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|  |  | At an I.A.S. Trial Term, Part \_\_\_ of the Supreme Court of the State of New York, held in and for the County of Manhattan, at the Courthouse, located at test 2, on the \_\_\_\_ day of \_\_\_\_\_\_\_\_ 20\_\_\_. |

PRESENT:

HON. \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Justice

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| -----------------------------------------------------------------X  Albert and Marilyn Elrington,  Plaintiff,  -against-  123,test  Defendants.  -----------------------------------------------------------------X |  | INDEX NO.: (123478)  **ORDER TO SHOW CAUSE** |

Upon the reading and filing of the annexed Emergency Affirmation of P. C. Jamie Andrew Schreck , the annexed Affidavit of 123, dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the exhibits attached thereto, the accompanying Memorandum of Law, dated \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and upon all other papers and proceedings in this action, it is hereby:

**LET** Plaintiff, Albert and Marilyn Elrington., (“Plaintiff”) show cause before this Court at an I.A.S. Part, Room \_\_\_\_, at the (Manhattan) County Courthouse, test 2,, on the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 201\_, at \_\_\_\_\_\_\_\_\_\_\_ or as soon thereafter as counsel may be heard, why a preliminary injunction pursuant to CPLR §6301 and §6311, should not be issued by this Court

1. Enjoining Plaintiff from transferring, conveying, alienating, assigning, including without limitation, auctioning of the subject real property, known as and located at 77 E 7 ST, Manhattan,NY 10003, Block \_\_449 \_\_, Lot \_\_43 \_\_ (hereinafter the “Premises”);
2. Granting Plaintiff such other, further and different relief as this Court may deem to be just, proper and equitable.

**ORDERED**, that pending a hearing of this motion, Plaintiff and its agents are temporarily restrained and enjoyed from taking any action in connection with auctioning and taking any further action with regard to the Premises; and it is further.

**LET** service upon Plaintiff on or before \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_ of a copy of this Order together with the papers upon which it is based shall be deemed good and sufficient service by mailing all papers to Plaintiff’s attorney, Michael K test 1

ENTER:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

J.S.C.

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| SUPREME COURT OF THE STATE OF NEW YORK  COUNTY OF Manhattan  -----------------------------------------------------------------X  Albert and Marilyn Elrington,  Plaintiff,  -against-  123, ,test  Defendants.  -----------------------------------------------------------------X |  | INDEX NO.: 123478  **AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE** |

STATE OF NEW YORK )

) ss.:

COUNTY OF Manhattan )

123, (hereinafter the “Defendant”) being duly sworn, deposes and says:

1. I am a Defendant named in this action, and as such am fully familiar with the facts and circumstances set forth below.
2. I make this affidavit in support of this Motion for a Temporary Restraining Order and Preliminary Injunction after having suffered substantial financial hardship as a result of the financial downturn that severely weakened the economy.
3. I at all relevant times owned and maintained the premises known as and located at 77 E 7 ST, Manhattan,NY 10003, Block [[Block]] , Lot 43 (hereinafter the “Premises”).
4. On \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_., Plaintiff is proceeding with a foreclosure sale, which will remove my legal interests in the Premises. A copy of the Notice of Sale is annexed hereto as **Exhibit A** and made a material part hereof.
5. Beginning on or about \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, I began attempting to obtain a loan modification through Plaintiff, but my application attempts were not actually reviewed. I was never in fact denied, or even received information so my application could be supplemented. Despite my good faith attempts to seek out and apply for a loan modification, Plaintiff has disregarded my efforts and continue with their foreclosure sale despite detailed requirements under HAMP that a foreclosure sale must be cancelled pending a determination of a borrower’s first loan modification application.
6. Furthermore, I have recently obtained the help of National Homeowners Assistance to list the Premises, such that a short sale package may also be submitted to Plaintiff. A short sale would also allow me to avoid the deleterious effects of a foreclosure, while allowing Plaintiff to recover a greater amount than they would likely receive from a foreclosure sale. A copy of my agreement with National Homeowners Assistance is annexed hereto as **Exhibit B** and made a material part hereof.
7. On \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, I entered into contract with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a bona fide purchaser, to sell the Premises, contingent upon the obtaining of short sale approval from Plaintiff. A copy of the contract is annexed hereto as **Exhibit C** and made a material part hereof. To date, the short sale package has not been completely reviewed by Plaintiff.
8. If the Premises goes through a foreclosure sale at this time, I will lose my home, while suffering the various negative consequences associated with a foreclosure sale despite my good faith efforts to seek loss mitigation through Plaintiff.
9. I will suffer imminent and irreparable injury if the sale of the Premises is permitted to be prosecuted and my home is allowed to be sold.
10. The balance of equities tips in favor of granting Defendant injunctive relief.
11. For the foregoing reasons and because the proposed sale is imminent, I respectfully requests that the Court grant my motion for a temporary restraining order, followed by a preliminary injunction to protect my interest in the Premises.
12. A prior action for the relief herein requested has not been made before this Court.

