UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

FEDERAL HOUSING FINANCE AGENCY'S MEMORANDUM IN SUPPORT OF ITS OPPOSED MOTION TO CERTIFY THE OCTOBER 17, 2022 ORDER FOR IMMEDIATE APPEAL

The Federal Housing Finance Agency ("FHFA"), as Conservator for Fannie Mae and Freddie Mac (the "Enterprises"), respectfully requests that the Court amend its October 17, 2022 oral ruling on FHFA's objection to the Magistrate Judge's order overruling FHFA's objection to the Receiver's Motion to Allocate Fees, Dkt. 1327 (the "Ruling"),[1] to include the certifications necessary to permit FHFA to petition for an interlocutory appeal under 28 U.S.C. § 1292(b).

The Ruling construes statutory powers and protections Congress granted exclusively to FHFA as Conservator in the Housing and Economic Recovery Act of 2008 ("HERA"). More specifically, the Ruling construes the Conservator's statutory powers to collect obligations due the Enterprises and to preserve and conserve the Enterprises' assets. *See* 12 U.S.C. § 4617(b)(2)(B). HERA protects those powers by, among other things, mandating that "no court may take any action to restrain or affect the [Conservator's] exercise of [its] powers or functions …." *See id*. § 4617(f). The Ruling construes that protection, as well as the protection Congress granted in § 4617(j)(3), which mandates that "[n]o [conservatorship] property … shall be subject to levy, attachment,

[1] The Ruling is attached as Exhibit A.

garnishment, foreclosure, or sale without the consent of the Agency ...." *Id.* at § 4617(j)(3).

FHFA seeks appellate review of three issues encompassed by the Ruling:

1. Whether, for purposes of Section 4617(f), the allocation of the Receiver's fees to Enterprise accounts restrains or affects the Conservator's powers or functions;

2. Whether, under Section 4617(j)(3), conservatorship property interests can be dissipated by payment of Receiver's fees from Enterprise accounts without FHFA's explicit consent; and

3. Whether Section 4617(j)(3) bars judicially sanctioned dissipation of conservatorship property interests by means other than levy, attachment, garnishment, foreclosure, sale.

Each involves a controlling question of law as to which there is substantial grounds for difference of opinion, and each would present a question of first impression for the Court of Appeals. The prompt resolution of these questions would simplify this case and expedite its ultimate resolution.

Accordingly, FHFA respectfully moves the Court to amend the Ruling to include the certifications necessary to permit FHFA to petition for an interlocutory appeal under 28 U.S.C. § 1292(b).

RELEVANT PROCEDURAL HISTORY

This is an SEC receivership case relating to a Ponzi scheme. The receivership initially consisted primarily of real property, against which the Receiver was granted a lien to secure its fees and costs. In 2020, with the Court's approval, and over objection by the Enterprises and without knowledge of FHFA, the Receiver sold properties at 1131-41 East 79th Place in Chicago and 7024-32 South Paxton Avenue in Chicago (the "Enterprise Properties"), which were encumbered by Enterprise mortgages, with the proceeds deposited into accounts against which each Enterprise was granted a lien equivalent to its pre-sale interest in the property. Dkt. 618 at 40-43; Dkt. 681. In substance, the sale proceeds were substituted as the collateral securing the Enterprises' loans.

In due course, the Receiver moved to allocate certain accrued fees and costs to specific properties and to receive an interim payment from the corresponding accounts. Dkt. 1107. Of particular relevance here, the Receiver sought to allocate $93,564.69 to the 79th Street Property and $54,966.96 to the Paxton Property. *See* Dkt. 1107-5 at 243, 1233. FHFA, citing Sections 4617(f) and 4617(j)(3), objected to those allocations because they would dissipate the Enterprises' collateral, thereby impairing the Conservator's statutory powers to collect on the obligations secured by the properties and to preserve and conserve the Enterprises' assets. Dkt. 1209. The Magistrate Judge overruled FHFA's objections and granted the Receiver's motion. Dkt. 1258 ("MJ Decision"). FHFA filed a timely objection. Dkt. 1266.

