UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States Securities and Exchange Commission, Plaintiff, v. EquityBuild, Inc., EquityBuild Finance, LLC, Jerome H. Cohen, and Shaun D. Cohen, Defendants.	No.: 18-cv-5587 Honorable John Z. Lee Magistrate Judge Young B. Kim

FEDERAL HOUSING FINANCE AGENCY'S MOTION FOR LEAVE TO FILE A SUR-REPLY IN SUPPORT OF ITS OBJECTION TO RECEIVER'S MOTION FOR APPROVAL OF ALLOCATIONS OF FEES TO PROPERTIES FOR PAYMENT PURUSANT TO RECEIVER'S LIEN

The Federal Housing Finance Agency ("FHFA"), in its capacity as Conservator for Fannie Mae and Freddie Mac, respectfully moves for leave to file a sur-reply (the "Sur-Reply") to Receiver's Combined Reply In Support of Fee Allocation Motion (the "Reply").

FHFA's objection—the submission that the Reply addresses—is unique in that it does not raise issues about the computation or composition of the amounts the Receiver has proposed for allocation to any property, but instead asserts a federal statute that precludes the allocation of any costs to two properties. Under the circumstances, and especially in light of the fact that the statute at issue is FHFA's organic statute, a sur-reply would likely aid the court.

The proposed Sur-Reply, which is attached as Exhibit A and is only four pages, offers four important points in response to the Reply:

- *First*, that the Receiver does not address at all FHFA's argument that Section 4617(j)(3) applies and prohibits the cost allocation that the Receiver seeks.
- *Second*, that Section 4617(f) is jurisdictional and, thus, cannot be waived or forfeited.

- *Third*, that the Receiver's distinction between a "conservator" and "receiver" is not relevant because FHFA is Conservator of Fannie Mae and Freddie Mac with the statutory powers conferred by Congress to protect Fannie Mae and Freddie Mac's lien interests in the GSE Properties.
- *Fourth*, that the Receiver's arguments on the cases cited by FHFA are unpersuasive.

Accordingly, FHFA requests that this Court grant FHFA's motion to file the concise Sur-Reply attached hereto as Exhibit A.

Dated: April 16, 2022

Respectfully submitted,

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Attorneys for Federal Housing Finance Agency in its capacity as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2022, I caused the foregoing **Federal Housing Finance Agency Motion for Leave To File A Sur-Reply In Support of Its Objections to Receiver's Motion for Approval of Allocation of Fees To Properties For Payment Pursuant to Receiver's Lien** to be electronically filed with the Clerk of the Court through the Court's CM/ ECF system, which sent electronic notification of such filing to all parties of record.

/s/ Daniel E. Raymond

EXHIBIT

A

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The Federal Housing Finance Agency ("FHFA"), in its capacity as Conservator for the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together "the Enterprises" or "GSEs"), respectfully submits this sur-reply to Receiver's Combined Reply In Support of Fee Allocation Motion (the "Reply").[1]

First, as FHFA explained in its Opposition to Receiver's Motion for Approval of Allocations of Fees to Properties for Payment Pursuant to Receiver's Lien (the "Opposition"), Section 4617(j)(3) protects property of the conservatorship from levy, attachment, garnishment, foreclosure, sale, or lien interests in property. Dkt. 1209 at 10-11. The Receiver's Reply does not even address Section 4617(j)(3) and the undeniable fact that the cost-allocation the Receiver seeks would, by dissipating the present form of collateral, subject the GSE's liens to a levy, attachment,

[1] Capitalized words not otherwise defined are the same as in FHFA's Opposition to Receiver's Motion for Approval of Allocations of Fees to Properties for Payment Pursuant to Receiver's Lien. Dkt. 1209.

foreclosure, or sale. The Receiver is unable to achieve such relief since Section 4617(j)(3) bars it.[2]

Second, Section 4617(f) is jurisdictional and cannot be waived or forfeited. *See Leon City v. FHFA*, 700 F.3d 1273, 1276 (11th Cir. 2012) (stating that Section 4617(f) is a "jurisdictional bar"). The Supreme Court in *Collins v. Yellens* instructs that the 4617(f) limitation on court action applies unless such action is requested by the Director. 141 S. Ct. 1761, 1775-76 (2021) (quoting § 4617(f)). There is no dispute that the Director of FHFA did not request any court action regarding the sales of the GSE Properties that resulted in the subject proceeds now at issue. Here, the Receiver claims that FHFA was both *too early* in filing its Opposition and also *too late*. Dkt. 1230 at 29-31. Neither is true. As FHFA explained in its Opposition, Section 4617(f) is a jurisdictional limitation. *See* Dkt. 1209 at 9-10. It cannot be waived and instead may be raised at any time. *Cty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013). The only case the Receiver cites, *Ester v. Principi*, 250 F.3d 1068, 1070-72 (7th Cir. 2001), is readily distinguished. There, the Seventh Circuit barred the Department of Veterans Affairs from raising a *non-jurisdictional* defense in a judicial proceeding because it had not asserted the defense in the underlying administrative proceeding. *Id.* at 1072-73; *see also Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (confirming defense at issue in *Ester* is "not … jurisdictional"). Here, by contrast, FHFA asserts a *jurisdictional* defense that is not subject to waiver or forfeiture. *Perez v. K&B Transp., Inc.*, 967 F.3d 651, 654 (7th Cir. 2020) (jurisdictional issues cannot be waived).

