Nos. 23-CV-492 & 23-CV-669

DISTRICT OF COLUMBIA COURT OF APPEALS

Sarah Staab,

Appellant,

v.

Wells Fargo Bank, N.A.,

Appellee.

On Appeal from a Final Judgment of the
Superior Court of the District of Columbia, Civil Division
Case No. 2015-CA-004100-(R)(RP), Judge Maurice A. Ross

BRIEF OF AMICUS CURIAE FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR AND REGULATOR OF THE FEDERAL NATIONAL MORTGAGE ASSOCIATION IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Amicus curiae the Federal Housing Finance Agency ("FHFA") respectfully submits this brief in support of Plaintiff-Appellee Wells Fargo Bank, N.A. ("Wells Fargo") in the above-referenced appeal. This action affects FHFA's interests as Conservator and regulator of the Federal National Mortgage Association ("Fannie Mae") and its sister corporation the Federal Home Loan Corporation ("Freddie Mac," and together with Fannie Mae, "Enterprises").

The Enterprises are federally chartered entities that Congress created to enhance the nation's housing-finance market. They own millions of mortgages nationwide, including in the District of Columbia. In 2008, Congress enacted the Housing and Economic Recovery Act of 2008 ("HERA"), which established FHFA as an independent agency of the federal government and as the Enterprises' regulator. *See* Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4511 *et seq.*). HERA vests FHFA with the power to place the Enterprises into conservatorship or receivership in statutorily defined circumstances, mandating that as Conservator, FHFA succeeds to all "rights, titles, powers, and privileges" of a conservatorship entity with respect to its assets. 12 U.S.C. § 4617(b)(2)(A). On September 6, 2008, FHFA's then-Director placed the Enterprises into FHFA's conservatorship, where they remain today.

FHFA has an interest in this case because the first lien on the subject property ("Property") secures a defaulted mortgage loan owned by Fannie Mae, and the Enterprises have deeds of trust that could be impacted by this Court's ruling. A failure to affirm the Superior Court may hamper FHFA in effectuating its regulatory powers to ensure that those entities are (1) supporting the secondary mortgage market effectively, (2) fulfilling their statutory missions, including affordable home ownership for low and moderate income households, and (3) operating in safe and sound condition.

As an agency of the United States, FHFA is permitted to file this brief without leave of court. *See* D.C. Court of Appeals R. 29(a)(2).[1]

SUMMARY OF ARGUMENT

This lawsuit concerns the proper interpretation and application of statutory powers and protections Congress granted exclusively to FHFA as Conservator under HERA. Specifically, this case involves FHFA's powers to collect obligations due the Enterprises and to preserve and conserve the Enterprises' assets while in conservatorship. *See* 12 U.S.C. § 4617(b)(2)(B). HERA protects those powers by, among other things, mandating that while an Enterprise is in FHFA's conservatorship, its "property," including lien interests, is not "subject to …

[1] Per D.C. Court of Appeals R. 29(a)(8), an *amicus curiae* may participate in oral argument only with the court's permission. FHFA is still assessing whether to request leave to participate in oral argument.

foreclosure or sale" without FHFA's consent, nor shall any involuntary lien attach to that property. 12 U.S.C. § 4617(j)(3) ("Federal Foreclosure Bar").

In this case, Fannie Mae owned (and continues to own) a deed of trust ("Deed of Trust") encumbering the Property at the time of the condominium association foreclosure sale ("COA Sale") of the Property. Because FHFA never consented to the extinguishment of Fannie Mae's interest in the Property, the Federal Foreclosure Bar automatically operates to void the COA Sale and protect the Deed of Trust—a conservatorship asset—from extinguishment through the COA Sale.

The Superior Court recognized this interplay between the Federal Foreclosure Bar and the COA Sale and correctly ruled in favor of Wells Fargo. Specifically, it held, *inter alia*, that (1) the Federal Foreclosure Bar preempted D.C. law that would otherwise permit foreclosure on the Property and extinguishment of Fannie Mae's security interest, and (2) the COA Sale was therefore void as a matter of law. *See* JA507; JA509.