**FOR THE FORGOING REASONS**, Plaintiff respectfully requests that the Court grant this motion for a Temporary Restraining Order, injunctive relief, and a declaratory judgment to protect my interest in the Premises.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

123

AFFIRMED TO AND SUBSCRIBED

before me, a notary public for the state and

county aforesaid, this \_\_\_ day of \_\_\_\_\_\_\_\_\_, 201\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

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| SUPREME COURT OF THE STATE OF NEW YORK  COUNTY OF Manhattan  -----------------------------------------------------------------X  Albert and Marilyn Elrington,  Plaintiff,  -against-  123, ,test  Defendants.  -----------------------------------------------------------------X |  | INDEX NO.: 123478  **22 N.Y.C.R.R §202.7(f) EMERGENCY AFFIRMATION** |

P. C. Jamie Andrew Schreck , an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following to be true under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules:

1. I am a member of the bar of this Court, and attorney for Plaintiff, Travis Harris, (hereinafter the “Defendant”) and am fully familiar with the facts and circumstances contained herein. I submit this affirmation, which is based on personal knowledge and information and belief, in support of Defendant’s application, brought by an Order to Show Cause, for a preliminary injunction and temporary restraining order to require Plaintiff to halt the sale of the premises known as and located 77 E 7 ST, Manhattan,NY 10003, Block 449 , Lot 43 (hereinafter the “Premises”).
2. I respectfully ask this Court to give emergency treatment to the present application for a temporary restraining order, as no other adequate remedy of law exists, to protect Defendant’s interest in certain properties, which faces imminent and irreparable harm.
3. Written notice of the application for a temporary restraining order was provided to Plaintiff on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. A copy of the aforementioned letter is attached hereto as **Exhibit “C”** and made part hereof.
4. As no other adequate remedy of law exists other than temporarily restraining Plaintiff, Defendant respectfully requests the Court to give emergency treatment to enjoin Plaintiff from removing Defendant’s interest in her residence and any such other and further relief as the Court deems just and proper
5. For these reasons, this application merits the immediate consideration of the court.
6. No prior action for the relief herein requested has been made.

**WHEREFORE**, it is respectfully requested that the within application for a temporary restraining order be granted to maintain the status quo pending resolution of Defendant’s Motion, and that the Court grant such order, further and different relief as it may deem to be just, proper and equitable.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, New York

**Law Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

P. C. Jamie Andrew Schreck ,

520 Eighth Avenue, Eighteenth Floor New York NY 10018

(212) 590-6800

*Attorneys for Defendant*

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| SUPREME COURT OF THE STATE OF NEW YORK  COUNTY OF Manhattan  -----------------------------------------------------------------X  Albert and Marilyn Elrington,  Plaintiff,  -against-  123, ,test  Defendants.  -----------------------------------------------------------------X |  | INDEX NO.: 123478  **MEMORANDUM OF LAW** |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TRAVIS HARRIS’S**

**APPLICATION FOR PRELIMINARY INJUNCTION**

**Law Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

P. C. Jamie Andrew Schreck ,

520 Eighth Avenue, Eighteenth Floor New York NY 10018

(212) 590-6800

*Attorneys for Defendant*

Defendant 123 (“Defendant”) respectfully submits this memorandum in support of his application for the prefixed Order to Show Cause for a declaratory judgment granted pursuant to CPLR § 3001, as well as a temporary restraining order (hereinafter the “TRO”), and a preliminary injunction under CPLR §§ 6301, 6311, and 6313.