On October 17, 2022, the Court overruled FHFA's objection. Ruling at 27. As to Section 4617(f), the Court posed the dispositive question as whether "the allocation of the receiver's fees to these property accounts [is] something that affects or restrains the agency's powers as conservator," and concluded "that paying the receiver's reasonable approved fees … does diminish the amount of money on hand … [but it] does not affect the agency's powers here, because the agency has agreed that the receiver should be paid, and the agency doesn't dispute that the receiver's efforts were beneficial to the properties." *Id.* at 30. The Court then considered the issue under Section 4617(j)(3). The Court held that "[i]f the record demonstrates that FHFA consented through its actions, that can be consent." Ruling at 32. While the Court acknowledged that "the agency hasn't expressly consented to the precise allocation of fees," it determined that consent was "sufficient" because FHFA "consented to receive the value of the receiver's work." *Id.* at 33. The Court further noted, in the alternative, that "the allocation of receiver fees to accounts is not a levy, attachment, garnishment, foreclosure, sale, or involuntary lien attaching to agency property." *Id.*

LEGAL STANDARD

Section 1292(b) authorizes a district court to certify an order for interlocutory appeal where two factors are present: (1) the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Seventh Circuit has further clarified those factors, explaining that "there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Bd. of Trs. of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). Questions of first impression are contestable. *See Boim v. Quranic Literacy Inst. & Holy Land Found. For Relief And Dev.*, 291 F.3d 1000, 1007-08 (7th Cir. 2002).

A motion for Section 1292(b) certification is considered timely if it is filed within "a *reasonable time*." *Ahrenholz*, 219 F.3d at 675 (emphasis in original).

ARGUMENT

Section 1292(b) certification is appropriate here, because the Ruling encompasses three issues that involve controlling, contestable questions of law, the resolution of which promises to speed up the litigation, and this motion is timely.

I. THE RULING INVOLVES CONTROLLING QUESTIONS OF LAW AS TO WHICH THERE ARE SUBSTANTIAL GROUNDS TO DIFFER

A. Whether the Allocation of Receiver's Fees to Enterprise Properties Restrains or Affects the Conservator's Powers as Conservator

The Ruling holds that Section "4617(f) doesn't prohibit a court from allocating undisputed reasonable receiver's fees to properties that are subject to the entities' mortgages that the agency has under conservatorship." Ruling at 31. The Court reasoned that "[b]eing a free rider . . . is not consistent with good faith conservatorship." *Id.*

This issue is *controlling* because "its resolution is quite likely to affect the further course of the litigation. . . ." *Sokaogon Gaming Enter. Corp., v. Tushie-Montgomery Assocs., Inc.,* 86 F.3d 656, 659 (7th Cir. 1996). That is, its resolution will affect all future allocations: Either Section 4617(f) allows allocation to the Enterprise Properties or it does not, and future allocations depend on the accuracy of prior allocations. Accordingly, future allocations depend on proper resolution of the question. The issue presents a "[q]uestion of law" because it "goes to the 'meaning of a statutory … provision'"—Section 4167(f). *See In re Clearview AI, Inc. Consumer Priv. Litig.*, Case No. 21-CV-0135, 2022 WL 823855, at *1 (N.D. Ill. Mar. 18, 2022) (quoting *Ahrenholz*, 219 F.3d at 676).

There are also substantial grounds for differences of opinion on the issue.[2] "A question of law is contestable if there are substantial, conflicting decisions regarding the claimed controlling issue of law …." *Yost v. Carroll*, No. 20 C 5393, 2022 WL 180153, at *4 (N.D. Ill. Jan. 20, 2022). Here, the Ruling is in tension with other courts' interpretation of Section 4617(f) and the substantively identical FDIC provision, Section 1821(j). Section 4617(f) provides that "no court may take any action to restrain or affect the exercise of powers or functions of [FHFA] as a conservator or receiver." 12 U.S.C. § 4617(f). Given the statute's broad language, reasonable minds can—and do—disagree with the Court's conclusion that "paying for the receiver's work out of entity interests or assets is not something that affects or restrains the agency's powers." *See* Ruling at 31. As FHFA argued in its Objection (Dkt. 1209 at 6), allocating costs to the proceeds from the sales of the Enterprise Properties—and allowing those costs to be disbursed to the Receiver—would reduce the amount the Conservator can collect on these loans, thereby

[2] Indeed, this Court and Magistrate Judge Kim differed in their interpretations of the statutory provision in their respective orders regarding the fee allocation. *See* Ruling at 28-29.

restraining the Conservator's powers to "collect all obligations and money due" the Enterprises, and to "preserve and conserve [their] assets and property." *See* 12 U.S.C. § 4617(b)(2)(B).

