further notice to Defendants, as well as providing them with an opportunity to respond before granting *ex parte* relief, will be devastating to Plaintiffs. Whipple Decl. ¶¶ 46-47. These extreme consequences and extraordinary circumstances justify an *ex parte* temporary restraining order without further notice to Defendants and without an opportunity for them to respond during the TRO's limited duration. *See* Fed. R. Civ. P. 65(b)(1)(B).

5. Upon granting such temporary relief, counsel for Plaintiffs stand ready to file an expedited reply to any response from Defendants (which Plaintiffs request be

due on an expedited schedule), and to appear before the Court at the earliest possible moment for argument on the Motion for a preliminary injunction. *See* Fed. R. Civ. P. 65(b)(3).

Date: April 22, 2019

s/ Jeremy M. Christiansen

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INTRODUCTION

This Motion seeks to enjoin a discriminatory and unlawful "Mortgagee Letter," issued by HUD without warning, that is destroying Plaintiff CBCMA, a federally-chartered subsidiary of the Cedar Band of Paiutes. Although Mortgagee Letter 19-06 purports to be an informal "guidance" document that merely "clarifies" existing law governing the provision of downpayment assistance ("DPA") to homebuyers, it does no such thing. Rather, the Mortgage Letter radically changes long-standing HUD policy and outlaws CBCMA's business—thereby stripping the Cedar Band of the single most important source of revenue for funding the Band's governmental functions, including a wide range of social and educational services for tribal members.

HUD has long permitted governmental entities, including tribal governments like the Cedar Band, to serve as a lawful source of DPA to borrowers with FHA-insured loans nationwide. For years, CBCMA, with HUD's knowledge and as allowed by HUD's regulations, has provided DPA to thousands of homebuyers across the country, including many minority and low-income homebuyers, simultaneously expanding homeownership while raising funds for tribal governance. The Mortgagee Letter, however, targets American Indian tribes by requiring them, for the first time, to confine the DPA they provide to properties within the boundaries of their reservations and to enrolled members of their particular tribe—literally driving them out of the national marketplace and back onto the reservation.

The Mortgagee Letter is putting CBCMA out of business. Within a day of the Mortgagee Letter issuing, nearly every lender that participates in CBCMA's DPA program announced it was suspending its business relationship with CBCMA effective immediately. On top of that, the Mortgagee Letter is inflicting massive harm on the many borrowers who rely on CBCMA to help them buy their home. The majority of such borrowers are African-Americans, Latinos, and other minorities, who often do not have the benefit of intergenerational wealth and savings as a source of downpayment funds. Prior to issuance of the Mortgagee Letter, CBCMA had achieved remarkable success on behalf of these borrowers. But now, as a result of the Mortgagee Letter, hundreds, if not thousands of buyers may not be able to close on the purchase of their home and are otherwise adversely affected by increased costs, unrecoverable fees, and diminished options.

Incredibly, HUD wreaked this havoc in a Mortgagee Letter without providing ***any*** of the protections of the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, such as notice and the opportunity to comment. In addition, HUD failed to give fair warning to CBCMA (and other tribal governments) as required by the Due Process Clause before changing rules and policies on which they have long relied; failed to provide a reasoned explanation for its actions; and failed to consult with any American Indian tribes as required by Executive Branch policy. Instead, it issued the Mortgagee Letter without warning, without explanation, and without even acknowledging that it was completely redefining the market for government DPA programs to the detriment of American Indian tribes, in direct conflict with federal

policy favoring greater economic self-sufficiency for tribes. In short, the Mortgagee Letter is a blatantly discriminatory and unlawful attempt to force American Indians "back on the reservation" and deprive them of revenue needed for governmental purposes. This Court's immediate action is urgently needed to enjoin the Mortgagee Letter and thereby restore the *status quo* so that Plaintiffs, their members, and the borrowers who benefit from CBCMA's program do not continue to suffer irreparable harm pending this litigation.

