IN THE SUPREME COURT OF THE STATE OF NEVADA

FEDERAL NATIONAL MORTGAGE ASSOCIATION; AND GRANDBRIDGE REAL ESTATE CAPITAL LLC, Appellants, vs. WESTLAND LIBERTY VILLAGE, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND WESTLAND VILLAGE SQUARE, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No. 82174

APPEAL

From the Eighth Judicial District Court
The Honorable Kerry Earley and Mark Denton, District Court Judges
Case No. A-20-819412-C

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF APPELLANT FANNIE MAE AND REVERSAL OF DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Federal Housing Finance Agency ("FHFA") respectfully supports Appellant Fannie Mae in its appeal of the district court's order granting Appellees Westland Liberty Village, LLC and Westland Village Square, LLC's (together, "Defendants") motion for a preliminary injunction. The injunction purports to enjoin Fannie Mae and other "Enjoined Parties," including FHFA in its role as Conservator.

Fannie Mae is a federally chartered entity that Congress created to enhance the nation's housing-finance market. It owns millions of mortgages nationwide, including hundreds of thousands in Nevada. In 2008, Congress enacted the Housing and Economic Recovery Act ("HERA"), which established FHFA as an independent agency of the federal government and as Fannie Mae's regulator. *See* Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.). HERA vests FHFA's Director with the power to place Fannie Mae into conservatorship or receivership under statutorily defined circumstances, mandating that as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of an entity in conservatorship with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). As Conservator, FHFA has "expansive authority," including "to take control of [Fannie Mae]'s assets and operations, conduct business on its behalf, and transfer or sell any of its assets or liabilities." *Collins v. Yellen*, Nos. 19-422 & 19-563, ---

S.Ct. ---, 2021 WL 2557067, at *9 (June 23, 2021) (citing 12 U.S.C. § 4617(b)(2)(B)-(C), (G)). Congress also mandated 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). On September 6, 2008, FHFA's Director placed Fannie Mae into FHFA's conservatorship, where it remains today.

While this brief addresses FHFA's statutory powers as Conservator, FHFA submits the brief in its distinct capacity as regulator, i.e., as an agency of the United States.[1] In that capacity, FHFA has an interest in this case because if this Court were to affirm the district court's ruling, that decision would hamper FHFA in effectuating its regulatory powers to ensure that Fannie Mae is supporting the secondary mortgage market effectively and fulfilling its statutory mission. Under the Nevada Rules of Appellate Procedure, FHFA is permitted, as an agency of the United States, to file this amicus curiae brief without consent of the parties or leave of court, and without a corporate disclosure statement. NRAP 26.1, 29(a).

INTRODUCTION

This case arises out of a lawsuit by Fannie Mae seeking to appoint a receiver for two multifamily properties in which Defendants hold title and Fannie Mae

[1] When FHFA acts in its capacity as Conservator, as it did in this case, its actions are deemed non-governmental for many substantive purposes.

holds a security interest. The district court denied Fannie Mae's application for a receiver and granted Defendants' request for a preliminary injunction against Fannie Mae and other "Enjoined Parties," including FHFA. The injunction purports to prohibit foreclosure on Defendants' properties, certain loan-management tasks, and a variety of actions concerning not only Defendants' two properties but the properties, loans, or loan applications of "any Westland entity," not just those in Nevada and not just those that are parties to this action.

Under federal law, the injunction cannot stand. The Housing and Economic Recovery Act of 2008 ("HERA") created FHFA and authorized it to serve as Fannie Mae's Conservator. *See* 12 U.S.C. § 4511 *et seq*. FHFA's Director placed Fannie Mae into conservatorship in September 2008. Under HERA, FHFA as Conservator has the power to "operate" and "perform all functions of" Fannie Mae. 12 U.S.C. § 4617(b)(2)(B)(i). Congress also mandated 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, as the U.S. Supreme Court recently explained, under Section 4617(f) the Conservator's "business decisions are protected from judicial review." *Collins*, 2021 WL 2557067, at *17.

As this Court is aware from Federal Foreclosure Bar cases (12 U.S.C. § 4617(j)(3)), HERA's conservatorship protections extend to Fannie Mae while under FHFA's conservatorship because the Conservator has "succeed[ed]" to

Fannie Mae's interests and is empowered to "preserve and conserve" Fannie Mae's "assets and property." 12 U.S.C. § 4617(b)(2). Thus, Section 4617(f)—a preemptive *federal* law—bars the injunctive relief the district court purported to impose upon Fannie Mae and its Conservator here.

Accordingly, FHFA supports Fannie Mae in its appeal and request that the Court dissolve the injunction.