Indeed, in applying Section 4617(f), the Eighth Circuit explained that "[p]icking among different ways of preserving and conserving assets, deciding whose interests to pursue while doing so, and determining the best way to do so are all choices that [HERA] clearly assigns to the FHFA, not the courts." *Bhatti v. Fed. Hous. Fin. Agency*, 15 F.4th 848, 855 (8th Cir. 2021) (quoting *Saxton v. Fed. Hous. Fin. Agency*, 901 F.3d 954, 960 (8th Cir. 2018) (Stras, J., concurring)). Similarly, a court applying Section 1821(j) explained that because it "do[es] not have the power to … interfere with the proper disposition of [receivership or conservatorship] assets," it may not "cordon off a pool of [those] assets" to benefit a plaintiff. *Bender v. Centrust Mortg. Corp.*, 833 F. Supp. 1540, 1543 (S.D. Fl. 1992); *see also Federated Bank v. FDIC*, No. 1:12-cv-3445-SCJ, 2013 WL 12170297, at *5 (N.D. Ga. Sept. 10, 2013) (Section 1821(j) barred a "declaration subordinating the FDIC-R[eceiver]'s interest in" certain assets because that "would be equivalent to an injunction requiring [it] to make payments in a certain order.").

Likewise, the Court's suggestion that "[b]eing a free rider is not in the public interest and is not consistent with good-faith conservatorship," Ruling at 31—essentially, that exercising those powers to preclude the allocations would be improper or inequitable—is in tension with other courts' readings of Sections 4617(f) and 1821(j). The Third Circuit has explained that Section 1821(j)'s application "does not hinge on our view of the proper exercise of otherwise-legitimate powers." *Gross v. Bell Sav. Bank PaSA*, 974 F.2d 403, 408 (3d Cir. 1992). The Fifth Circuit agrees, having held that "even if the [receiver] improperly or unlawfully exercised an authorized power or function," it could not "conceivably [be] subject … to injunction or rescission as an exception to … § 1821(j)." *Ward v. RTC*, 996 F.2d 99, 103 (5th Cir. 1993). Hence, reasonable

ground for a difference of opinion exists as to whether purported "free rid[ing]" constitutes an exercise of legitimate powers in a way a court might deem unwise but lacks jurisdiction to restrain, rather than action outside the Conservator's statutory authority, as the Court appears to have concluded.

B. Whether Explicit Consent is Required under Section 4617(j)(3) to Subject FHFA Property to Levy, Attachment, Garnishment, Foreclosure, or Sale

In its Ruling, the Court similarly concluded that a different HERA provision, Section 4617(j)(3), does not prevent the fee allocation here. Section 4617(j)(3) provides: "No property of [an FHFA conservatorship] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [Conservator], nor shall any involuntary lien attach to the property of the [conservatorship]." 12 U.S.C. § 4617(j)(3). The Court reasoned that "[w]hile the agency hasn't expressly consented to the precise allocation of fees," Section 4617(j)(3) did not apply because FHFA purportedly "consented to receive the value of the receiver's work." Ruling at 33. Specifically, the Court found that the Agency "affirmatively relinquished the 4617(j) protection by acceding to the receiver's work all the while knowing that the receiver would expect compensation." *Id.*

Like the Section 4617(f) question (*see supra* at Section I.A.), this issue is *controlling* to the extent that "its resolution is quite likely to affect the further course of the litigation." *Sokaogon,* 86 F.3d at 659. Again, the issue presents a "[q]uestion of law" because it "goes to the 'meaning'" of Section 4617(j)(3), "a statutory … provision" that would be dispositive. *See Clearview*, 2022 WL 823855, at *1 (quoting *Ahrenholz*, 219 F.3d at 676).

The question is *contestable* because, among other things, the Court's conclusion is in tension with the Ninth Circuit's holdings in *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017) and *Fed. Home Loan Mortg. Corp. v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136 (9th Cir. 2018), which

squarely hold that unless FHFA affirmatively consents, the statute applies automatically. *SFR*, 893 F.3d at 1149; *Berezovsky*, 869 F.3d at 929.[3] In its Ruling here, the Court asserted that neither decision forecloses the possibility of "implied" or "implicit consent," Ruling at 32, but FHFA respectfully disagrees. In *Berezovsky*, the plaintiff argued that Section 4617(j)(3) did not apply because "Freddie Mac and the Agency implicitly consented to [forfeit a lien] when they took no action to stop [another creditor's foreclosure]." 869 F.3d at 929. The Ninth Circuit rejected this argument, observing that "the statutory language cloaks Agency property with Congressional protection unless or until the Agency *affirmatively relinquishes it*" and emphasizing that "the Agency *did not agree* to forego its property interest." *Id.* (emphasis added). Nowhere did the *Berezovsky* court suggest that implicit consent was possible, or that it mattered whether the Conservator could have benefitted from the other creditor's action.