BACKGROUND

I. Downpayment Assistance Is Critical To Expanding Homeownership, Consistent With The FHA's Mission.

To incentivize lending and expand homeownership for low-income borrowers, the FHA insures certain home loans to protect against mortgage defaults. FHA loans generally require a lower downpayment and a lower minimum credit score, but many creditworthy Americans still find it difficult to save the necessary funds for this downpayment. This is particularly true for minority borrowers, who often cannot rely on intergenerational wealth and gifts from family members as a source of savings, and thus downpayment funds. *See* Whipple Decl. ¶¶ 4-5.

II. Plaintiffs Lawfully Provide Downpayment Assistance To FHA-Insured Mortgages As A Governmental Entity.

The Cedar Band is a federally-recognized American Indian tribe. *See* 67 Fed. Reg. 46328, 46328, 46330 (July 12, 2002). As such, it is generally considered a governmental entity under federal law. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). The Cedar Band's

reservation encompasses approximately 3.5 square miles near Cedar City, Utah. Whipple Decl. ¶ 1. The Cedar Band is small, with just 318 enrolled members. Because of its rural location, lack of natural resources, small size, and limited tax base, the Cedar Band relies almost exclusively on income derived from CBC to fund services for its members, including housing, education, and security. *See id.* ¶¶ 15-18.

Both CBC and CBCMA are tribal corporations. CBC was chartered by the Interior Department under 25 U.S.C. § 5214, and CBCMA was created by CBC pursuant to the latter's federal charter. *See* Compl. Ex. C (CBC Charter); Compl. Ex. D (CBCMA Charter). Both are authorized in their charters to do business nationwide. *See, e.g.*, Compl. Ex. C, at art. VII.F., art. VIII.A., art. VIII.S; Compl. Ex. D, at art. VII, § 7.01, art. VIII, §§ 8.19-8.20. The Cedar Band is the sole shareholder of voting stock in CBC, Compl. Ex. C, at art. V, and CBC is the sole shareholder of voting stock in CBCMA, Compl. Ex. D, at art. V. Both CBC and CBCMA are government agencies or instrumentalities of the tribe. *See, e.g.*, *Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1184 n.8 (10th Cir. 2010). A substantial portion of CBC's revenue comes from CBCMA's operations, and the Cedar Band relies heavily on the distributions from CBC to fund its ongoing governmental activities and social services programs. Whipple Decl. ¶ 15.

CBCMA is a registered Governmental Mortgagee with HUD. Through its Chenoa Fund program, CBCMA provides second-lien downpayment loans to enable

borrowers to obtain first-lien mortgage loans insured by FHA. These mortgages are originated by a third-party lender. In the usual course, CBCMA purchases the mortgages, sells the first-lien mortgage, and retains the subordinate, second-lien mortgage, maintaining contact with the borrower during the first year of homeownership to provide support and counseling, advising customers on issues ranging from where to send payments to how to maintain a budget. *Id.* ¶ 11. CBCMA has provided DPA to approximately 14,000 FHA-insured loans since 2013, nationwide and on an equal opportunity basis. *Id.* ¶ 9.

CBCMA, through CBC, provides distributions to the Cedar Band, which then uses them for vital governmental services. *Id.* ¶ 15.

III. HUD'S Previous Policy Long Permitted And Acknowledged Plaintiffs' Ability To Provide Nationwide, Equal-Opportunity DPA.

FHA insurance is governed by 12 U.S.C. § 1709. Before October 1, 2008, to qualify for FHA insurance, a homebuyer was required to provide a downpayment of at least 3% of estimated cost of acquisition. The statute did not discuss DPA other than to state that the downpayment—sometimes called a minimum required investment ("MRI")—could be sourced from family members. *See* 12 U.S.C. § 1709(b)(9) (2007). HUD allowed DPA to be provided by governmental entities.

In 2007, HUD published a final rule prohibiting "sellers from funding downpayments in their own home sales transactions" in certain circumstances. *Standards for Mortgagor's Investment in Mortgaged Property*, 72 Fed. Reg. 56002, 56002-03 (Oct. 1, 2007) (the "2007 Rule"). However, the 2007 Rule expressly

provided that DPA "***is permitted … from … governments***," including "***tribal government[s]***." *Id.*; *see also* 24 C.F.R. § 203.19(f) (2008).