RELEVANT FACTS

I. Fannie Mae Under FHFA's Conservatorship

Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage market to enhance the equitable distribution of mortgage credit. *See* 12 U.S.C. § 1716; *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). HERA established FHFA as the primary regulatory and oversight authority of Fannie Mae and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, "the Enterprises").

In September 2008, FHFA's Director exercised statutory authority to place Fannie Mae and Freddie Mac into conservatorship, where they remain to this day. *See* 12 U.S.C. § 4617(a). As Conservator, FHFA succeeded to "all [of Fannie Mae's] rights, titles, powers, and privileges" regarding its property. *See* 12 U.S.C. § 4617(b)(2)(A)(i). FHFA has comprehensive authority as Conservator to "preserve and conserve the assets and property of [Fannie Mae]," *id*.

§ 4617(b)(2)(B)(iv); "collect all obligations and money due" Fannie Mae, *id.* § 4617(b)(2)(B)(ii); "take over the assets of and operate [Fannie Mae] with all the powers of the shareholders, the directors, and the officers," *id.* § 4617(b)(2)(B)(i); "conduct all business of [Fannie Mae]," *id.*; and "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," *id.* § 4617(b)(2)(B)(iii).

Congress precluded judicial constraint of the Conservator's statutory activities, mandating that "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator." 12 U.S.C. § 4617(f).

II. The Preliminary Injunction

On November 20, 2020, the district court entered Defendants' proposed written order for a preliminary injunction. The injunction covers not only plaintiff Fannie Mae, but also non-party "Enjoined Parties," including "persons exercising or having control over the affairs of Fannie Mae," which necessarily includes FHFA in its role as Conservator. APP1508 § 1. The injunction not only prohibits activities furthering foreclosure on Defendants' two Las Vegas properties, APP1508-10 §§ 1-3, 5(b)-(c), but also "adverse actions" with respect to the multi-state property portfolio held by not only Defendants but also other unnamed

"Westland Entities."[2] APP1508-11 §§ 4, 5(d)-(o).

ARGUMENT

Under Section 4617(f), "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). The U.S. Supreme Court very recently evaluated that provision and described it as "sharply circumscrib[ing] judicial review of any action that the FHFA takes as a conservator," leaving the Conservator's "business decisions … protected from judicial review." *Collins*, 2021 WL 2557067, at *9, *17. Accordingly, the *Collins* Court agreed with the appellate courts' uniform application of Section 4617(f) to bar injunctive relief when FHFA exercises its powers or functions as conservator. *Id.*; *see also Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 605 (D.C. Cir. 2017) (provision effects "a sweeping ouster of courts' power to grant equitable remedies" that interfere with the Conservator's powers or functions); *Robinson v. FHFA*, 876 F.3d 220, 227 (6th Cir. 2017) (Section 4617(f) "explicitly limits judicial review of claims that would hamper FHFA's conduct as a conservator."). Thus, Section 4617(f) precludes any court from ordering relief that

[2] That portfolio includes 12,000 units in 65 multifamily residential communities in Los Angeles and Las Vegas, 14 manufactured housing communities mostly in Southern California, and 1.4 million square feet of retail space in Southern California.

would constrain activities within FHFA's statutory powers and functions.

The district court's injunction purports to constrain the Conservator's exercise of its statutory powers and functions. As the U.S. Supreme Court observed in *Collins*, HERA "grants the FHFA expansive authority in its role as conservator." 2021 WL 255 7067, at *9. Specifically, under HERA the Conservator has broad authority to, among other things, "operate" Fannie Mae, to "perform all functions of [Fannie Mae] in the name of [Fannie Mae]," to "collect all obligations and money due" Fannie Mae, and take any action "appropriate to carry on the business of [Fannie Mae]." 12 U.S.C. §§ 4617(b)(2)(B), 4617(b)(2)(D). Congress also expressly provided that as Conservator FHFA possesses "all rights, titles, powers, and privileges of [Fannie Mae]." 12 U.S.C. § 4617(b)(2)(A). The loan-administration and default-resolution activities the injunction purports to restrain fall well within these statutory powers, thereby placing the injunction squarely into conflict with Section 4617(f), regardless of whether the injunction refers expressly to the Conservator.

Section 4617(f) is properly considered a jurisdictional provision. *Cnty. of Sonoma v. FHFA*, 710 F.3d 987, 990 (9th Cir. 2013) (under Section 4617(f), "courts have no jurisdiction" over claim for injunction); *Leon Cnty., Fla. v. FHFA*, 700 F.3d 1273, 1276 (11th Cir. 2012) (Section 4617(f) is a "jurisdictional bar"). But that label is immaterial to this appeal: Whatever term one might use to

describe Section 4617(f), the statute expressly and unequivocally bars injunctive relief that purports to constrain the Conservator's exercise of its statutory powers, regardless of the underlying cause of action. This is evident not just from HERA's plain text, but also from persuasive and analogous case law, including the Supreme Court's recent *Collins* decision.