On appeal, Ms. Staab does not contest the Superior Court's merits holding, but instead takes issue with three preliminary, and largely procedural, rulings. Specifically, Ms. Staab contends that (1) the Superior Court abused its discretion in granting leave to amend the complaint, (2) the amended claims were untimely, and (3) the condominium association ("COA") was an indispensable party. *See* Staab

Br. at 12–22. FHFA agrees with Wells Fargo's positions in its appellee brief against these arguments.

To assist the Court in interpreting HERA, FHFA submits this brief to address certain contentions in Ms. Staab's brief and make five key points. *First*, HERA grants FHFA broad powers to preserve and conserve the Enterprises assets and protects Conservatorship property from being subject to foreclosure or sale without FHFA's consent. *See* 12 U.S.C. §§ 4617(b)(2)(B), (j)(3). Ms. Staab's argument that the March 14, 2012 Fannie Mae Single Family Servicing Guide ("Guide") weighs against the Superior Court's decision to grant leave to amend presents a meritless distraction from those broad powers that Congress granted FHFA. *Second*, HERA's statute of limitations period applies to Wells Fargo as Fannie Mae's loan servicer, as Wells Fargo is fully authorized to represent the interests of FHFA and Fannie Mae in this case. This is consistent with Congress's purpose in enacting HERA to protect FHFA conservatorships and simplify their administration. *Third*, Ms. Staab was on notice of Fannie Mae's lien on the Property, but even if she was not, it was advertised that the COA Sale would not extinguish the Deed of Trust in any event. *Fourth*, the Federal Foreclosure Bar voids the COA Sale regardless of whether the COA is party to the case. *Fifth*, the above points and Wells Fargo's overall position are all supported by sound policy arguments, which reflect the public policy goals Congress enshrined in HERA.

ARGUMENT

I. Ms. Staab's Arguments Do Not Impede HERA's Broad Application

A. The Guide Does Not Impact the Superior Court's Decision to Grant Wells Fargo Leave to Amend

The Superior Court properly exercised its discretion and found good cause to grant Wells Fargo leave to amend. *See* WF Br. at 12–21; JA213. In the Superior Court, Ms. Staab unsuccessfully tried to argue that provisions of the Guide negated the Federal Foreclosure Bar's effect. *See, e.g.,* JA410. She now argues that Wells Fargo's purported failure to adhere to the terms of its servicing agreement with Fannie Mae weighs against the Superior Court's decision to grant Wells Fargo leave to amend. *See* Staab Br. at 9–11, 18–19. Specifically, she asserts that Wells Fargo acted in "bad faith" or engaged in "dilatory conduct" because "[Wells Fargo] made no effort to pay the assessments owed in order to preserve Fannie Mae's mortgage on the Property or to prevent the foreclosure sale." *Id.* at 18. This, argues Ms. Staab, "was a breach by [Wells Fargo] of its contractual duty to Fannie Mae as reflected in the Servicing Guide," and therefore, she asserts, Wells Fargo's failure to pay delinquent condominium assessments resulted in the COA Sale and this litigation. *See id.* at 10, 19.

Ms. Staab misinterprets the Guide, and her argument—that Wells Fargo's failure to pay taxes or assessments equates to the presence of bad faith for purposes of requesting leave to amend—is wrong and contrary to the Federal Foreclosure

Bar's broad application. *First*, the provision pertaining to payment of special assessments where "necessary to protect the priority of Fannie Mae's lien" is inapplicable because the Federal Foreclosure Bar already protected Fannie Mae's interest here. *See* Staab Br. at 11. Thus, Wells Fargo did not "breach" any provision of the Guide or act in bad faith in moving to amend. *Second*, the Guide is a contract, and a contract cannot supersede federal law. *Third*, Ms. Staab lacks standing to enforce or rely on the Guide.