In 2008, two courts held that the 2007 Rule's prohibition of seller-funded DPA violated the APA and ordered it vacated, but did not address whether a tribal government is a permissible source of DPA. *See Penobscot Indian Nation v. HUD*, 539 F. Supp. 2d 40 (D.D.C. 2008); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008). In a subsequent settlement of the *Penobscot* litigation, HUD was aware that the Penobscot Tribe was operating nationwide, and HUD acknowledged that the Tribe could so provide DPA. *Penobscot Indian Nation v. HUD*, No. 07-1282, Dkt. 43, at 2 (D.D.C. Apr. 3, 2008).

That same year, Congress amended the National Housing Act ("NHA"). Under Section 203(b)(9)(C), the borrower's MRI now cannot

> consist, in whole or in part, of funds provided by any of the following parties before, during, or after closing of the property sale: (i) The seller or any other person or entity that financially benefits from the transaction. (ii) Any third party or entity that is reimbursed, directly or indirectly, by any of the parties described in clause (i).

12 U.S.C. § 1709(b)(9)(C). Section 203(b)(9)(C) does not say anything about DPA provided by governmental entities.

In 2012, HUD issued an interpretive rule stating that "the NHA 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." 77 Fed. Reg. 72219, 72222 (Dec.

5, 2012). HUD policy, as set forth in HUD Handbook 4000.1 (Mar. 27, 2019), allows "Governmental Entities" to provide DPA in connection with: originating a first mortgage (II.A.4.d.ii.(B), p.225-26); as a gift (II.A.4.d.iii.(F).(2).(a), p.229-30); and as secondary financing (II.A.4.d.iii.(J).(1), p.235-36). The HUD Handbook defines "Governmental Entity" as "any federal, state, or local government agency or instrumentality." II.A.4.iii.(J).(1).(a), p.234; *see also* HUD Handbook 4000.1 Glossary at 13 (Mar. 27, 2019).

In 2013, HUD approved CBCMA as a Governmental Mortgagee, defined in relevant part as "a federal, state, or municipal governmental agency." HUD Handbook 4000.1 Glossary at 13. CBCMA's recognition as a Governmental Mortgagee therefore means it is a Governmental Entity. CBCMA provided its charters to HUD during this process, *see* Compl. Ex. E, and HUD therefore knew that CBCMA would be providing down payment assistance nationwide. *See* Compl. Ex. D, at art. VIII, § 8.20. Similarly, HUD has insured loan packages that include CBCMA's DPA for years, which is "conclusive evidence of the eligibility of the loan or mortgage for insurance." 12 U.S.C. § 1709(e). HUD accepted that CBCMA is allowed to provide DPA nationwide.

After internal agency rumblings in 2017 that some at HUD did not like CBCMA's participation in the national marketplace, *see* Compl. ¶¶ 33-35, CBCMA made several attempts throughout 2017 into early 2019 to meet with HUD representatives in order to understand HUD's concerns and to ensure HUD's understanding of its program. Whipple Decl. ¶ 25. Other than one brief meeting on

March 1, 2018, during which HUD representatives made no reference to any forthcoming action, HUD has been unwilling to engage with CBCMA. Assistant Secretary Montgomery has refused to meet with CBCMA representatives entirely. *Id.*

In both spring and fall 2018, HUD informed the Office of Information and Regulatory Affairs ("OIRA") that it was drafting an advanced notice of proposed rulemaking ("ANPRM"). The ANPRM would seek comment on DPA-sourcing, including from tribes and other governmental entities. Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, Office of Mgmt. & Budget, RIN No. 2502-AJ44; Fall 2018 Unified Agenda of Regulatory and Deregulatory Actions, Office of Mgmt. & Budget, RIN No. 2502-AJ44. However, the ANPRM was never published.

On April 11, 2019, at the direction of the President, the Acting Director of the Office of Management and Budget ("OMB") sent a memorandum to the heads of all executive agencies announcing that, effective May 11, 2019, the agencies will be required to submit all regulatory guidance materials that qualify as "rules" under the Congressional Review Act to OIRA for review prior to publication. Office of Mgmt. & Budget, Exec. Office of the President, M-19-14 (Apr. 11, 2019).