**Preliminary Statement**

Defendant is the rightful fee owner of premises known as and located at 77 E 7 ST, Manhattan,NY 10003, Block 449 , Lot 43 (hereinafter the “Premises”). Defendant suffered severe financial hardships several years ago as part of the economic downturn felt throughout this country. Furthermore, the value of the Premises had become severely depressed, where Defendant could not mitigate his financial harm by selling his home. As a result, Defendant entered into default on his mortgage and Plaintiff subsequently commenced foreclosure proceeding.

In order to avoid foreclosure, Defendant has sought to obtain loan relief or assistance from Plaintiff. Specifically, Defendant has made a good faith effort to obtain a loan modification from the bank, which proved to be a fruitless endeavor. Defendant attempted to modify his loan, yet was never officially denied, but Plaintiff is continuing with their scheduled foreclosure sale on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, in violation of certain HAMP requirements to cancel a sale. Furthermore, Defendant has also worked to locate a purchaser willing to work with Plaintiff to pursue a short sale. Defendant has entered into contract with \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to sell the Premises, contingent upon short sale approval on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ after having listed the property through the aid of National Homeowners Assistance. Plaintiff has not to this date given appropriate consideration to the short sale, although it would financially be in Plaintiff’s interest as it will likely allow it to recover more than a foreclosure sale, and let Defendant avoid foreclosure. Therefore, Plaintiff should be enjoined from proceeding with the foreclosure sale until Defendant’s modification application and short sale package are adequately reviewed.

**Argument**

**This Court Should Grant Defendant’s Request for a Preliminary Injunction.**

CPLR § 6301 provides that a preliminary injunction “may be granted in any action where . . . the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.” To be entitled to a preliminary injunction, Plaintiff must show (1) a likelihood of success on the merits, (2) irreparable injury in the absence of the injunction, and (3) a balancing of the equities in its favor. *See Cedar Graphics, Inc. v. Long Island Power Auth.*, 826 N.Y.S.2d 396, 398, 35 A.D.3d 337, 338-39 (2d Dep’t 2006); *Terrell v. Terrell*, 719 N.Y.S.2d 41, 43, 279 A.D.2d 301, 303 (1st Dep’t 2001). As explained below, Defendant can demonstrate all three factors, and the Court should grant her application for a preliminary injunction.

**Defendant is Likely to Succeed on the Merits.**

To demonstrate that Defendant is likely to succeed on the merits, “all that must be shown is the likelihood of success; conclusive proof is not required.” *Ying Fung Moy v. Hohi Umeki*, 781 N.Y.S.2d 684, 686, 10 A.D.3d 604, 605 (2d Dep’t 2004); *see also Terrell*, 719 N.Y.S.2d at 43, 279 A.D.2d at 303. “[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction,” *Egan v. New York Care Plus Ins. Co.*, 697 N.Y.S.2d 776, 777, 266 A.D.2d 600, 601 (3d Dep’t 1999), for “even when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be conclusive,” *Ma v. Lien*, 604 N.Y.S.2d 84, 85, 198 A.D.2d 186, 187 (1st Dep’t 1993) (internal quotation marks omitted). “Provided that the elements required for the issuance of a preliminary injunction are demonstrated in the plaintiff’s papers, the presentation by the defendant of evidence sufficient to raise an issue of fact as to any of such elements shall not in itself be grounds for denial of the motion.” N.Y. C.P.L.R. 6312(c).

Where, as here, “the denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced.” *State v. City of N.Y.*, 713 N.Y.S.2d 360, 360, 275 A.D.2d 740, 741 (2d Dep’t 2000); *see also* *N. Fork Preserve, Inc. v Kaplan*, 31 A.D.3d 403, 405-06, 819 N.Y.S. 2d 53, 55 (2d Dep’t 2006) (upholding preliminary injunction to prevent sale of corporate assets where minority shareholders claimed they had been frozen out of management).