1. The Federal Foreclosure Bar's Application Does Not Depend on Whether Wells Fargo Paid the Assessments

The Guide does not require that servicers pay every special assessment. Instead, it explains that "generally," where a borrower fails to pay special assessments, "the servicer must advance its own funds to pay them *if that is necessary to protect the priority of Fannie Mae's lien*." *See* JA351; Staab Br. at 9 (emphasis added). Here, however, the Guide did not oblige Wells Fargo to pay the assessments—such payment was not necessary as a matter of federal law to protect the priority of Fannie Mae's lien. The Federal Foreclosure Bar, enacted in 2008, *already* provided such protection regardless of the Guide. Thus, when Ms. Staab suggests that servicers like Wells Fargo are "contractually obligated to pay both real estate taxes and condominium assessments on the Property under the terms of its servicing agreement with Fannie Mae," *see* Staab Br. at 9, she is wrong, where the

clear terms of the Federal Foreclosure Bar apply automatically and the lien was not otherwise in jeopardy.

At all relevant times Wells Fargo serviced the Loan on behalf of Fannie Mae who was (and is) in FHFA conservatorship. Upon inception of the conservatorship in 2008, FHFA immediately "succeed[ed] to all rights, titles, powers, and privileges" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(a). In so doing, all property interests of Fannie Mae became property interests of FHFA protected by the Federal Foreclosure Bar.

As the Ninth Circuit, Nevada Supreme Court, and federal district courts (including the U.S. District Court for the District of Columbia) have confirmed, "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." *See Skylights LLC v. Byron*, 112 F. Supp 3d 1145, 1155 (D. Nev. 2015) (collecting cases); *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363, 367 (Nev. 2018); *Fed. Home Loan Mortg. Corp. v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1149 (9th Cir. 2018) (explaining that under 12 U.S.C. § 4617(j)(3), "the bar on foreclosure sales lacking FHFA's consents applies by default.") (citing *Berezovsky v. Moniz*, 869 F.3d 923, 929 (9th Cir. 2017) ("The Federal Foreclosure Bar does not require the Agency to actively resist foreclosure…. Rather, the statutory language cloaks Agency property with Congressional

protection unless or until the Agency affirmatively relinquishes it."); *see also M&T Bank v. Brown*, No. CV 19-578 (JMC), 2022 WL 7003740, at *2 (D.D.C. Oct. 12, 2022). Thus, in this case, the Federal Foreclosure Bar preempts D.C. Code § 42-1903.13 and requires that none of Fannie Mae's property while in conservatorship, including its property interests, "shall be subject to ... foreclosure or sale" absent FHFA's affirmative consent. 12 U.S.C. § 4617(j)(3).

As FHFA did not consent to the foreclosure sale of the Property, the Federal Foreclosure Bar automatically and unconditionally applied to protect Fannie Mae's (and its Conservator's) federally-protected interest in the Property without further action by Wells Fargo. Accordingly, Ms. Staab's reliance on the Guide is misplaced and without legal relevance.

The Federal Foreclosure Bar does not render the Guide provisions superfluous, but instead, it makes portions of the provisions inapplicable where, as here, HERA preempts the need for them. The Guide describes the servicers' relationship with Fannie Mae over the mortgage loan life cycle, and it remains in effect regardless of Fannie Mae's conservatorship status. Thus, the Guide must be, and has been, written to apply outside of conservatorship as well as within conservatorship. Outside of conservatorship, further action may have been necessary by a servicer in Wells Fargo's position, but here, within conservatorship, the Federal Foreclosure Bar provides absolute legal backstop protection that

preserves Fannie Mae's interest with no additional servicer action necessary. This is important to FHFA because as explained in Section II *infra*, this comports with Congress's intent in enacting such broad relief under HERA; the law does not provide carveouts for private contractual arrangements.

2. The Guide Cannot Supersede Federal Law

Relatedly, the broad and automatic protection of the Federal Foreclosure Bar explicitly mandates that "[n]o property of the Agency shall be subject to ... foreclosure or sale without the consent of the Agency, nor shall any involuntary lien attach the property of the Agency," full stop. 12 U.S.C. § 4617(j)(3). Any carve-outs would undermine the Federal Foreclosure Bar's broad and automatic protection by effectively imposing a contractual provision that the Federal Foreclosure Bar prohibits. The Guide does not—and cannot—supersede federal law. The Federal Foreclosure Bar's protection does *not* depend on whether Wells Fargo performed its contractual obligations under the Guide, whether Wells Fargo opposed or objected to a foreclosure, or whether Fannie Mae has a claim against the Bank for breach of contract. *See Nationstar Mortg. LLC v. Rainbow Bend Homeowners Ass'n*, No. 3:17-cv-374, 2019 WL 2030108, at *4 (D. Nev. May 8, 2019) (holding that a servicer's "failure to comply with the Guide has no bearing on the Federal Foreclosure Bar analysis").