In any event, the issue of whether "implied" or "implicit consent" is sufficient to avoid the Section 4617(j)(3) bar presents a question of first impression for the Circuit, which further establishes that it is contestable for purposes of Section 1292(b). *See Boim*, 291 F.3d at 1007-08.

C. Whether Section 4617(j)(3) Applies to Dissipation of the Enterprises' Collateral

The Ruling further rejected the application of Section 4617(j)(3) on the alternative ground "that the allocation of receiver fees to accounts is not a levy, attachment, garnishment, foreclosure, sale, or involuntary lien attaching to agency property." Ruling at 33. For the reasons stated above in Section I.B, the issue of whether Section 4617(j)(3) bars the fee allocation here is a *controlling question of law*. It makes no difference that the Court provided two alternative grounds for its

[3] It is also clear that reasonable minds *in fact* disagree on how to best interpret Section 4617(j)(3). For instance, the Court and Magistrate Judge Kim offered different interpretations in their respective orders. *Compare* Dkt 1258 at 9-11 *with* Ruling at 32-33.

resolution; an alternative ground for a dispositive holding can be "controlling" for the purposes of Section 1292(b). *See Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) ("[A] growing number of decisions have accepted the rule that a question is controlling, even though its decision might not lead to reversal on appeal, if interlocutory reversal might save time for the district court, and time and expense for the litigants." (citation omitted)). In any event, because each of the two seemingly alternative grounds reflects the Court's interpretation of the same statutory provision, whether the Court properly interpreted Section 4617(j)(3) is properly viewed as a single, controlling issue.

The issue is *contestable* because the Court's analysis is inconsistent with other courts' conclusion that the provision bars *any* deprivation of conservatorship property—not just those deprivations effected through attachment, garnishment, foreclosure, or sale. Indeed, courts applying the analogous FDIC provision have focused on the effect of the action, not the label, and have applied it to bar judicial actions that *are not* enumerated specifically within the statute. For example, in *Trembling Prairie Land Co. v. Verspoor*, 145 F.3d 686 (5th Cir. 1998), the Fifth Circuit analyzed "whether the petition to quiet title is essentially analogous to a foreclosure, and is a 'triggering event'" under the FDIC analog to Section 4617(j)(3), 12 U.S.C. § 1825(b)(2). *Id.* at 689. The court held that it was, reasoning that "[w]hile the term 'quiet title' is not specifically mentioned in … § 1825, the end result is functionally the same as that of the actions that are specifically listed in the statute: the FDIC loses the Property," while the statute "represents the express will of Congress that the [conservator or receiver] must consent to *any deprivation of property* …." *Id.* at 691 (emphasis added) (citation omitted); *see also S/N-1 REO Liab. Co. v. City of Fall River*, 81 F. Supp. 2d 142, 150 (D. Mass. 1999) (equating "deprivation" with "reduction in the value of the receivership's assets" (citation omitted)).

This Court's Ruling acknowledges that the fee allocation "does diminish the amount of money on hand," Ruling at 30, but does not distinguish these cases' square holding that under Section 1825(b)(2)—and by extension, Section 4617(j)(3)—the conservator or receiver "must consent to *any deprivation of property*," i.e., any judicially imposed "reduction in the value of the [protected] assets." *S/N-1 REO*, 81 F. Supp. 2d at 150 (emphasis added) (citations omitted). Nor are *Trembling Prairie* and *S/N-1 REO* outliers. Section 1825(b)(2) also prohibits the filing of a lis pendens, even though that is not expressly mentioned in the statutory text; courts treat "the list of state law liens and attachments as inclusive rather than exhaustive." *Santa Monica Mountains Conservancy v. FDIC*, Civ. A. No. 92-1650 SSH, 1992 WL 672288, at *1 (D.D.C. Aug. 25, 1992). That is because "[i]t's hard to imagine that even if Congress could direct its full time to the drafting of a statute of this kind, it could … undertake an encyclopedic reference to every particular device to be found in the armament of every one of our American jurisdictions." *Id.* at *1 (citation omitted).

Therefore, the Ruling's conclusion that Section 4617(j)(3) does not apply here is a contestable question of law under Section 1292(b). *See Yost*, 2022 WL 180153, at *4.

II. AN IMMEDIATE APPEAL WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

This Court's certification would materially advance the ultimate termination of a substantial portion of this litigation. *See Ahrenholz*, 219 F.3d at 675. Critically, "neither the statutory language nor the case law requires that if the interlocutory appeal should be decided in favor of the appellant the litigation will end then and there, with no further proceedings in the district court." *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012)). Rather, "it is sufficient that an interlocutory appeal would remove uncertainty about the status of a claim that might delay settlement or resolution." *Costello v. BeavEx, Inc.*, Case No. 12 c 7843, 2014

WL 12775669, at *1 (N.D. Ill. Dec. 1, 2014).