Defendant should succeed on the merits for this motion primarily based on his attempts to obtain a loan modification. According to the Home Affordable Modification Program (“HAMP”) (pursuant to the Helping Families Save Their Homes Act of 2009), a loan servicer must suspend the foreclosure sale as needed to evaluate a borrower for a modification based on specific protocols. Defendant has attempted to apply for a loan modification under HAMP, obligating Plaintiff to evaluate his eligibility for the program before continuing with the foreclosure sale. Defendant had not previously been determined to be ineligible for HAMP based on an initial modification package, nor has he failed to make payments under a trial plan or lost good standing under a prior HAMP modification.

Defendant’s first attempts to obtain a loan modification have not been adequately reviewed or processed and Plaintiff continues to proceed with an imminent foreclosure sale. Plaintiff maintains a lack of standards for determining which borrowers should be granted or even properly reviewed under their HAMP obligations. Plaintiff’s failure to properly process a loan modification or give an explanation for their lack of approval runs counter to their requirements under HAMP.  Plaintiff maintains and allows for such drastic shortcomings in their loan modification infrastructure that Defendant has not even received any explanation regarding their loan modification. It is believed that his application request went completely unchecked. Therefore, the subject foreclosure sale must be stayed and ultimately cancelled due to Plaintiff’s absence of modification review safeguards and failure to properly process a loan modification application under HAMP, or alternative in-house loan modification programs.

Not only has Plaintiff attempted to proceed with a foreclosure sale, but they has evaded requirements under custom and usage in the banking industry as well as good faith and fair dealings under contract theory with Defendant to work towards loss mitigation options, including short sales of financially troubled loans. Plaintiff is incentivized by their participation in Credit Default Swaps (“CDS”), which are insurance-like or other contractual relationships in which losses through foreclosure or short sale (i.e., when the homeowner-mortgagor loses his/her home) are paid in whole or in part to Plaintiff, in addition to the amount they realize on a foreclosure sale.  Under the CDS scheme, Plaintiff only receives reimbursements for their losses if the mortgaged property is sold through foreclosure.

Plaintiff would almost certainly obtain a greater value from a short sale than it would by foreclosure auction, especially without these undisclosed financial offsets.  Plaintiff recently located a bona fide purchaser and executed a contract with them for a short sale.  The purchaser is currently engaging in a short sale application with Plaintiff, and for good faith loss mitigation practices, the foreclosure sale should be enjoined so that the short sale application can be properly reviewed.  As a matter of good faith and fair dealings, the foreclosure sale date should be enjoined to allow Defendant to have their short sale offer formally processed and negotiated such that Defendant may avoid foreclosure, while Plaintiff will ultimately garner a greater net recovery than through foreclosure.

In addition, while a court generally only grants a preliminary injunction where the plaintiff has proven a likelihood of success on the merits, a preliminary injunction may also be granted where injunctive relief is deemed necessary to maintain the status quo, even if the movant’s success on the merits cannot be determined at the time that the application for a preliminary injunction is brought. *5 W. 120th Realty Corp. v. Continental Capital Group, LLC,* No. 110318/05, 2005 WL 2741954 (Sup. Ct. N.Y. Co. Oct. 24, 2005); *Jacobowitz v. Jacobowitz*, No. 16605/04, 2004 WL 2532297, \*4 (Sup. Ct. Queens. Co. Oct. 25, 2004). *Accord Mr. Natural, Inc. v. Unadulterated Food Prods., Inc*., 152 A.D.2d 729, 730, 544 N.Y.S.2d 182, 183 (2d Dep’t 1989) (existence of factual dispute will not bar granting preliminary injunction if one is necessary to preserve status quo and party to be enjoined will suffer no great hardship as result of its issuance); *Abed v. Zach Assocs.,* 124 A.D.2d 531, 532, 507 N.Y.S.2d 676, 677 (2d Dep’t 1986) (Special Term properly granted plaintiff’s motion for temporary injunction inasmuch as record clearly indicates it was necessary to maintain status quo pending determination on the merits); *Schlosser v. United Presbyterian Home at Syosset, Inc.,* 56 A.D.2d 615, 391 N.Y.S.2d 880, 881 (2d Dep’t 1977).