I. Section 4617(f) Bars the Injunction, Which Interferes with the Conservator's Operation of Fannie Mae

Section 4617(f) bars relief that would "restrain or affect" the Conservator's exercise of its powers and functions. Because the Conservator exercises its powers and functions through Fannie Mae, Section 4617(f) bars injunctive relief that, like the injunction here, would constrain Fannie Mae's loan-administration and default-resolution activities.

A. Courts Apply Section 4617(f) to Bar Injunctions Against Enterprise Operations

Courts have held that Section 4617(f) bars injunctive relief against the Enterprises' business operations while under conservatorship. For example, several federal appellate courts have held that courts cannot enjoin the Enterprises from refusing to purchase a certain category of mortgages in accordance with FHFA's instruction. *See, e.g.*, *Sonoma*, 710 F.3d at 992-93; *Leon*, 700 F.3d at 1276. The Ninth Circuit held that "FHFA carries on th[e] business [of the

Enterprises] when it weighs the relative risks and benefits of purchasing classes of mortgages for investment." *Sonoma.*, 710 F.3d at 993. Accordingly, a district court could not enjoin "[a] decision not to buy assets that FHFA deems risky [because it] is within its conservator power to 'carry on' the Enterprises' business and to 'preserve and conserve the assets and property of the [Enterprises].'" *Id.* (citing 12 U.S.C. § 4617(b)(2)(D)(ii)). Similarly, the Eleventh Circuit affirmed dismissal of a complaint seeking injunctive relief "to prohibit the implementation of Fannie Mae and Freddie Mac's announced restriction" on purchasing certain mortgages because Section 4617(f) barred such relief. *Leon*, 700 F.3d at 1276.

Section 4617(f) also bars requests to enjoin or mandate activities of the Enterprises in conservatorship that concern individual properties. For example, a court determined that HERA barred equitable relief sought "in the form of an order directing Freddie Mac to sell" a particular foreclosed property to a particular entity under state law. *Suero v. Freddie Mac*, 123 F. Supp. 3d 162, 170 (D. Mass. 2015). In a related case, the court held that "the application of [Section 4617(f)] is not limited to instances in which the FHFA issues formal directives. Rather, by its own terms, it extends to any 'exercise of powers or functions of [FHFA] as a conservator.'" *Massachusetts v. FHFA*, 54 F. Supp. 3d 94, 99 (D. Mass. 2014) (quoting 12 U.S.C. § 4617(f)). In that case, too, the court held that it could not enjoin the restrictions Freddie Mac and Fannie Mae had announced concerning

property sales because those activities were part of the Conservator's exercise of its powers to operate the Enterprises and preserve and conserve their assets. *Id.*

Here, likewise, the district court ordered injunctive relief that would prohibit certain actions (and mandate others) by Fannie Mae and all the "Enjoined Parties"—including FHFA—as they relate to not only Defendants' two properties and two loans, but also to all properties and loans of all Westland entities unrelated to the underlying action, wherever those properties may be. Like the business practices at issue in *County of Sonoma*, *Suero*, and other cases, operations carried out by FHFA as Conservator are statutorily protected from injunctive relief such as that the district court purported to order.

B. The Analogous FDIC Statute Prevents Injunctions Against Actions of Entities Under FDIC's Conservatorship or Receivership

This Court should be guided also by cases applying the Federal Deposit Insurance Corporation's ("FDIC") similar anti-injunction provision, 12 U.S.C. § 1821(j), which appears in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[3] *See, e.g. Robinson*, 876 F.3d at 227 (holding that FDIC's statute is "nearly identical" to Section 4617(f) and "bar[s]

[3] "[N]o court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. § 1821(j).

claims for declaratory, injunctive, and other equitable relief against an agency acting within its statutory authority as conservator."); *Esther Sadowsky Testamentary Tr. v. Syron*, 639 F. Supp. 2d 347, 350-51 (S.D.N.Y. 2009) (holding that Section 4617(f) is an "anti-injunction clause" similar to FDIC's statute, which "has been found by several courts to constitute 'a sweeping ouster of courts' power to grant equitable remedies.").