Absent interlocutory appeal, more fees will be allocated and additional funds disbursed in a series of iterative steps that each depends on the correctness of all previous steps. Getting these first allocations right is therefore vitally important, as any error would propagate through the entire series, making it more difficult to correct at the end of the case rather than now. Extensive calculations would need to be erased and done over, and countless disbursements would need to be clawed back and redistributed according to the corrected calculations. The practical problems with seeking to recover and redistribute millions of dollars in cash disbursements—surely, in many instances, years after the fact—are obvious and daunting. It is far more efficient to settle FHFA's objection to the fee allocation *now*, rather than wait until the end of the litigation to recalculate the allocations consistent with HERA. Indeed, the Court's decision to issue the Ruling now, rather than waiting until the lien-priority stage of litigation, implicitly recognizes the benefit of resolving these issues at the outset. *See* Ruling at 27.

III. THIS MOTION IS TIMELY

This motion is timely because it has been filed within thirty (30) days of the October 17, 2022 Ruling. "[T]here is no statutory deadline for the filing of [a] petition [such a this] in the district court." *Ahrenholz*, 219 F.3d at 676. Instead, courts require that certification be sought within "a reasonable time." *Id*. at 675. Courts in this circuit routinely deem comparable—and even longer—intervals reasonable. *See Feit Elec. Co., Inc. v. CFL Techs. LLC*, Case No. 13-CV-09339, 2019 WL 7020496, at *3 (N.D. Ill. Dec. 20, 2019) (finding the "reasonable time" standard met where "the Court issued its order on August 8, 2019 and [party] filed its motion on September 13, 2019").

CONCLUSION

For these reasons, FHFA respectfully asks this Court to certify three questions for

immediate appeal pursuant to 28 U.S.C. § 1292(b).[4] FHFA requests that the order contain the required language identifying the relevant legal questions and noting they are controlling questions of law to which there are substantial grounds for differences of opinion, and that an immediate appeal of those questions may materially advance the ultimate termination of the litigation.

[4] As stated in FHFA's Motion, FHFA also respectfully notices an appeal of the Ruling under 28 U.S.C.A. § 1292(a) as a protective measure in the event the Court does not certify the Ruling for appeal under Section 1292(b). This notice does not undermine FHFA's arguments that the Ruling is appealable under Section 1292(b). *See* Wright & Miller, 16 Fed. Prac. & Proc. Juris. § 3929.1 (3d ed.) (noting that appellants can properly combine a motion for Section 1292(b) certification with a notice of appeal as a matter of right).

Dated: November 16, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2022, I caused the foregoing **Federal Housing Finance Agency's Memorandum in Support of its Opposed Motion to Certify the October 17, 2022 Order For Immediate Appeal** to be electronically filed with the Clerk of the Court through the Court's CM/ECF system, which sent electronic notification of such filing to all parties of record.

/s/ Daniel E. Raymond

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, et al., Plaintiffs, vs. EQUITYBUILD, INC., EQUITYBUILD FINANCE, L.L.C., JEROME H. COHEN, SHAUN D. COHEN, and CITIBANK, N.A., as Trustee, Defendants.	No. 18 C 5587 Chicago, Illinois October 17, 2022 10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS -
Status Hearing
BEFORE THE HONORABLE MANISH S. SHAH

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(Proceedings available by phone/heard in open court:)

THE CLERK: 18 C 5587, United States Securities And Exchange Commission versus EquityBuild.

THE COURT: Good morning, everyone.

There are a number of people here in the courtroom and listening on the phone. For those listening on the phone, I am Judge Shah.

The attorneys who are present in court and who are listening on the phone, you have checked in with the courtroom deputy and the court staff. We'll note everyone's appearances for the record. That way, I don't need to run through everybody individually and take attendance. I don't think that's a good use of our time this morning.

And let me just remind people listening on the phone that there is a court order and rule prohibiting the recording and broadcast of any court proceedings. I'll just remind people of that.

And if you are on the phone, I would ask that you remain muted unless I ask someone to address a question that I have got. It will just make things a little bit more smoothly, go smoothly in the courtroom this morning.

So, again, by way of introduction. Judge Lee is not on this case anymore. I have been assigned to it.

I understand and appreciate that it's been a long process here. Frustrating to many, I understand and I imagine.