IV. HUD Issues The Mortgagee Letter Without Notice, Effective Immediately.

On April 18, 2019, one day before the beginning of Passover and the Easter weekend, HUD issued the Mortgagee Letter without notice, without soliciting comment, without engaging in tribal consultation, and without submitting it to

OIRA. The Mortgagee Letter is effective immediately.

The Mortgagee Letter introduces, for the first time ever, a requirement that DPA may only be provided for an FHA-insured property located within the borders of the government of which the entity is an agency or instrumentality or, in the case of American Indian tribes, where the property is on the reservation or is being purchased by a member of the tribe in question. Ex. A, at 5. In addition, the Mortgagee Letter establishes burdensome new documentation requirements. *Id.* The Mortgagee Letter purports to be "effective for case numbers assigned on or after April 18, 2019," which includes loans already being processed for borrowers by lenders, and loans scheduled to close in the days and weeks to come. *Id.* at 1. The Mortgagee Letter contains two paragraphs of "[b]ackground," *id.* at 2, and identifies no legitimate operational need or justification.

V. The Mortgagee Letter Decimates CBCMA's Business Overnight.

There was no mistaking the meaning of the Mortgagee Letter, and the market immediately recognized its impact. Within 24 hours of the issuance of the Mortgagee Letter, ***nearly every lender informed CBCMA that they were suspending business with CBCMA***, effective immediately. Whipple Decl. ¶¶ 32-34. The Mortgagee Letter has thus had a devastating effect on CBCMA, and is also harming CBC and the Cedar Band, which heavily relies on funds from CBCMA to carry out vital tribal governmental functions, and borrowers who were counting on CBCMA's DPA program. *Id.* ¶¶ 32-45.

LEGAL STANDARD

"A temporary restraining order and a preliminary injunction share the same standard," and require: "(1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) [that] the threatened injury outweighs the harm that the … injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *E.g.*, *Perez v. Stone Castle LLC*, 2014 WL 2465892, at *2 (D. Utah June 2, 2014).

ARGUMENT

This Court should immediately grant the requested *ex parte* relief, and then a preliminary injunction. Plaintiffs have clearly demonstrated all four factors necessary for this Court "to preserve the pre-trial status quo," *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009), allowing Plaintiffs to continue to operate as they have lawfully done for years.

I. Plaintiffs Are Suffering Immediate Irreparable Injury Right Now.

"[T]he showing of probable irreparable harm is the single most important prerequisite for the issuance of [injunctive relief]." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1268 (10th Cir. 2005). Plaintiffs meet this standard for several independent reasons.

First, the Mortgagee Letter "threatens the very existence of [CBCMA's] business," *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016), and will cause (indeed, is already causing) "a complete or substantial loss of [CBCMA's] business during

the pendency of the trial unless the injunction issues." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986). The Mortgagee Letter on its face purports to prohibit CBCMA from: (1) operating anywhere but on its roughly 2,200 acre reservation; or (2) serving anyone but one of its 380 enrolled members nationwide. Ex. A at 5. Such restrictions devastate CBCMA, as a company that operates nationwide and has provided lawful DPA for more than 14,000 loans to persons on an equal-opportunity basis for years. Whipple Decl. ¶ 9.

On the ***same day*** the Mortgagee Letter was issued, numerous loan providers or other business partners contacted CBCMA to either express concern about future business or to ***entirely withdraw any future business***. *Id.* ¶ 31. By the close of business on Friday, April 19, ***nearly every lender*** had ***suspended doing business with CBCMA***, meaning no new loans are being generated that rely on CBCMA's DPA. *Id.* ¶ 33.

These consequences of the Mortgagee Letter have been devastating to CBCMA, and will soon prove ruinous if injunctive relief does not promptly issue from this Court. Hour by hour, CBCMA's business is dying, as more and more borrowers and lenders directly cite the Mortgagee Letter as the reason they can no longer work with CBCMA. *Id.* The enterprise-destroying impact of HUD's action is clear-cut irreparable injury. *See id.* ¶¶ 32-45.

The stakes could not be higher for Plaintiffs. The revenues from CBCMA's DPA business are a substantial source of income for CBC and the Cedar Band. For instance, revenues support:

- after-school youth programs;
- scholarship programs (both need- and merit-based);
- elder assistance programs
- Southern Paiute language preservation programs;
- Band headquarters and building maintenance and renovation;
- work training programs; and
- other vital tribal sovereign functions.