Courts interpreting FDIC's statute have applied it to bar relief in cases where parties have sought to enjoin the actions of entities under FDIC's conservatorships and receiverships. For example, relying on its anti-injunction statute, FDIC successfully intervened and sought an emergency appeal to dissolve a preliminary injunction Bank of America had secured against Colonial Bank concerning certain loans in *Bank of Am. Nat. Ass'n v. Colonial Bank*, 604 F.3d 1239 (11th Cir. 2010). The court held that "controlling and disposing of the loans and loan proceeds … fall squarely within the powers and functions granted to the FDIC by Congress." *Id*. at 1243. Accordingly, the court vacated the order enjoining the Colonial Bank from "selling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of the loans and loan proceeds," reasoning that it would "restrain or affect" the powers of FDIC. *Id.* at 1244.

FDIC's anti-injunction statute bars injunctions that would otherwise stop or mandate the kinds of activities addressed by the injunction here. As one court

reasoned in rejecting a proposed injunction to stop a foreclosure:

> FDIC succeeds to the rights of the Bank under [FIRREA]. Therefore, the FDIC has whatever power the Bank would have had regarding [plaintiff's] promissory notes. Thus, because [plaintiff] has defaulted, the FDIC has the power to take action against [plaintiff] on the basis of the notes, and enjoining the FDIC from doing so would violate section 1821(j) by restraining the FDIC in the exercise of such power.

Vegas Diamond Props., LLC v. La Jolla Bank, FSB, No. 10-cv-1205-WQH-BGS, 2010 WL 4606461, at *5-6 (S.D. Cal. Oct. 29, 2010); *see also Zarate v. Amtrust Bank*, No. 2:13-CV-0659 KJM, 2013 WL 5934316, at *4 (E.D. Cal. Nov. 1, 2013) (Section 1821(j) barred an injunction concerning foreclosure activity). The statute also prevents injunctions mandating that an institution provide financing. *See, e.g.*, *Barrows v. Resol. Tr. Corp.*, 39 F.3d 1166 (1st Cir. 1994) (court lacked jurisdiction to enforce settlement agreement under which institution agreed to extend loan).

Moreover, courts routinely bar claims for injunctive relief concerning the activities of a financial institution under conservatorship protection, even when they nominally sought to enjoin only the institution itself, because the anti-injunction statute "deprives the court of jurisdiction to enter orders against third parties 'where the result is such that the relief restrain[s] or affect[s] the exercise of powers or functions of the [FDIC] as a conservator or a receiver.'" *New Century Bank v. Open Sols., Inc.*, No. CIV.A. 10-6537, 2011 WL 3497279, at *4 (E.D. Pa.

Aug. 8, 2011) (internal citations omitted); *see also Colonial Bank*, 604 F.3d 1239; *Vegas Diamond*, 2010 WL 4606461, at *5-6. Courts often cite *Furgatch v. Resolution Trust Corp.*, Civ. No. 93-20304 SW, 1993 WL 149084 (N.D. Cal. Apr. 30, 1993), to illustrate the point. There, a borrower sought to enjoin a bank in RTC conservatorship from foreclosing on a loan; the borrower "contend[ed] that section 1821(j) [wa]s inapplicable … because he [wa]s attempting to enjoin [the bank] and the trustee who is conducting the sale, not RTC." The court rejected that argument and held that § 1821(j) barred the injunction, explaining that "enjoining these parties indirectly enjoins RTC, which a district court has no power to do." *Id*. at *2.

Indeed, courts routinely recognize that the FDIC's anti-injunction provision bars injunctive relief against parties *other than* the FDIC or the bank in conservatorship or receivership, if the relief would restrain or affect the FDIC's powers and functions as receiver or conservator. *See, e.g.*, *Dittmer Props., L.P. v. FDIC*, 708 F.3d 1011, 1016-17 (8th Cir. 2013) (Section 1821(j) barred injunction precluding purchaser of note from FDIC receiver from liquidating collateral property); *Hindes v. FDIC*, 137 F.3d 148, 160 (3d Cir. 1998) (holding that Section1821(j) barred injunctive relief against state officer who placed bank into FDIC receivership; "an action can 'affect' the exercise of powers by an agency without being aimed directly at [the agency]").

And, of course, under the Supremacy Clause, the limitations of Section 4617(f) and analogous provisions apply to state and federal courts alike. As a Kansas state court held, "federal law deprives this court of jurisdiction" to order an FDIC receiver to rescind a sale of foreclosed property. *Security Sav. Bank v. Home Resort Inc.*, No. 103,131 2011 WL 2175933 (Kan. Ct. App. 2011); *see also Bobick v. Cmty. & Southern Bank*, 743 S.E.2d 518, 530 n.7 (Ga. Ct. App. 2013) (similar); *Stearns Bank, N.A. v. Burnes-Leverenz*, No. A11-1868, 2012 WL 3023405 at *6 (Minn. Ct. App. July 23, 2012) (similar).