Furthermore, the Federal Foreclosure Bar's protections cannot be waived by *any* contractual arrangement between Fannie Mae and its servicer. The notion that a provision of the Guide could negate the Federal Foreclosure Bar is contrary to the text of the statute, which permits the statutory protection to be overridden only by the Agency's affirmative consent. *See* 12 U.S.C. § 4617(j)(3). Because the Federal Foreclosure Bar "applies by default," whether the servicer acted to protect Fannie Mae's property interest is irrelevant. *See Berezovsky*, 869 F.3d at 929 (holding that HERA "cloaks Agency property with Congressional protection unless or until the Agency affirmatively relinquishes it"). The law is the law. And federal law supersedes any purported contract provision upon which Ms. Staab relies.

3. Ms. Staab Cannot Enforce or Rely Upon the Guide Because She Is Neither a Party Nor a Third-Party Beneficiary

Lastly, Ms. Staab cannot enforce or rely upon the Guide because she lacks standing to do so. Under black-letter D.C. law, contracts can be enforced only by their parties or intended beneficiaries, not by third parties such as Ms. Staab. *See Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008); *Fields v. Tillerson*, 726 A.2d 670, 672 (D.C. 1999). As Ms. Staab implies, the Guide governs the relationship *between Fannie Mae and its servicers*. *See* Staab Br. at 10–11, 18–19. Ms. Staab is not in privity with Fannie Mae or Wells Fargo with respect to the Guide. Nor does the evidence suggest that Ms. Staab was an intended third-party beneficiary. Under D.C. law, "an indirect interest in the

performance of the [contractual] undertakings is insufficient" to establish standing to enforce a contract. *See Fort Lincoln*, 944 A.2d at 1064 (internal quotation marks omitted). Thus, Ms. Staab cannot enforce or rely on any provision of the Guide.

B. HERA's Limitations Provision Applies to Servicers Like Wells Fargo

The Superior Court correctly held that Wells Fargo's claims were timely under 12 U.S.C. § 4617(b)(12)(A). *See* WF Br. at 21–28; JA505–06. FHFA agrees with Wells Fargo's position on this issue, but addresses here Ms. Staab's incorrect suggestion that HERA's limitations provision might not apply to Wells Fargo as servicer. *See* Staab Br. at 20–21. As several courts have confirmed, neither FHFA nor Fannie Mae need be a direct party to this case for HERA's limitations period to apply. *M&T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 858 (9th Cir. 2020) (confirming that HERA governs the statute of limitations that applies to an FHFA loan servicer's action raising the Federal Foreclosure Bar); *JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 136 Nev. 596, 599 (2020) (holding that "HERA's statute of limitations governs an action brought by a mortgage loan servicer to enforce the Federal Foreclosure Bar"). And this makes perfect sense: to best "preserve and conserve" the Enterprises' assets, FHFA and the Enterprises should not have to prosecute or defend every action arising under HERA.

Wells Fargo, as Fannie Mae's loan servicer—is authorized to litigate on behalf of Fannie Mae and has standing to represent and defend Fannie Mae's

interests in this action. *See Saticoy Bay LLC, Series 2714 Snapdragon v. Flagstar Bank, FSB*, 699 F. App'x 658, 659 (9th Cir. 2017). To effectively defend Fannie Mae's interests, servicers like Wells Fargo are permitted to—and often do—assert statutory rights and make arguments on the Enterprise's behalf that would otherwise be available to the Enterprise or FHFA under HERA. *See, e.g., Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 251 (2017) ("[T]he servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar pre-empts NRS 116.3116, and that neither Freddie Mac nor the FHFA need be joined as a party."); *JPMorgan Chase* 136 Nev. at 598 ("[A] loan servicer such as Chase can raise the Federal Foreclosure Bar on the FHFA's behalf without joining the FHFA or the regulated entity that owns the loan as a party to the action.").