Id. ¶ 16.

Second, apart from the harm occasioned by borrowers and lenders who have suspended business with CBCMA, CBCMA is also suffering the "threatened loss of prospective customers." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001). There is little doubt that potential ***new*** borrowers or lenders will simply never come to CBCMA in the first place because of the Mortgagee Letter, if the Letter is not stayed. *See* Whipple Decl. ¶ 34.

Third, the Mortgagee Letter harms CBCMA's hard-earned goodwill, yet another form of irreparable injury. *See, e.g.*, *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1192 (10th Cir. 2009). Over the years, CBCMA has built a successful business. Whipple Decl. ¶¶ 9, 12-14. But the Mortgagee Letter maligns CBCMA as "acting … contrary to established law." Ex. A at 2. That imposes "incalculable

damage to [Plaintiffs'] goodwill" and is "irreparable harm." *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1192 (10th Cir. 2009). Regaining trust from borrowers and lenders once Defendants have all but declared CBCMA's DPA program illegal will be extremely challenging, if not impossible. Whipple Decl. ¶ 34.

Fourth, the Mortgagee Letter imposes constitutional injury on Plaintiffs. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001), *abrogated in part on other grounds by O Centro Espitira Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2019). Here, HUD has violated Plaintiffs' rights of due process and fair notice, as well as their rights under the Takings Clause. *See infra* Part II.D. The Mortgagee Letter's continued existence is imposing ongoing constitutional harm on Plaintiffs, which is by definition irreparable.

For all these reasons, Plaintiffs are suffering irreparable—indeed, existential, enterprise-destroying—injury due to the Mortgage Letter. It is hard to imagine a starker example of irreparable harm justifying preliminary relief.

II. Plaintiffs Have Shown Substantial Likelihood Of Success On The Merits.

Plaintiffs are substantially likely to succeed on the merits. The Mortgagee Letter violates: (1) the APA's notice-and-comment requirement; (2) HUD's tribal consultation policy; (3) the APA's reasoned explanation requirement; (4) the

Constitution's (and the APA's) requirement of fair notice and prohibition against regulatory takings, and (5) the NHA.

A. The Mortgagee Letter Violates The APA's Notice-And-Comment Requirement.

It is elementary that agencies must afford the public notice and an opportunity to comment on new rules. 5 U.S.C. § 553(b)-(c). HUD did neither, instead trying to pass off massive, substantive legal changes as mere "clarification." But "HUD is not free to ignore the requirements of the APA in its haste to address perceived problems in the realm of national housing policy." *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); *see also Hous. Study Grp. v. Kemp*, 732 F. Supp. 180, 183-85 (D.D.C. 1990) (*Kemp I*); *Hous. Study Grp. v. Kemp*, 736 F. Supp. 321, 325-29 (D.D.C. 1990) (*Kemp II*). If HUD intends to outlaw the provision of DPA by tribal governments, it can only do so pursuant to the notice-and-comment procedures of the APA, for at least three reasons.

First, the Mortgagee Letter is a legislative rule with the force and effect of law. Prior to the Mortgagee Letter, Plaintiffs were free to operate nationwide and on an equal opportunity basis. Whipple Decl. ¶¶ 20-21. Now, however, the Mortgagee Letter purports to:

- Strip tribes of their ability to use agencies or instrumentalities to provide DPA, while permitting other federal, state, and local governments to offer DPA through their "agenc[ies] or instrumentalities," Ex. A at 5; *cf.* HUD

Handbook 4000.1 at 234 (previously defining Governmental Entity to include any agency or instrumentality "established by a governmental body").

- Limit tribes' ability to offer DPA to properties on "tribal land" or "to enrolled members of the tribe." Ex. A at 5.

- Narrowly define "governmental capacity," by ignoring the national scope of CBC and CBCMA's federal charter, as well as the fact that CBCMA's revenue generation runs and operates core tribal governmental activities. *Id.* at 4.