C. This Court Has Already Applied Similar Protective, Preemptive Provisions of HERA to the Enterprises

This Court should be guided also by its own precedent acknowledging that HERA "empowers the FHFA to 'take such action' as it deems necessary to carry on the business of [the Enterprises]. The phrase 'such action' is broad." *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 250 (2017). In addition, the Court has repeatedly acknowledged that FHFA's conservator powers include operation of the Enterprises. *E.g.*, *id.*; *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 134 Nev. 270, 272 (2018).

Given the extent of these powers, the Court held that during conservatorship, Enterprise assets are protected from involuntary extinguishment by the preemptive effect of the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), which by its terms

"applies 'with respect to the [FHFA] in any case in which the [FHFA] is acting as a conservator or a receiver."' *Christine View*, 134 Nev. at 272 (quoting 12 U.S.C. § 4617(j)(1)). In the same vein, the Court held that the statute of limitations provision in HERA that extends the period for "any action brought by the Agency as conservator or receiver" governs claims brought by the Enterprises concerning the Federal Foreclosure Bar. *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, 476 P.3d 436 (Nev. 2020) (holding 12 U.S.C. § 4617(b)(12) would apply if argument raised by Fannie Mae and its servicer was subject to a statute of limitations).

The same analysis applies here. The language of Section 4617(f) and the extent of FHFA's powers as acknowledged already by this Court confirm that the protection from injunctive relief preempts state law and encompasses the operations of Fannie Mae while in conservatorship, just as the Federal Foreclosure Bar protects Fannie Mae's assets from involuntary extinguishment while under conservatorship.

II. The Injunction Impermissibly Seeks to Restrain the Conservator's Statutory Powers

As Conservator, FHFA has the power and responsibility to manage risks concerning Fannie Mae's business, and to direct decisions on how and when to pursue lending and loss-mitigation activities. Such action falls squarely within its

broad statutory authority to carry on and operate Fannie Mae's business, to collect on obligations due Fannie Mae, and to preserve and conserve Fannie Mae's assets. *See* 12 U.S.C. § 4617(b)(2)(B)(i), (iv). Thus, any judicially imposed constraint on the business judgments of "persons exercising or having control over the affairs of Fannie Mae," APP1508 § 1—such as the constraints the district court imposed on judgments about how best to administer and collect on the loans at issue—violates Section 4617(f) on its face, and must be dissolved as void.

The Eighth Circuit's decision in *Tri-State Hotels, Inc. v. FDIC.*, 79 F.3d 707 (8th Cir. 1996) illustrates the point. There, a borrower sought to rescind a loan agreement shortly before the FDIC placed the bank into receivership. Once the receivership was in place, the Eighth Circuit held that "[b]ecause FIRREA grants the FDIC the power to 'collect all obligations and money due the institution,' 12 U.S.C. § 1821(d)(2)(B)(ii), rescinding the agreements would act as an impermissible restraint on the ability of the FDIC to exercise its powers as receiver" even if the bank had breached the agreements and rescission would therefore have been an available remedy but for the receivership. *Id*. at 715. The First Circuit's decision in *Telematics Intern., Inc. v. NEMLC Leasing Corp.*, 967 F.2d 703 (1st Cir. 1992) is to the same effect. There, the plaintiff sought to enjoin FDIC as receiver from foreclosing on an asset the plaintiff had pledged as collateral. The First Circuit explained that "[a]llowing Telematics to enjoin the

FDIC would clearly restrain or affect the FDIC in the exercise of its powers as receiver to collect moneys due and to realize upon the assets of [the bank]." *Id*. at 705-06. This case is no different.

Here, the injunction would not pass muster even if it purported to restrain only Fannie Mae, not other "Enjoined Parties" including FHFA. Each provision seeks to limit the loan management operations of an entity under federal conservatorship. Because the Conservator automatically steps into the shoes of Fannie Mae, 12 U.S.C. § 4617(b)(2)(B)(i), (iii), the injunction would still violate Section 4617(f). Preventing Fannie Mae from taking the actions set forth in the injunction would constrain the Conservator's power to not just operate Fannie Mae, but also to "collect all obligations" due to Fannie Mae, "preserve and conserve" its assets, and "take any action in the best interests" of Fannie Mae. 12 U.S.C. §§ 4617(b)(2)(B)(i)-(iv), 4617(b)(2)(J)(ii); *see* APP1508-11.

III. Section 4617(f) Applies in Contract Cases

Defendants may argue, as they have in the parallel original proceeding in which FHFA petitioned for a writ of prohibition, that Section 4617(f) does not apply where the Conservator or the entity in conservatorship supposedly has acted or would act in breach of a contractual obligation. There has not been any finding that Fannie Mae has breached any contract. But this argument would fail in any event.

