IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 69419

SATICOY BAY LLC SERIES 9641 CHRISTINE VIEW

Appellant,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respondent.

Appeal from the Eighth Judicial District Court, Clark County, Nevada

The Honorable Elissa F. Cadish, District Judge

District Court Case No. A690924

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency respectfully files this brief supporting Respondent Fannie Mae.[1] This appeal directly affects the interests of Fannie Mae and Freddie Mac (the "Enterprises")—federally chartered entities Congress created to enhance the nation's home-finance market, and that are presently in FHFA conservatorship. The Enterprises own millions of mortgages, including hundreds of thousands in Nevada.

In 2008, Congress enacted the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 ("HERA"). Among other things, HERA established FHFA as the Enterprises' regulator. 12 U.S.C. § 4511. Congress vested FHFA with the power to place the Enterprises into conservatorship or receivership under statutorily defined circumstances, mandating that as Conservator, FHFA would succeed to all "rights, titles, powers, and privileges" of the entity in conservatorship with respect to its assets. 12 U.S.C.

[1] Pursuant to Rule 29(a) of the Nevada Rules of Appellate Procedure, as an agency of the United States, FHFA is permitted to file this amicus curiae brief without consent of the parties or leave of court. Nev. R. App. P. 29(a). This rule parallels Section 517 of Title 28 of the U.S. Code which provides that the Attorney General of the United States may dispatch any officer of the Department of Justice to any state or district "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

§ 4617. On September 6, 2008, FHFA's Director placed the Enterprises into FHFA's conservatorship, where they remain today.

FHFA has an interest in this case because it concerns statutory property protection Congress provided Fannie Mae while in FHFA's conservatorship.

INTRODUCTION

This case involves a Nevada homeowners' association's foreclosure sale to satisfy its lien for unpaid dues (an "HOA Sale"). Under Nevada law, HOA Sales, if properly conducted, may extinguish all other preexisting liens on the underlying property, including first deeds of trust. But the federal statute creating FHFA provides that while an Enterprise is in conservatorship, its "property" is not "subject to . . . foreclosure." 12 U.S.C. § 4617(j)(3).

This appeal presents a straightforward issue: Does 12 U.S.C. § 4617(j)(3) (the "Federal Foreclosure Bar") preempt state foreclosure law to the extent it would otherwise extinguish Fannie Mae's deed-of-trust interests? The district court correctly answered "yes."

Contrary to Saticoy Bay's arguments, Fannie Mae's deed-of-trust interest (which the HOA foreclosure purported to extinguish under Nevada law) is property of the conservatorship, and the Conservator never consented to the extinguishment; the Federal Foreclosure Bar therefore preserved Fannie Mae's interest notwithstanding Nevada law. Saticoy Bay's contention that Fannie Mae lacks

standing to assert the statutory protection is also wrong; Fannie Mae has a concrete stake in this action and may invoke the Federal Foreclosure Bar, which under the Supremacy Clause provides the rule of decision.

ARGUMENT

I. THE PROPERTY AT ISSUE IS PROPERTY OF THE CONSERVATOR

Saticoy Bay contends that the Federal Foreclosure Bar does not apply in this case because the property at issue was owned by Fannie Mae, not FHFA. *See* Opening Brief at 16:1-3. Saticoy Bay's argument reveals a fundamental misunderstanding of the role of FHFA and its relationship with the Enterprises while in FHFA conservatorship. Congress created FHFA and authorized the conservatorship to protect and stabilize the Enterprises in order to lessen the severity of the housing crisis. It is implausible to assume that HERA gives no protection to the mortgage loans Fannie Mae owns, which are a very significant portion of Fannie Mae's assets and central to its statutory purpose of creating and supporting the nationwide secondary mortgage market.

That the mortgage loans owned by Fannie Mae are also property of the Conservator is confirmed by the text of HERA, which confirms that the Conservator has succeeded by law to all of Fannie Mae's "rights, titles, powers, and privileges . . . and [its] assets." 12 U.S.C. § 4617(b)(2)(A)(i). The protections of the Federal Foreclosure Bar apply in any situation in which FHFA "is acting as

a conservator or a receiver." 12 U.S.C. § 4617(j)(1). "Accordingly, the property of [Fannie Mae] effectively becomes the property of FHFA once it assumes the role of conservator, and that property is protected by section 4617(j)'s exemptions." *Skylights v. Byron*, 112 F. Supp. 3d 1145, 1155 (D. Nev. 2015).