I will get up to speed as best I can, as quickly as I can, but it's going to take some time.

What I wanted to do first was just make sure that I do understand what the issues are that are ripe for a resolution by me. And, as I understand it, there are really two main topics that I think are ripe for resolution.

One is the Group 1 claims process, which has a few sub-issues to it. But that's one subject.

And the second is the pending objections --

(Audible phone interruption.)

THE COURT: I'll again ask, if anyone is on the phone, to please mute yourself.

The second pending issue, as I understand it, is the pending objection by FHFA to Judge Kim's order and opinion allocating the receiver's fees to certain properties.

Let me ask counsel for the receiver to identify yourself and then let me know whether I am missing something in terms of what's on my plate.

MR. RACHLIS: Again, good morning, Your Honor. Michael Rachlis. I'm one of the lawyers that represents the receiver. Jodi Rosen Wine, who's over to my left --

(Counsel waves.)

MR. RACHLIS: -- is co-counsel with me. And the receiver, Kevin Duff --

(Counsel waves.)

MR. RACHLIS: -- is right behind me.

So you know at least the players on the receivership team.

THE COURT: Good morning.

MR. RACHLIS: In terms of the items that you've articulated, they're -- the first is absolutely correct.

The Group 1 claims process is ripe for discussion. And Judge Lee has indicated that last hearing that we were in front of him in May. So that's easily compartmentalized as correct.

On the FHFA objection, which is correct in terms of where it currently sits, the objection is not allocating. It was an objection which over -- it was a ruling that overruled an objection that was raised by the FHFA as to two properties.

It's important to note, Your Honor, that there are -- that that is part and parcel of what are really two other pending motions before Judge Kim. Those are on the allocation issues associated with the receiver lien and other issues.

And, as Your Honor knows, Judge Kim is working through those issues right now. And, in fact, there have been many discussions, kind of like property by property that he's making efforts to look at and do an order to resolve many questions. It's a slow process, but it's one that -- but that is ongoing.

So that objection that is before Your Honor from his

ruling is really kind of part and parcel of that -- those items.

Another point I think that is important is that, as to that objection, it is -- as to two properties, they haven't had -- that have priority-related issues, they have not been resolved.

And so I think when Your Honor goes back through some of the materials on that one, you'll note that one of the issues that the receiver has identified is that perhaps that issue can wait until the priority issue as to those two properties is resolved.

So for contextual purposes, I did want to at least note that for Your Honor and note its relationship, in some sense, both to the allocation issues that remain before Judge Kim as well as future issues on -- you know, in terms of priority on these other properties.

But other than those, there are no other pending issues before the Court that the receiver is aware of at this point.

THE COURT: On the issue of the FHFA's objection to Judge Kim's order, I do understand that there is the argument that it might be, in a way, moot if that -- if the FHFA's interest or claim is a lower priority than the individual investors.

(Counsel nods.)

THE COURT: But it does seem to me that the issue of how these statutes apply in this context is one that is certainly fully briefed and it's been teed up, and I -- while it's related to these issues of allocation that are still being worked through by Judge Kim, is there some value to getting my ruling now on that objection? Or is it the receiver's position that I should hold off while that -- while Judge Kim is still doing what he's doing?

I am tempted to think that getting my guidance on this issue now is better than waiting, but maybe I'm missing something.

MR. RACHLIS: Well, Your Honor, certainly -- let's go back to the Group 1 issues.

I certain -- there's no question that getting guidance from the Court on the issues that are embedded within Group 1 will provide guidance to the parties. We -- I think Judge Lee intended that to be the case. I think that is going to be the case. That may then lead to other discussions and issues that may not require Your Honor to rule unnecessarily on the statutory interpretations that are part of the FHFA's objections.

So I would believe that the -- in terms of using the word consciously "priority," getting the Group 1 issues resolved first and then seeing where those go may resolve, for a lot of different reasons, those issues on those two

properties, as Judge Kim is working through them. As a result, I don't know that there would be a necessity that the Court have -- rule on those issues right now.

However, certainly having guidance on those issues will be -- they're useful and helpful. But if the issues are going to be resolved potentially because of the Group 1 resolutions and because of Judge Kim's work, it may be unnecessary.

THE COURT: Do I have counsel for FHFA in the room?

MR. JOHNSON: Yes, Your Honor.

THE COURT: If you could step up, identify yourself --

(Counsel approaches.)

MR. JOHNSON: Certainly.

THE COURT: -- please.

MR. JOHNSON: Yes. Michael Johnson, Your Honor.