As an initial matter, it is irrelevant if Fannie Mae breached a contract because any contracting party has the power to decide whether to perform or to default and thereby incur liability for damages. As a matter of hornbook law, "[v]irtually *every* contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *United States v. Winstar Corp.*, 518 U.S. 839, 919 (1996) (Scalia, J., concurring); *see Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669, 682 (Cal. 1995) (quoting Justice Holmes: the "duty to keep a contract at common law means a predication that you must pay damages if you do not keep it—and nothing else").

That principle applies here. FHFA as Conservator has the statutory power to "operate" Fannie Mae and to "preserve and conserve" Fannie Mae's assets. *See* 12 U.S.C. § 4617(b)(2)(D); *Collins*, 2021 WL 2557067, at *9 (FHFA has "expansive authority in its role as a conservator," including the ability "to take control of the [Enterprises'] assets and operations, conduct business on [their] behalf, and transfer or sell any of [their] assets or liabilities"). Therefore, any potential breach within the scope of the conservatorship powers would not negate Section 4617(f)'s statutory prohibition on enjoining the Conservator in the exercise of its powers. *See id.* at *9, *18 (holding that Section 4617(f) applies whenever FHFA acts within scope of its conservatorship powers and noting that the Conservator's "business decisions are protected from judicial review"). If the Conservator's business

decision caused a breach of Westland's contractual rights, then Westland's remedy is limited to damages consistent with the terms of the contract; prohibition of injunctive relief is not a damage remedy available to Westland, or to any contract party, merely upon an unproved allegation of a breach.

Federal appellate decisions applying the substantively identical provision in § 1821(j) confirm the point. For example, in *Volges v. RTC*, the court rejected the notion of an "implicit limitation" in § 1821(j) "that would give courts equitable jurisdiction to compel the RTC to honor a third party's rights as against RTC under state contract law." 32 F.3d 50, 52 (2d Cir. 1994). The proposed sale of the mortgages at issue fell under RTC's powers and functions as a receiver, and "[t]he fact that the sale might violate [plaintiff's] state law contract rights does not alter the calculus … [and] render [§ 1821(j)] inapplicable." *Id.* (citing similar holdings from other circuits). The district court therefore "did not have jurisdiction to enjoin the RTC from carrying out the planned disposition regardless of [plaintiff's] ultimate chance of success on his contract claim." *Id.* at 53.

Similarly, in *RPM Invs. Inc. v. RTC*, the court held that ordering specific performance of a contract would impermissibly "restrain or affect" the RTC in exercise of its statutory powers, explaining that "allegations that the RTC breached a contract does not affect our holding." 75 F.3d 618, 621 (11th Cir. 1996). And in *Gross v. Bell Sav. Bank PaSA*, the court held that "RTC was acting within its

legitimate authority in withholding [plaintiffs'] deposits" and therefore injunctive relief under § 1821(j) would be "inappropriate." 974 F.2d 403, 408 (3d Cir. 1992).

As the federal court for the District of Colorado, relying on many of those same cases, explained in denying a motion to enjoin an FDIC receiver from selling a property in alleged breach of a contract:

> [T]he Court does not agree with Plaintiff that this Court has jurisdiction to enjoin the sale … on the basis that allowing the sale to go forward would be a breach of contract. … Rather, the Court finds that, regardless of whether the sale would breach any contract, such breach is immaterial to the Court's analysis of whether it has jurisdiction to enjoin the sale. … Because the Court cannot take any action that restrains the FDIC from executing its powers as receiver, it cannot grant … the injunctive relief requested.

Mile High Banks v. FDIC No. 11-cv-01417-WJM-MJW, 2011 WL 2174004 (D. Colo., June 2, 2011) at *4.

The situation here is no different from these RTC and FDIC rulings. Indeed, those cases reinforce the point that Section 4617(f) applies without regard to the specific cause of action at issue, unless FHFA is acting outside the bounds of its authority. *See also Collins*, 2021 WL 2557067, at *9 ("agree[ing] with th[e] consensus" that Section 4617(f) "prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator, but that relief is allowed if the FHFA exceeded that authority").

As in the writ proceeding, Defendants may argue that *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), supports their contention that Section 4617(f) does not apply to contract claims. But *Sharpe* is a fact-specific decision that has not been and should not be read as establishing any such rule. Indeed, the Ninth Circuit has expressly held that "*Sharpe* was limited to its particular facts." *Deutsche Bank Nat'l Trust Co. v. FDIC*, 744 F.3d 1124, 1137 (9th Cir. 2014).