Any alternative interpretation would not only contradict express statutory language but also undermine a central objective of conservatorship—to restore the Enterprises' financial safety and soundness. *See* FHFA, Conservatorship, http://www.fhfa.gov/Conservatorship. In its capacity as Conservator, FHFA may "take such action as may be . . . appropriate to . . . preserve and conserve the assets and property of [the Enterprises.]" 12 U.S.C. § 4617(b)(2)(D). The Enterprises, which were chartered by Congress with the specific objective of supporting the secondary mortgage market, unsurprisingly own a large number of mortgage loans that comprise the vast majority of their assets. By empowering FHFA to assume the Enterprises' "rights, titles, powers, and privileges" and to take action to safeguard their assets and property, including mortgages, Congress clearly and manifestly expressed its intent that the protections of the Federal Foreclosure Bar apply to Enterprise property, such as Fannie Mae's interest in the property here.

II. FHFA DID NOT CONSENT TO EXTINGUISHMENT OF THE PROPERTY INTEREST

Saticoy Bay acknowledges that FHFA did not expressly consent to the extinguishment of Fannie Mae's property interest in this case—notably, Saticoy

Bay never alleges that it even sought FHFA's consent. Instead, Saticoy Bay asks the Court to read into FHFA's conduct some manifestation of "implied consent." Opening Br. at Section VI(5). Saticoy Bay's assertion is contradicted by both law and fact. As a preliminary matter, the Federal Foreclosure Bar operates automatically to safeguard the property interests of the Enterprises while in conservatorship. No conduct, action, or inaction on the part of FHFA—save express consent—could have allowed the HOA Sale to extinguish Fannie Mae's property interest. *See* Respondent Br. at 26, 28.

In support of its implied consent theory, Saticoy Bay cites certain excerpts from Fannie Mae's Servicing Guide in which Fannie Mae instructs its servicers to pay a limited amount of unpaid assessments if the payment is necessary to protect the priority of Fannie Mae's mortgage lien. Opening Br. at 30-31. As Fannie Mae explained in its brief, the Guide is not a regulation that a third-party can use to bind Fannie Mae or FHFA, nor does the Guide even discuss the issue of potential extinguishment of lien interests. *See* Respondent Br. at 29-30. Moreover, the Guide provisions cannot and do not supersede federal legal protections afforded to the Enterprises while in FHFA conservatorship. *Id.*

Saticoy Bay argues that the lack of a formal procedure to request consent "supports [its] interpretation . . . that consent by FHFA is not required before an HOA can foreclose its super priority lien and extinguish a 'subordinate' deed of

trust assigned to Fannie Mae." Opening Brief at 31:16-21. To the contrary, the lack of any formal procedure manifests FHFA's firm and unwavering refusal to consent to such extinguishment of the property interests of the Enterprises. Indeed, FHFA has stated publicly that it has not consented and will never consent to the extinguishment of a property interest held by the Enterprises. *See* FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx.

As a matter of public policy, it would not make sense for FHFA to consent to the extinguishment of the Enterprises' property interests. First, as discussed above, in September 2008, FHFA placed the Enterprises into conservatorship, giving FHFA the express authority to "take such action as may be . . . necessary to put the [Enterprises] in a sound and solvent condition" and "appropriate to . . . preserve and conserve the assets and property of the [Enterprises]." 12 U.S.C. § 4617(b)(2)(D). With that mission, FHFA as Conservator is not required to consent to the extinguishment of a property interest held by Fannie Mae or Freddie Mac while receiving no consideration in return.

Second, one of Congress's ultimate objectives in enacting HERA and establishing FHFA was to facilitate the recovery of the country's economy and housing market while reducing taxpayer risk. *See* FHFA, Conservatorship,

http://www.fhfa.gov/Conservatorship. To consent to the uncompensated erasure of assets from the Enterprises' balance sheets would clearly interfere with FHFA's ability to protect the federal taxpayer and "foster liquid, efficient, competitive and resilient national housing finance markets." *Id*.

Finally, any interpretation that FHFA's inaction could imply consent to the extinguishment of Enterprise property would make the Federal Foreclosure Bar toothless unless FHFA were to continuously monitor each potential HOA Sale and any other potential action that could affect the Enterprises' property interests, including the millions of loans they own nationwide. HERA provides no support for the inference that Congress intended to condition the operation of the Federal Foreclosure Bar on such a burdensome procedure to the virtual exclusion of all of FHFA's other functions; to the contrary, its text makes clear that the protection is automatic and requires no such herculean efforts. *See Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133 (E.D.N.Y. 1997) (evaluating the FDIC's similar property protection statute and concluding Congress did not intend for the FDIC to make individual decisions for that protection to be effective).