- Broaden the special requirements for Governmental Entities, which used to hinge on whether "the Governmental Entity *is originating* the insured Mortgage through one of its homeownership programs," HUD Handbook 4000.1 at 225 (emphasis added), to now apply "where the Mortgage *is being originated as part of* a Governmental Entity homeownership program," Ex. A at 4 (emphasis added).

Outlawing CBCMA's ability to provide DPA plainly "effects a substantive regulatory change" by altering its legal rights. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014). The Mortgagee Letter, irrespective of its label, "upset … settled legal expectations," *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1159 (10th Cir. 2006), and plainly "create[d] … new duties" with respect to the provision of DPA, *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009). These are the hallmarks of a substantive, legislative rule, which can only be adopted pursuant to notice and comment. *Am. Min. Cong. v. Marshall*, 671 F.2d 1251, 1263 (10th Cir. 1982).

Second, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance." *Perez*

v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015). HUD employed notice-and-comment procedures when it issued its 2007 Final Rule, which sought to establish the parameters of permissible DPA, including tribes' ability to offer DPA. 72 Fed. Reg. 56002, 56002-03. HUD thus was required to employ that same process here. That conclusion is confirmed by HUD's own actions: In 2018, HUD twice informed OIRA that it would seek comment on the provision of DPA by governmental entities. *Supra* at p.8. It should have done the same thing here, instead of issuing the Mortgage Letter as a *fait accompli*.

Third, HUD released the Mortgagee Letter without any notice to, or meaningful consultation with, affected entities. Such regulation-by-ambush (on the eve of two major religious holidays) violates HUD's own expressly codified policy "to provide for public participation in rulemaking with respect to ***all HUD programs and functions***," 24 C.F.R. § 10.1 (emphasis added), which HUD has been chastised for ignoring in similar circumstances on multiple occasions, *see Patriot, Inc.*, 963 F. Supp. at 5; *Hous. Study Grp. v. Kemp*, 739 F. Supp. 633, 636 n.9 (D.D.C. 1990) (*Kemp III*); *Kemp II*, 736 F. Supp. at 325 n.3, 329; *Kemp I*, 732 F. Supp. at 186.

As courts have consistently acknowledged, HUD cannot use mortgagee letters to avoid public participation in rulemaking and violate its own policies. At the very least, Plaintiffs were entitled to notice and a chance to provide input on the deathblow changes in federal law effectuated by the Mortgagee Letter.

B. The Mortgagee Letter Violates Tribal Consultation Policies.

The Mortgagee Letter also violates HUD's policy that it consult "with individual tribes" "to the greatest extent practicable" (i) when it drafts a policy that will have "tribal implications," and again (ii) before it adopts such a policy. *Tribal Government-to-Government Consultation Policy*, 81 Fed. Reg. 40893, 40896 (June 23, 2016). "Policies that have tribal implications" are those "regulations, legislative proposals, [or] other policy statements or actions that have substantial direct effects on one or more Indian tribe[s]." *Id.* at 40895. "'Consultation' means the ***direct*** and ***interactive*** (*i.e.*, collaborative) involvement of tribes in the development of regulatory policies on matters that have tribal implications." *Id.*

In this case, HUD never even tried to satisfy this duty. Whipple Decl. ¶ 25. "It is axiomatic … that an agency is bound by its own regulations," and "an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations." *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014).

C. The Mortgagee Letter Violates The APA Because It Offers No Reasoned Explanation.

HUD failed to provide any reasoned explanation for the Mortgagee Letter, which also violates the APA. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It merely stated "that certain Governmental Entities may be acting beyond the scope of any inherent or granted governmental authority in providing funds towards the Borrower's MRI in circumstances that

would violate Handbook 4000.1, the National Housing Act, and is contrary to established law." Ex. A, at 2. But the Letter did not explain what the "scope of … governmental authority" is or how governmental entities are violating Handbook 4000.1, the NHA, or any other federal law. It simply *assumed* that was so. Nor did the Letter explain how its new requirements would prevent those purported unlawful acts, or set forth any legitimate operational concern purportedly addressed by those requirements.

HUD also failed to "display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). HUD has already been reprimanded once by the courts for failing to acknowledge a change of course regarding DPA. *See Nehemiah Corp.*, 546 F. Supp. at 842.