**In the Absence of a Preliminary Injunction, Defendant Will Suffer Immediate, Irreparable Injury.**

Defendant will be irreparably harmed in the absence of a preliminary injunction. An injury is irreparable if there is no adequate remedy at law. “The remedy at law to be adequate must be plain, adequate and complete and must be as practicable and efficient as an equitable remedy. The remedy at law is inadequate when the damages are not capable of measurement or difficult to determine or there would be long delay in its availability. ” *Bd. of Higher Ed. of City of New York v. Marcus*, 63 Misc. 2d 268, 272-73, 311 N.Y.S.2d 579, 584 (Sup. Ct. Queens Cty. 1970) (internal citations omitted) (finding irreparable injury where loss could not be readily calculated); *see also Wasilkowski v. Amsterdam Mem'l Hosp.*, 92 A.D.2d 1016, 1017, 461 N.Y.S.2d 451, 452 (3d Dep’t 1983) (granting preliminary injunction where value of loss was “difficult, if not impossible, to fully ascertain and therefore must be viewed as irreparable.”)

The injuries faced by Defendant here are serious and irreparable. Defendant is the sole and rightful owner of the Premises. If Defendant loses the property through foreclosure there will be no way to undo the harm. These harms are “not capable of measurement” because it will likely be impossible to determine what the value of would have been had Plaintiff abided by their obligations to negotiate in good faith. Similarly, in *Finkelman v. Finkelman*, 105 A.D.2d 771, 481 NYS2d 715 (2d Dep’t 1984), where title to shares of stock in a cooperative apartment corporation and thereby the apartment appurtenant thereto were at issue, the Appellate Division held that the Supreme Court did not abuse its discretion in issuing an injunction to preserve the status quo pending a determination on the merits, since the primary issue was title which could not be fully adjudicated in a summary proceeding.

**The Balance of Equities Tilts In Favor of Defendant.**

In deciding whether to grant preliminary relief, the Court must balance the equities. The equities tip in favor of the Defendant when “the irreparable injury to be sustained by the [movant] is more burdensome to it than the harm caused to defendant[s] through imposition of the injunction.” *Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797, 443 N.Y.S.2d 895, 898 (2d Dep’t 1981) (citation omitted). A review of the considerations that go into this balance demonstrates that the equities favor a temporary restraining order and preliminary injunction in this case.

If a preliminary injunction is not granted, Defendant risks losing possession of Premises, through foreclosure. This is a grave and irreparable harm. On the other hand, if a preliminary injunction is granted, the worst that Plaintiff will suffer is a delay to their intended foreclosure sale.

# **This Court Should Issue a Temporary Restraining Order.**

CPLR § 6301 provides in relevant part that “a temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” Furthermore, CPLR § 6313(a) provides that the Court may grant a temporary restraining order without notice to Plaintiff if the Defendant shows that “immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had.” A temporary restraining order is warranted here because Defendant faces an immediate harm of a foreclosure sale on the property.

**CONCLUSION**

As no other adequate remedy of law exists other than restraining Plaintiff, Defendant respectfully requests the Court to give emergency treatment to the present application for a temporary restraining order, followed by a preliminary injunction and vacating of the Judgment of Foreclosure and Sale to protect Plaintiff’s interest in certain property, which faces irreparable harm, together with any other relief the Honorable Court finds to be just and proper.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Manhattan, New York

**Law Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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| SUPREME COURT OF THE STATE OF NEW YORK  COUNTY OF Manhattan  -----------------------------------------------------------------X  Albert and Marilyn Elrington,  Plaintiff,  -against-  123, ,test  Defendants.  -----------------------------------------------------------------X |  | INDEX NO.: 123478 |

**ORDER TO SHOW CAUSE**

**with TEMPORARY RESTRAINING ORDER and SUPPORTING AFFIDAVIT**

**Law Office of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

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