The Receiver's contention that FHFA "waived" its Section 4617(f) argument through a "knowing and express decision" not to raise it earlier in the case is therefore immaterial. *See* Dkt.

[2] This Court should also consider the Receiver's silence on Section 4617(j)(3) as a concession. *See, e.g.*, *Kobler v. Illinois Dep't Hum. Servs.*, No. 12 C 1277, 2012 WL 5995836, at *2 (N.D. Ill. Nov. 30, 2012) (stating that the failure to address arguments in reply is akin to an implicit concession).

1230, at 30-31. Regardless, the Receiver's argument fails on its own terms; it depends on inference and imputation, not actual knowledge. To the extent the Receiver makes a claim that somehow FHFA is bound by the actions of its conservatees and that actual notice to FHFA itself was not necessary, such claim flies in the face of the Court's Order appointing the Receiver, which required notice to all "creditors." Dkt. 16 at ¶ 23 (p. 13). FHFA and its conservatees remain separate entities—Fannie Mae and Freddie Mac continue to exist as corporate entities under their own charters—and FHFA is therefore a creditor entitled to separate notice under the facts of this case. The lack of actual notice to FHFA, which is the entity asserting Section 4617(f), is fatal to the Receiver's argument.

Third, the Receiver's distinction between a "conservator" and a "receiver" misses the mark. FHFA is the Congressionally authorized Conservator of Fannie Mae and Freddie Mac, not the receiver of GSE Properties. Dkt. 1209 at 3. FHFA is not acting as a receiver, and neither Fannie Mae nor Freddie Mac is in the process of winding down. The Receiver's claim that FHFA's statutory powers as Conservator are inapplicable because the "properties were being liquidated" is nonsensical and appears to misunderstand the nature of the FHFA conservatorship and the unequivocal intentions of Congress that only the Conservator holds the rights, titles, powers, privileges, and assets of these entities while in conservatorship.

As Conservator, FHFA has the statutory powers to "preserve and conserve the assets and property of [Fannie Mae]" and "collect all obligations and money due [Fannie Mae]." 12 U.S.C. §§ 4617(b)(2)(B)(ii), (iv). Congress also expressly provided that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator." 12 U.S.C. § 4617(f). Thus, the sole issue here is whether the result that the Receiver seeks in this case would restrain or affect the exercise of FHFA's powers or functions as Conservator; if so, HERA plainly

forbids it. That plainly is the case here. Allocating any fees or costs to the GSE Properties will necessarily dissipate that collateral, thereby restraining and affecting the Conservator's power to collect the money due Freddie Mac and Fannie Mae on the obligations the collateral secures, as well as the power to preserve and conserve Freddie Mac's and Fannie Mae's assets.

Fourth and finally, the Receiver argues that the cases cited by FHFA in support of the application of Section 4617(f) are "simply inapplicable to the matter at bar." Dkt. 1230 at 32. The Receiver is mistaken. The cases cited by FHFA fully support that Section 4617(f) bars any form of order that interferes with the Conservator's exercise of its powers and functions. Dtk. 1209 at 7. Several cases specifically hold that courts are precluded from granting any form of relief that would interfere with the powers to collect on obligations and preserve and conserve assets—the powers at issue here. Dtk. 1209 at 7. And though the relief sought here is purely equitable—the Receiver does not even address FHFA's point that the entire receivership is an equitable construct (*see* Dkt. 1209 at 8)—other cases FHFA cited confirm that monetary relief is equally barred where it would restrain or affect the Conservator's statutory powers, as the cost-allocation sought here would. Dkt. 1209 at 7. For this reason, the Receiver's distinction between this case and the shareholder or investor actions cited by FHFA is not relevant. In the end, the Receiver offers no persuasive reason why Section 4617(f) does not bar the cost allocation the Receiver seeks against the GSE Properties' proceeds.

FHFA therefore respectfully requests the Court deny the Receiver's motion insofar as it seeks to allocate any receivership costs or fees to the proceeds from either GSE Property or to otherwise diminish the proceeds the Receiver collected from the forced sales of either GSE Property to which the Conservator did not consent.

Dated: April 16, 2022

Respectfully submitted,

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/s/ Daniel E. Raymond