Sharpe stands only for the limited proposition that *receivership-specific* provisions of the corresponding FDIC statute "do[] not preempt state law so as to abrogate state law contract rights." *Sharpe*, 126 F.3d at 1155. That point was germane in *Sharpe* because there, the FDIC as receiver sought to avoid liability for full expectancy damages—the amount the bank in receivership had promised to pay under a settlement agreement the plaintiffs had fully performed. Specifically, although the agreement specified that the bank would pay plaintiffs $510,000 and the bank had tendered cashiers' checks in that amount just before being placed into receivership, the receiver stopped payment. It then construed the obligation as a "claim" subject to a receivership-specific administrative claims process, and "allowed" only $480,000—mostly in the form of a "receiver's certificate" that did not guarantee full payment. *Id*. at 1151. The Ninth Circuit reasoned that the "FDIC forced the Sharpes into the administrative claims process through which the Sharpes have received what might be construed as a partial damages award," and held that

under those circumstances, "aggrieved parties to a contract breached by the FDIC [as receiver] are not subject to the FIRREA [administrative] claims process." *Id*. at 1154, 1157.[4] *See also id*. at 1156 (FDIC is not "free to breach any pre-receivership contract, keep the benefit of the bargain, and then escape the consequences by hiding behind the [administrative] claims process").

Other courts have flatly rejected *Sharpe*'s analysis, suggesting that they would apply Section 1821(j) even on *Sharpe*'s unusual facts. *E.g.*, *LNV Corp. v. Outsource Services Mgmt., LLC*, 869 F.3d 662, 668 (8th Cir. 2017) (declining to follow *Sharpe* as "unpersuasive"). And the recent *Collins* decision lends considerable support to that view. 2021 WL 2557067 at *11 ("It is not necessary for us to decide—and we do not decide—whether the FHFA made the best, or even a particularly good, business decision" for Section 4617(f) to apply).

But in any event, this case is so different from *Sharpe* as to leave *Sharpe* completely beside the point. There is no allegation or plausible suggestion in this case that FHFA is seeking to "abrogate state law contract rights," to limit the availability of full expectancy damages, or to force Defendants to present their counterclaim administratively rather than to this Court. Nor could there be: Because

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[4] Given the circumstances, it is no wonder that the Ninth Circuit and federal district courts within it have often distinguished *Sharpe* on various grounds, noting that it is an "unusual" case. *E.g.*, *McCarthy v. FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003); *Delino v. Platinum Cmty. Bank*, No. 09-cv-00288-H(ABJ), 2010 WL 11508574 (S.D. Cal. June 9, 2010).

there is no receivership in place, the FHFA administrative claims process analogous to the process at issue in *Sharpe* is not at issue, and is therefore completely irrelevant here. *See* 12 U.S.C. §§ 1821(d)(3)-(5), 4617(b)(3)-(5) (conferring power on FDIC and FHFA receivers, but not conservators, to "determine claims"). Thus, even if Westland were able to establish a breach and the other elements of contract liability, HERA does not authorize the Conservator to "force[]" Westland "into [any] administrative claims process through which [Westland could] receive[] what might be construed as a partial damages award," and Section 4617(f) would not bar a fully compensatory monetary judgment against Fannie Mae under Nevada contract law.[5]

As the Ninth Circuit has explained, *Sharpe* "is not controlling outside of its limited context," and stands only for the proposition that "the FDIC may not breach a contract and then compel the other party to the contract to accept a receiver's certificate, as the result of the FDIC's claims process, rather than the 'benefit of the bargain' provided for in the contract itself." *Meritage Homes of Nevada, Inc. v. FDIC*, 753 F.3d 819, 825 (9th Cir. 2014) (citations omitted).[6] As this case does not

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[5] A different HERA provision bars punitive damages. 12 U.S.C. 4617(j)(4). But Nevada does not allow such awards on claims grounded in contract anyway. *S.J. Amoroso Const. Co. v. Lazovich and Lazovich*, 107 Nev. 294, 298 (1991) ("Punitive damages are not available on the count for breach of contract"); *Sprouse v. Wentz*, 106 Nev. 597, 604 (1989) ("punitive damages must be based on an underlying cause of action not based on a contract theory") (citations omitted).

[6] *Bank of Manhattan, N.A. v. FDIC* likewise notes that *Sharpe* "does not permit the FDIC to *breach pre-receivership contracts without consequence*," does not

Footnote continued on next page

involve a receivership—let alone a pre-receivership contract or any attempt to use an administrative claims process to escape the consequences of a purported breach—*Sharpe* has no application here.