More specifically, HERA applies to claims brought by or against servicers acting on behalf of the Enterprises and FHFA to protect conservatorship estate assets, such as the Deed of Trust at issue here. *See M&T Bank*, 963 F.3d at 858; *JPMorgan Chase*, 136 Nev. at 598. That is because "HERA allows the FHFA to authorize a loan servicer [here, Wells Fargo] to act on its behalf by contracting with the loan servicer or relying on the regulated entity's [here, Fannie Mae's] contractual relationship with a loan servicer, such that the contractually authorized loan servicer has standing to take action to protect the FHFA's interests." *JPMorgan Chase Bank*, 136 Nev. at 598; *see also Nationstar*, 133 Nev. at 250 (holding the broad language

"such action" in 12 U.S.C. § 4617(b)(2)(D) would include allowing contracted servicers to act to protect an asset owned by a regulated entity that is under an FHFA conservatorship). It therefore follows that, because Wells Fargo is authorized to act on FHFA and Fannie Mae's behalf, the same statute of limitations applies as if FHFA brought the action itself.

Accordingly, it is immaterial for purposes of the application of HERA's limitations period that FHFA and Fannie Mae are not parties.

C. Ms. Staab Was on Notice of Fannie Mae's Lien, But Even if She Was Not, Fannie Mae's Deed of Trust Remains Effective Against Her

The Superior Court correctly held that the COA Sale was void and did not extinguish Fannie Mae's interest in the Property because FHFA did not consent to the COA Sale. *See* JA521. It also correctly held that Ms. Staab's equitable defenses, including her claim that Wells Fargo's "failure to provide notice of Fannie Mae's interest in the Property should estop [Wells Fargo] from obtaining relief in this case," were preempted by the Federal Foreclosure Bar. *See* JA521–22. Ms. Staab does not attempt to re-litigate those findings here.

However, in her Statement of Facts, Ms. Staab says that Fannie Mae's Loan ownership was not a matter of public record, nobody had notice of Fannie Mae's interest, and therefore the COA had no obligation to seek FHFA's consent prior to foreclosing. *See* Staab Br. at 9–10. This assertion does not relate to the merits of

Ms. Staab's appeal, but FHFA addresses them due to their significant implications for the Conservator's ability to protect the Enterprises under conservatorship. Specifically, Ms. Staab's statements that Fannie Mae's interest was not a matter of public record and that the world was unaware of Fannie Mae's interest is contrary to established D.C. law. Further, she and the COA were on inquiry notice of Fannie Mae's Deed of Trust. But even if they were not, notice was not required to protect the lien—a conservatorship asset—from the COA foreclosure.

1. Ms. Staab Need Not Be Aware of Fannie Mae's Interest for the Federal Foreclosure Bar to Apply

The Federal Foreclosure Bar applies regardless of whether Ms. Staab was aware of Fannie Mae's interest. The U.S. District Court for the District of Columbia considered this very argument and rejected it. *See Brown*, 2022 WL 7003740, at *4. There, the court found that D.C. law does not require the loan owner to serve as the record beneficiary of the deed of trust, and that the recording statute, D.C. Code § 42-401, only requires that the purchaser have notice of the deed of trust, not the identity of its owner. *Id*. (citations omitted). Thus, Ms. Staab's statement that nobody was aware of Fannie Mae's interest as it was not a matter of public record is no defense to the Federal Foreclosure Bar's application. *See* Staab Br. at 8–9.