Moreover, HUD did not acknowledge that its "longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). CBCMA has reasonably relied for years on HUD's policy and has provided DPA for ***thousands*** of mortgages as a result. Yet HUD did not so much as acknowledge the possibility of reliance interests. That is arbitrary and capricious.

D. The Mortgagee Letter Violates Fair Notice And Effects A Taking.

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *cf. De Niz Robles v. Lynch*, 803 F.3d 1165, 1178-79 (10th Cir. 2015) (Gorsuch, J.). Here, HUD has all but destroyed CBCMA's business without fair notice and by changing its long-standing approach to the provision of DPA by tribal entities. HUD thus violated CBCMA's due process rights under the Constitution, which also violates the APA. 5 U.S.C. § 706(2)(A)-(B); *see Corbesco, Inc. v. Dole*, 926 F.2d 422, 425 (5th Cir. 1991).

In addition, the Mortgagee Letter "deprives [the Cedar Band] of all economically beneficial use" of CBCMA without compensation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). The Mortgagee Letter has already destroyed the lion's share of CBCMA's value as a going concern. Whipple Decl. ¶ 35. That uncompensated destruction of CBCMA's business is an unconstitutional taking, and violates the APA. *Corbesco*, 926 F.2d at 425.

Finally, "[a] rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be 'arbitrary' or 'capricious,' *see* 5 U.S.C. § 706, and thus invalid." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring). That is,

the abrupt upheaval to CBCMA's settled expectations is arbitrary and capricious even if it is not unconstitutional.

E. Defendants Lack Statutory Authority To Limit DPA To Tribal Land And Persons.

Nothing in the provision of the NHA regarding down payments for FHA-insured loans, *see* 12 U.S.C. § 1709(b)(9), grants HUD the authority to keep CBCMA on the reservation or to restrict CBCMA to serving tribal members.[1]

Only Congress has the power to regulate tribes directly, *see, e.g.*, *United States v. Lara*, 541 U.S. 193, 200-02 (2004), and it has not delegated to HUD the power to limit tribes' provision of DPA to borrowers based on their tribal membership or residence within tribal lands. Where Congress wanted HUD to create special rules for property on tribal lands or with regard to tribes or tribal members, it has done so clearly and in detail. *See* 12 U.S.C. § 1715z-13(a); *id.* § 1715z-13a. Similarly, when Congress wants to restrict governmental entities geographically, it knows how to do so. *See* 42 U.S.C. § 12752(a); *id.* § 12752(b). But it did not do so in Section 1709(b)(9).

Moreover, Section 1709(b)(9)(A) does not prohibit the provision of DPA at all in the secondary mortgage market, the only market in which CBCMA operates. Rather, Congress prohibited interested parties from providing DPA as part

[1] Because the Mortgagee Letter fails to offer any interpretation of federal law, simply *assuming* the existence of a prohibition on the provision of DPA by tribal governments, there is nothing for this Court even arguably to defer to.

of the first, initial mortgage—*i.e.*, the relevant "transaction" described in Section 203(b)(9)(A). HUD itself has recognized this. *See* Compl. Ex. I, at 3.

To be sure, Congress authorized the provision of insurance "upon such terms as the Secretary may prescribe," 12 U.S.C. § 1709(a), but that does not give HUD carte blanche. The specific requirements set forth in the statute relate to risk and the mechanics of insurance. *See id.* § 1709. A limitation or restriction based on the geographical location of the lender has no rational relation to the risk or mechanics of insurance—and the Mortgagee Letter mentions none. Indeed, 12 U.S.C. § 1735f-6 prohibits HUD from refusing to insure a mortgage "solely because" the collateral is subject to a secondary mortgage "made or insured, or … held, by any State or local governmental agency or instrumentality," and that statute's legislative history contemplated that HUD would "withhold insurance" for reasons "associated with normal underwriting standards," H.R. Rep. 95-1161, at 43-44 (1978), not based on the geographic location of the DPA provided.[2]

Furthermore, HUD lacks authority to require tribes to limit DPA to tribal members because that would force the tribes to potentially violate the Fair Housing Act, which prohibits lenders from considering race in deciding whether to provide DPA. 42 U.S.C. §§ 3604(b), 3605(a). HUD has brought enforcement actions

[2] If there were any doubt about the statutory language, the "canon requiring resolution of ambiguities in favor of Indians," *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194 (10th Cir. 2002) (en banc), would apply to ensure that a core sovereign tribal function—revenue raising—was not inhibited without express Congressional intent.

against that very practice. *See* HUD, Title VIII Conciliation Agreement, FHEO Title VIII Case No. 08-13-0299-8; HUD, Title VIII Conciliation Agreement, FHEO Title VIII Case Nos. 08-17-5267-8 and 08-6949-8.