THE COURT: What are your views on whether I should give you a ruling on your objections or not?

MR. JOHNSON: I think it's appropriate for the Court to address the objection now. As the Court knows, it's fully briefed. It's ripe for decision. So legally, there's no impediment.

There are strong practical reasons why a ruling now would be useful. Remember, what the receiver wants is to get the money now, right? This isn't proving a claim to the money

to be addressed later. This is to take money out of the accounts, to dissipate the collateral that's securing the properties, the loans on the properties at issue here.

We've briefed it. The Court knows that our position is the statute just precludes that. It can't happen. If the Court authorized it anyway and then had to unwind that later, it would be a very difficult practical undertaking because the allocation process is iterative. Each round of allocations depends on the balances left in the accounts as it rolls forward.

So if we make a mistake in Step 1 of the allocations and then that gets fixed after Steps 2, 3, 4, 5, 6, and 7, we are going to have a very difficult mathematical undertaking that may also be practically impossible if any of the accounts are exhausted or properties are disposed of in a way that makes it difficult to adjust the allocations that were erroneously made in the meantime.

THE COURT: The properties, though, are, as I understand it, all effectively disposed of. We're now talking about money that's sitting in accounts.

MR. JOHNSON: Correct. But if that money is incorrectly distributed, then we might have a difficult effort in trying to claw it back, depending on to whom it gets distributed in the meantime.

It would just seem intuitive to not send money out

the door on the hope that we won't need to adjust the distributions later but decide, before we send it out the door, how the distributions should be done.

THE COURT: But the allocation to the properties/accounts associated with properties at this stage of the case is still subject to the debates over priority and whether that's really compromising someone's interest or not, right?

MR. JOHNSON: That's true. The money would sit in the accounts, though. And, you know, where -- I don't want to minimize it. It's important. I would like to have the total sum in my wallet. But it's, I think, roughly a hundred and 40 or 50 thousand dollars.

So if that -- if that sits in the account and has to be resolved later, I think that's a much easier issue to resolve than if we take it out now and ultimately would need to reverse that and try to avoid or -- I think that's sort of the receivership word, right? Avoid payments that actually happened.

THE COURT: And the receiver can correct me if I'm wrong about this, but where I think all of this is at at this point is, for lack of a better term, really an accounting in a ledger, but the money isn't necessarily going out the door to the receiver.

MR. RACHLIS: That's correct. Your Honor, no dollars

are exited out of any account without court order. I mean, every -- virtually every dollar spent is subject to orders. Your Honor will go back, will see the docket that kind of confirms those issues.

But that is correct, Your Honor.

THE COURT: And I, at least as I'm sitting here this morning, think there is some value to everyone knowing how some of these items should be accounted for in this ledger, even if it's not money that's going out the door this second. I think there's some value in you knowing how should you be accounting for this.

MR. JOHNSON: Yes.

THE COURT: These funds. And especially as we're going forward, I think it's in everyone's interest to really understand how is the receiver being paid, how much is the receiver being paid. The more we fight, the less money there is going to be for everybody at the end of the day, because we're tapping in to the receiver to provide assistance and value that has to be compensated. And if we can get to the finish line sooner rather than later, I think that's in everybody's interest. And each data point and decision point might get us closer to that finish line. At least that's my sense of things.

Okay. Thank you, Mr. Johnson.

(Counsel returns to table.)

THE COURT: I have a couple of questions about the Group 1 process.

There seems to be agreement that the receiver's avoidance claim against BC57 can be resolved after deciding the priority issues.

Do I have counsel for BC57 here?

(Counsel raises hand.)

MR. GALE: Yes, Your Honor.

(Counsel coughs.)

MR. GALE: Excuse me. Todd Gale. I represent BC57.

And you are correct. The receiver did set forth that he thought that the avoidance claims could wait until after lien priority is determined, and we did not push back on that.

So you're exactly right.

THE COURT: And the City of Chicago's claim as to the Group 1 properties looks to me to be of a slightly different-in-kind claim than the others because that's having to deal with fines and penalties as to those properties.

But am I missing something about that? I guess I'll direct that to the receiver.

MR. RACHLIS: And I may need to refer it, on that one, to Ms. Wine, if you recall the City of Chicago's --

MS. ROSEN WINE: Right. The City of Chicago did submit a claim against multiple properties. A couple of them are in the Group 1 -- in Group 1.

And the receiver, in its position statement, pointed out that there were no liens filed against those properties.

So as far as priority dispute, it's a relevant point, but they're really similar to the other claims.