2. Ms. Staab Had Inquiry Notice of Fannie Mae's Interest

In addition, Ms. Staab was on inquiry notice of Fannie Mae's ownership. "A purchaser is held to be on inquiry notice where he or she is aware of circumstances

which generate enough uncertainty about the state of title that a person of ordinary prudence would inquire further about those circumstances. The purchaser is on inquiry notice of all facts and outstanding interests which a reasonable inquiry would have revealed." *Clay Props., Inc. v. Wash. Post Co.*, 604 A.2d 890, 895 (D.C. 1992). Ms. Staab was on inquiry notice of Fannie Mae's interest for at least three reasons:

First, the Deed of Trust, recorded before the COA Sale, stated that it could be sold to another party and was labeled as a "Fannie Mae/Freddie Mac UNIFORM INSTRUMENT." *See* JA245, JA261, JA264. This is sufficient to put a potential purchaser of ordinary prudence on notice that the lien *could* be owned by an Enterprise and that further inquiry is required. *See Brown*, 2022 WL 7003740, at *4; *see also Clay Props.*, 604 A.2d at 895.

Second, Fannie Mae and Freddie Mac are "the dominant force in the market" of home mortgages. *Perry Cap.*, 864 F.3d at 599-600, 602; *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012). Fannie Mae's prominent position in the residential mortgage market is common knowledge, and provides further grounds that Ms. Staab or the COA "reasonably should have inquired whether [Fannie Mae] owned the deed of trust." *M&T Bank*, 2022 WL 7003740, at *4 (citing *Clay Props.*, 604 A.2d at 895).

Third, the combination of a low purchase price of $15,000 and a quitclaim deed, *see* JA238, put Ms. Staab on inquiry or constructive notice of all existing title

issues, including Fannie Mae's statutorily protected interest. The District of Nevada has found that a purchaser "is on inquiry notice of the continuing vitality of the [deed of trust]" where "the sale price was a tiny fraction of the value of the Property and [the purchaser] knew the winning bidder was to take a trustee's deed without warranty." *See US Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 3:15-cv-241, 2016 WL 4473427, at *10 (D. Nev. Aug. 24, 2016). Here, the language of the COA Sale advertisement, Memorandum of Purchase, and COA-Sale deed specified that the Property would be sold subject to the Deed of Trust. *See* JA281–82; JA238.

Further, Ms. Staab and the COA are legally presumed to have knowledge of the Federal Foreclosure Bar. HERA is a matter of public record. Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008). It is also a matter of public record that FHFA placed Fannie Mae in conservatorship in September 2008, at which point FHFA, in its role as the Conservator, succeeded by law to "all rights, title, powers, and privileges" of Fannie Mae. 12 U.S.C. § 4617(b)(2)(A)(i); *see Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). Given the implications of the Federal Foreclosure Bar, if Ms. Staab or the COA had any doubt about its application to this Property, either of them could have contacted FHFA to confirm whether the Deed of Trust was a conservatorship asset.[2] Neither the COA nor Ms. Staab made any such inquiry. Ms.

[2] FHFA has consistently acknowledged that it will respond to inquiries by COA sale purchasers about whether the Conservator holds an interest in a property. *See, e.g.*,

Staab assumed the risk that an Enterprise lien encumbered the Property when she purchased it for pennies on the dollar at the COA Sale.

3. The Federal Foreclosure Bar Protects Fannie Mae's Lien Interest Even if Ms. Staab Had No Notice of the Lien Interest

Even if Ms. Staab had no way of knowing of Fannie Mae's lien, the Federal Foreclosure Bar still protects the lien. Such application of the Federal Foreclosure Bar does not violate Ms. Staab's constitutional rights because Ms. Staab had no constitutionally protected property interest, and therefore could not have been deprived of one. Indeed, federal courts have held that application of the Federal Foreclosure Bar does not deprive HOA-sale purchasers of due process because they have no constitutionally protected property interest. *See, e.g.*, *SFR Invs. Pool*, 893 F.3d at 1148.