IV. Applying Section 4617(f) Will Advance Federal Policy Goals and Will Not Interfere with Any Nevada State Policy

Applying Section 4617(f) here to bar the injunctive relief demanded by Defendants will advance the important policy goals of Congress in passing HERA. HERA provides the Conservator with a variety of powers that, combined with Section 4617(f), ensures that the Conservator enjoys broad "managerial judgment" to make "hard operational calls" about "the necessity and fiscal wisdom" of particular measures, especially in light of "ever-changing market conditions." *Perry Capital*, 864 F.3d at 607-608, 613. Such discretion makes sense; by definition, conservators are appointed only in challenging circumstances—here, an entity critical to the national economy was saved from insolvency by the infusion of billions of taxpayer dollars. A conservator must make difficult choices, and its role would be unworkable if conservators could be hauled into court and forced to stop their activity every time an affected party questions a conservator's decision.

"authorize[] the *unrestrained* breach of contract," and "does not permit the FDIC to *avoid liability for the breach of pre-receivership contracts*." 778 F.3d 1133, 1137 (9th Cir. 2015) (emphases added).

Section 4617(f) embodies Congress's policy judgment that enabling conservators to focus on the work Congress empowered them to do, without being constrained by injunctive relief of the sort the district court ordered, is paramount and preserves the most important public mission of Fannie Mae and the Agency to benefit of the American public.

The First Circuit's decision in *Telematics*, a decision concerning section 1821(j), succinctly provides additional practical analysis of these statutes' policy underpinnings:

> Allowing Telematics to enjoin the FDIC would clearly restrain or affect the FDIC in the exercise of its powers as receiver …. If such an injunction were permissible, creditors would be able to secure judicial review, in advance, of every action that the FDIC proposed to take, regardless of whether that action was clearly within the FDIC's statutory authority. Such judicial interference would dramatically limit the FDIC's ability to exercise its statutory powers efficiently and effectively.

967 F.2d at 705-06. *See also Hindes*, 137 F.3d at 160 (Congress "intended [section 1821(j)] to permit the FDIC to perform its duties as conservator or receiver promptly and effectively without judicial interference.").

Indeed, as the U.S. Supreme Court recently recognized, Congress intended the discretion accorded FHFA to be particularly broad. *See Collins*, 2021 WL 2557067, at *9, *16. Accordingly, Congress deemed it wise to ensure that the Conservator's operation of the Enterprises could be flexible, innovative, and responsive to changes

in a dynamic and nationally vital sector of the economy, by keeping it free from judicial restraint. HERA provides that the role of a court is not to evaluate whether the Conservator is making "the best, or even a particularly good, business decision." *Id.* at 11. Rather, it need only determine if actions would fall within FHFA's authority as conservator; if so, Section 4617(f) bars injunctive relief. *See id.*

On the other hand, Congress did *not* determine that parties aggrieved by an exercise of Conservator power lack any recourse. Such parties, including Defendants here—*if* they are able to prove a breach of contract—can be compensated by money damages. Thus, a ruling in Fannie Mae's favor does not require the Court to find that HERA preempts Nevada contract law, as fully compensatory damages remain available. *See Hindes*, 137 F.3d at 161 (section 1821(j) "does not deny appellants a judicial remedy for an appropriate damages claim."). Indeed, disputes about investment properties are generally limited to monetary damages in any event. *See, e.g.*, *Field v. Genova Capital, Inc.*, No. 2:20-cv-09563-ODW-(JCx), 2020 WL 6161450, at *3 (C.D. Cal. Oct. 21, 2020) ("where … property that is the subject of the foreclosure is not the moving party's primary residence, and merely a rental property, courts have held there is no irreparable injury); *In re Richmond*, No. 14-41678 (CEC), 2014 WL 5100705 at *4 (Bankr. E.D.N.Y. Oct. 10, 2014) ("Absent special circumstances, the sale of commercial property does not create an irreparable harm, since any harm due to the sale of the

property or interference with the business can be remedied with monetary damages.") (internal quotations omitted). That will remain true for Defendants even if this Court holds that their request for injunctive relief is barred by Section 4617(f).

CONCLUSION

For the reasons stated above, FHFA supports Fannie Mae's request that the Court dissolve the injunction and remand this case for further proceedings.

Dated this 29th day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to NEFCR 9(b)(d)(e), I certify that on June 29, 2021, a true and correct copy of the **BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF APPELLANT FANNIE MAE AND REVERSAL OF DISTRICT COURT'S PRELIMINARY INJUNCTION ORDER,** was transmitted electronically through the Court's e-filing system to the attorney(s) associated with this case.

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

1. 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any

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Dated: June 29, 2021.

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By: */s/ Leslie Bryan Hart*
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