For these reasons, and those alleged in the Complaint, Plaintiffs are likely to succeed on the merits of their challenge to the Mortgagee Letter.

III. The Balance Of Harms Weighs In Plaintiffs' Favor And The Public Interest Supports An Injunction.

Finally, the Court must consider the "balance of hardships" between the parties, as well as whether an injunction is "in the public interest." *Tri-State Generation*, 805 F.2d at 357-58. Both factors weigh decisively in favor of the requested relief.

First, the balance of hardships weighs in favor of an injunction. As discussed above, *supra* Part II, Plaintiffs will suffer immense, crippling, and irreparable injury absent injunctive relief. The impact of the Mortgagee Letter, felt within one day of its issuance, has already devastated CBCMA. Whipple Decl. ¶¶ 31-45. By contrast, the government will suffer no harm from an order preserving the *status quo* while this lawsuit is litigated.

Second, the public interest counsels strongly in support of relief. The Mortgagee Letter will "cause substantial harm" to third parties. *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010); *see also Arriva Med. LLC v. HUD*, 239 F. Supp. 3d 266, 283 (D.D.C. 2017). DPA programs overwhelmingly serve low-income and minority populations. Whipple Decl. ¶ 5. In fact, 54% of

Chenoa Fund DPA recipients are minorities. *Id.* ¶ 7. It is beyond question that encouraging housing for those of low-income backgrounds is in the public interest, as courts have consistently found. *NTD I, LLC v. Alliant Asset Mgmt. Co., LLC*, 337 F. Supp. 3d 877, 890 (E.D. Mo. 2018); *Johnson v. Macy*, 145 F. Supp. 3d 907, 921 (C.D. Cal. 2015); *Johnson v. Fort Walton Beach Hous. Auth.*, 2012 WL 10688344, at *8 (N.D. Fla. Jan. 5, 2012).

Last but not least, the Mortgagee Letter is already having a profoundly harmful impact on CBCMA's borrowers who are applying for mortgages with DPA. Those individuals may not be able to close on their loans, may lose their earnest money, and more. Whipple Decl. ¶¶ 37-47. At least one borrower contacted CBCMA when their loan fell through because of the Mortgagee Letter, leaving the borrower, who had given notice to the landlord and moved out, facing homelessness. *Id.* ¶ 46. Unless this Court steps in, numerous borrowers, many of whom are minority and first-time homebuyers, will have their plans turned upside down and may very well lose the opportunity to move into a home they had planned on calling their own. *Id.* ¶¶ 37-47.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion.

Dated: April 22, 2019

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the word-count limitations of DUCivR 7-1(a)(3)(A), and that this document contains 6,268 words, excluding portions of the memorandum exempted by DUCivR 7-1(a)(3)(A).

I further certify that the foregoing complies with DUCivR 10-1(b) and is written in Times New Roman, 14 point font, using Microsoft Word 2016.

Date: April 22, 2019

s/ Jeremy M. Christiansen
Jeremy M. Christiansen

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Utah by using the Court's CM/ECF system on April 22, 2019.

I hereby certify that on April 22, 2019 I caused a copy of the foregoing to be served upon the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; DR. BENJAMIN S. CARSON, SR., in his official capacity as Secretary of the U.S. Department of Housing and Urban Development; FEDERAL HOUSING ADMINISTRATION; and BRIAN D. MONTGOMERY, in his official capacity as Assistant Secretary of Housing and Urban Development for Housing-Federal Housing Commissioner, via First Class Mail as per the addresses below as well as via a process server that served the underlying Complaint in this action:

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