Alternatively, even if a protected property interest had been at stake, the Federal Foreclosure Bar's application comports fully with due process as confirmed by the Supreme Court's decision in *International Harvester Credit Corp. v. Goodrich*, 350 U.S. 537, 547-48 (1956) (holding that recognizing and enforcing a statutorily authorized or protected lien does not violate due process, even if the lien-

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FHFA Amicus Br. 15-16, *Nationstar Mortg. v. Guberland, LLC – Series 3*, No. 70546 (Nev. 2018); Appellees' Suppl. Br. 6-7, *SFR Invs. Pool 1, LLC v. Green Tree Servicing*, No. 72010 (Nev. 2018); Appellees' Br. 19 n.6, *Alessi & Koenig v. FHFA*, No. 18-16166 (9th Cir. 2018).

encumbered property's owner had no notice of the lien's existence and no practical means of discovering it). Relying on *International Harvester*, the District of Nevada has held in a case similar to this one that, "[i]f the enforcement of the unrecorded lien in *International Harvester* did not violate due process, then neither does enforcement of Fannie Mae's [purportedly] unrecorded interest in the property here." *Nationstar Mortg. LLC v. Tow Props., LLC II*, No. 2:17-cv-01770, 2018 WL 2014064, at *6 (D. Nev. Apr. 27, 2018). The same reasoning applies in this case.

D. The Federal Foreclosure Bar Voids the COA Sale Regardless of Whether The COA is Party to the Case

Ms. Staab's argument that the COA is an indispensable party fails under the plain terms of HERA. Under the Federal Foreclosure Bar, the relief to which Wells Fargo is entitled is the same whether the COA is a party or not: The COA Sale was void. *See* 12 U.S.C. § 4617(j)(3). This is important to FHFA's congressionally mandated prerogative to best protect its conservatorships and to receive the full extent of the relief afforded by the statute.

Under the Federal Foreclosure Bar, while an Enterprise is in FHFA's conservatorship, its "property," including lien interests, "shall" not be "subject to … foreclosure or sale" without FHFA's consent. *See* 12 U.S.C. § 4617(j)(3). For the Federal Foreclosure Bar to apply in this instance, only three things are needed : (1) Fannie Mae was in FHFA's conservatorship at the time of the COA Sale; (2) Fannie Mae held a valid interest in the Deed of Trust; and (3) FHFA did not

affirmatively consent to the extinguishment of the Deed of Trust through the COA Sale. *See id.* All three are present here, and Ms. Staab does not dispute any of them.

Because the Federal Foreclosure Bar applies, the Superior Court correctly held that the COA Sale was void *ab initio* and the Deed of Trust continues to encumber the Property. *See* JA518–521. And in closely analogous cases, the Superior Court has consistently held that condominium associations need not be joined before a condominium association sale can be voided under HERA. *See* WF Br. at 29–32; *Reverse Mortg. Solutions Inc. v. Moore*, No. 2014 CA 07660 R(RP), 2023 WL 3975088, at *1–2 (D.C. Super. Ct. Jun. 7, 2023); *Fed. Nat'l Mortg. Ass'n v. Billups*, No. 2015 CA 001764 R(RP), 2023 WL 6003527, at *5 (D.C. Super. Ct. Sept. 13, 2023). Thus, the application of the Federal Foreclosure Bar and the straightforward relief Wells Fargo seeks do not require the COA's presence in the case, and this Court should not find otherwise. *See Roberts v. Fed, Hous. Fin. Agency*, 889 F.3d 397, 409 (7th Cir. 2018) (noting that HERA's language is "clear and absolute.")

II. These Arguments Reflect Sound Policy

The conclusions set forth herein reflect public policy goals Congress enshrined in HERA. Congress chartered the Enterprises to facilitate liquidity in the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation. *See City of Spokane v. Fannie*

Mae, 775 F.3d 1113, 1114 (9th Cir. 2014). Congress has noted that the "continued ability of [the Enterprises] to accomplish their public missions is important to providing housing in the United States and the health of the Nation's economy." 12 U.S.C. § 4501. It would be difficult to overstate the importance of the stability of the Enterprises' assets to the national economy. Congress enacted HERA in 2008 because it was "[c]oncerned that a default by Fannie or Freddie would imperil the already fragile national economy," and created FHFA with broad powers to place the Enterprises into conservatorships and fulfill its role as Conservator. *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017). These goals demonstrate why, for example, FHFA's explicit consent is required before Enterprise property can be dissipated in any way and why servicers like Wells Fargo are entitled to litigate on behalf of Enterprise and FHFA interests. FHFA's arguments are, at bottom, averred to accomplish Congress's statutory goals to collect on obligations due to each Enterprise and to preserve and conserve the Enterprises' assets.