III. FANNIE MAE HAS STANDING TO RAISE HERA

Finally, Saticoy Bay argues that only FHFA, which is not a party to this case, has standing to invoke the protection of the Federal Foreclosure Bar. *See* Opening Brief at 26:3-10. As Fannie Mae discusses in its answering brief, Fannie

Mae both has a property interest at issue in this case and the ability to raise a federal preemption argument to defend against Saticoy Bay's quiet title claim. *See* Respondent Br. at 31-35. FHFA agrees with these legal arguments.

There is also a strong policy rationale supporting Fannie Mae's ability to defend its interests during the conservatorship. Fannie Mae continues to exist as a private entity that can litigate in its own right during conservatorship. *See* Statement of Edward J. DeMarco, Acting Director, FHFA, Before the U.S. House of Representatives Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, Transparency, Transition and Taxpayer Protection: More Steps to End the GSE Bailout, at 8-9 (May 25, 2011), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66871/html/CHRG-112hhrg66871.htm ("Fannie Mae and Freddie Mac . . . are still private companies operating in conservatorship. They did not cease to be private legal entities when they were placed into conservatorship, nor did they become part of FHFA."). Accordingly, entities such as Saticoy Bay can and do file claims against Fannie Mae without also naming FHFA as a defendant.

FHFA has delegated authority to Fannie Mae to manage its day-to-day operations. *See* FHFA, History of Fannie Mae & Freddie Mac Conservatorships, http://www.fhfa.gov/Conservatorship/pages/history-of-fannie-mae--freddieconservatorships.aspx. Defending its legal interests, especially in cases

involving individual mortgage loans among the millions owned by Fannie Mae, is part of that delegation. One rationale for this delegation of the defense of legal interests in cases involving individual mortgage loans is that it conserves taxpayer dollars; it would be duplicative and wasteful for FHFA to intervene in every case nationwide where the Enterprises have been sued. FHFA has a few hundred employees—less than ten percent of Fannie Mae's total headcount—and these employees are charged with overseeing the regulation of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks, not just managing the conservatorships. Fannie Mae's much larger staff of thousands of employees has been managing litigation involving individual mortgage loans for years prior to the conservatorship, and thus is better placed to more efficiently defend Fannie Mae's interest in this and similar cases.

Furthermore, there is no question that FHFA endorses Fannie Mae's legal position in this case.[2] Not only has it filed this amicus brief, but FHFA has three times released statements that address the legal issues raised in this case and expressed its support for the positions Fannie Mae takes here. In December 2014 and April 2015, FHFA noted its concern that certain jurisdictions had interpreted

[2] *Cf. Fannie Mae v. Champion Homes Realty, LLC*, No. 3:13-CV-0893-G, 2014 WL 3855317, at *6 (N.D. Tex. Aug. 5, 2014) (rejecting challenge to Fannie Mae's standing to bring claims where FHFA's approval of the legal position was apparent).

state law to permit HOA foreclosure sales to extinguish first-priority liens. *See* FHFA, Statement of the Federal Housing Finance Agency on Certain Super-Priority Liens (Dec. 22, 2014), http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-the-Federal-Housing-Finance-Agency-on-Certain-Super-Priority-Liens.aspx; FHFA, Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx. To address these concerns, FHFA filed and intervened in federal cases along with Fannie Mae, raising the same arguments Fannie Mae has made in this case. *See id.* Then, in August 2015, FHFA stated that it endorsed the reliance by authorized loan servicers of the Enterprises on the Federal Foreclosure Bar to defend the Enterprises' property interests. *See* FHFA, Statement on Servicer Reliance on the Housing and Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations (Aug. 28 2015), http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance.pdf. Thus, FHFA confirmed that it did not need to be a party to the increasingly large number of related cases where the Enterprises and/or their servicers are named parties. This is one of those cases, where efficiency and conservation of taxpayer resources supports Fannie Mae's legal ability to raise the Federal Foreclosure Bar to protect its property interest.

CONCLUSION

For the foregoing reasons, FHFA supports Fannie Mae's request for affirmance of the trial court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on the 22nd day of June, 2016, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF RESPONDENT AND AFFIRMANCE,** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case. If electronic notice is not indicated through the court's e-filing system, then a true and correct paper copy of the foregoing document was delivered via U.S. Mail.

/s/ Shawna Braselton
An Employee of Fennemore Craig P.C.

ATTORNEY'S CERTIFICATE PURSUANT TO
NEVADA RULE OF APPELLATE PROCEDURE 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Times New Roman. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2,335 words. I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable NRAP, including NRAP 28 and NRAP 29, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the NRAP.

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