To further accomplish these goals, Congress's enacted HERA to protect the vitally important operations of the Enterprises in conservatorship from actions under state law, such as those at issue here, that would otherwise deprive the Enterprises of their federally protected property interests. Thus, the Federal Foreclosure Bar reflects the foreseeably turbulent environment in which imposition of a conservatorship or receivership might be necessary, and its absolute backstop

protection ensures that the Enterprises (and their servicers) are not subject to contradictory state laws, which would diminish the safety and efficiency of the Enterprises' business operations and thereby impose a material threat to the Nation's economy. This policy is squarely implicated by Ms. Staab's arguments on appeal; namely, that provisions of the Guide render Wells Fargo's decision to move to amend its complaint was made in bad faith, that Wells Fargo should not be able to avail itself of HERA's limitations provisions under these circumstances, that the COA was not required to seek FHFA's consent, and that the COA is a required party to this case. While these arguments run contrary to Congress's manifest purpose in enacting HERA, the law's plain terms make Ms. Staab's claims inapplicable. Under HERA, FHFA has the power to collect obligations due the Enterprises and preserve and conserve their assets. *See* 12 U.S.C. § 4617(b)(2)(B). And the Federal Foreclosure Bar broadly precludes any sale or foreclosure of FHFA property interests absent FHFA's affirmative consent, or any involuntary lien from attaching to FHFA's conservatorship property. *See* 12 U.S.C. § 4617(j)(3)

For example, as to Ms. Staab's claim about servicers litigating in place of FHFA or the Enterprise or availing themselves of the HERA statute of limitations provisions, it would not be feasible for FHFA itself or an Enterprise to prosecute or defend each and every claim involving HERA's application to a defaulted mortgage loan and the collateral that secures repayment of that loan, nor would that scenario

best position FHFA to preserve and conserve the Enterprises' assets. Indeed, courts have properly held that authorized loan servicers can rely upon HERA's mandates and protections. *See JP Morgan Chase Bank*, 136 Nev. at 598. And to best protect the Enterprises' interests while in conservatorship, HERA's statutory protections exist regardless of any private arrangements between parties, including contractual provisions such as those set forth in the Guide, and its relief does not depend on the participation of a foreclosure seller in the lawsuit.

In sum, at the core of both the Enterprises' and FHFA's congressionally mandated missions is the facilitation of safe and affordable housing across the country, including in the District of Columbia. And a departure from established legal principles governing Fannie Mae's protected property interest here would hinder FHFA in fulfilling its statutory mission as Fannie Mae's regulator and conservator and would undermine Fannie Mae's role in promoting a stable mortgage market. *See* 12 U.S.C. § 4513(a)(1)(B)(ii) (FHFA as regulator ensures that "the operations and activities of [Fannie Mae] foster liquid, efficient, competitive, and resilient national housing finance markets"); *id*. at § 4617(b)(2)(B)(iv); *id.* at § 4501. The fact that Congress specifically sought to protect conservatorship assets through the Federal Foreclosure Bar and other asset-protection provisions indicates congressional intent to the Enterprises' property interests over other concerns.

CONCLUSION

For the foregoing reasons and those elaborated in Wells Fargo's appellee brief, this Court should affirm the Superior Court.

Dated: March 6, 2024

Respectfully submitted,

/s/ Michael A.F. Johnson

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CERTIFICATE OF SERVICE

I certify that on March 6, 2024, a true and correct copy of the foregoing was served on all counsel of record through the Court's electronic filing system.

Dated: March 6, 2024

/s/ Michael A.F. Johnson
Michael A.F. Johnson

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:
     1) the acronym "SS#" where the individual's social-security number would have been included;
     2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     4) the year of the individual's birth;
     5) the minor's initials; and
     6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under

evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Michael A.F. Johnson
Signature

23-CV-492 & 23-CV-669
Case Number(s)

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