THE COURT: Well, so I guess my question is, is the City of Chicago's claim subject to any issues that get wrapped up in the priority dispute that exists between BC57 and the other investors?

Where in line would the City of Chicago be from the receiver's perspective?

MS. ROSEN WINE: From the receiver's perspective, it would be behind the parties that have secured interest in the properties.

THE COURT: Even if what the City of Chicago's claiming is about penalties or fines that the properties incurred by their existence post-receivership?

MS. ROSEN WINE: That's correct, Your Honor. Any liens against the properties were paid at the time of closing. So these that are claims were not liens.

THE COURT: The priority issue or dispute in the Group 1 claims does seem to boil down to whether there were valid and authorized releases.

That seems to be what the dispute boils down to, but let me make sure I've got that right.

Let me ask Mr. Gale, do you think that that's what

this boils down to?

MR. GALE: Yes, sir.

THE COURT: And for the receiver, do you think that's what is really at issue here?

MR. RACHLIS: Yes, Your Honor.

THE COURT: Do I have the SEC here?

(Counsel stands.)

MR. HANAUER: Good morning, Your Honor. Ben Hanauer for the SEC.

THE COURT: And is that also the SEC's position?

MR. HANAUER: The SEC's position is that the releases are one and the primary ground to resolve the issue.

We've also -- as also stated in the SEC's papers, and I believe the certain of the investors' papers also, there's also this *bona fide* purchaser doctrine/inquiry notice issue. But, as the SEC stated, I think the issue can entirely be resolved via looking at the releases.

THE COURT: On that question, I don't see a -- and thank you.

(Counsel sits.)

THE COURT: I don't see a factual dispute that requires testimony. I think it's all laid out in terms of who signed what document, what do the documents say, what is the import of that chain of events. That's at least how I see it based on what I have read so far.

I think I have what I need to make that decision, but what may happen, as I continue to educate myself about it, is I may decide that some sort of oral argument might be useful, just so that I can make sure that I have honed in on everybody's positions, I have identified what I think are the key facts and documents, and we can talk about it. But I don't think we're going to need to have an evidentiary hearing.

So that's by way of preview in terms of how I am thinking about the Group 1 claims process.

And in terms of timeline, it is, unfortunately, difficult for me to give you a sense of how long it's going to take me to get up to speed enough to have a meaningful discussion with you about the merits of that. I would like to think I can find some time before the end of the calendar year to have that session with you and perhaps arrive at a decision. But, unfortunately, don't hold me to that. I just want to let you know that that's at least what I'm thinking about and what I'm going to try to achieve to help you get what you need to keep this moving along.

I have some big picture thoughts or questions that I suppose I'll share.

MR. STEIN: Your Honor, if I might, just before we leave the Group 1? My name is Max Stein. I'm one of the attorneys on behalf of the, quote-unquote, certain investors.

My clients are the individuals whose retirements are

on hold because of all of this, and so I feel obligated to them to make the Court aware of that fact and hopefully help incentivize you to move as quickly as is humanly possible, recognizing all of the work that you are needing to do to get up to speed.

In terms of oral argument, I think it would be very useful for the parties if you were to pose questions ahead of time so that we did not have to spend the time and resources preparing for a full panoply of issues of anything that might come up in oral argument and instead would be able to be focused on the issues that Your Honor is wondering about and seeking further guidance on.

THE COURT: Understood. Thank you, Mr. Stein.

And yes, if I were to hold oral argument, I would tell you what's on my mind and give you the questions ahead of time.

(Counsel nods.)

THE COURT: It's not designed to be a pop quiz. It's designed to actually be helpful to me. And the way oral argument can be helpful to me is if I tell you what I want you to focus on.

So I don't disagree at all. I agree entirely. If that's where we're headed, I will give you more guidance.

And I also don't want people spending time and money on things they shouldn't be spending time and money on.

(Counsel nods.)

THE COURT: But let me ask some -- just some big picture questions that are on my mind as I think about this case and how to help it in a way that minimizes time, costs and expense.

As I understand it, and I think we've already established, everything's sold, so now we're talking about cash-on-hand in a number of different accounts designated accordingly.

And there is not enough money to pay everybody and make everybody whole. That's just an impossibility.

Am I right about that? And I'll just direct this to counsel for the receiver.

MR. RACHLIS: I believe that that is correct, Your Honor.

THE COURT: Even if some of the claimants, lenders, people with stakes in this are of a lower priority than others and they are at the back of the line, the people ahead of them in line aren't likely to be made whole anyway.

Is that -- and that's just a -- that's a real question on my mind. I am just wondering, if these priority disputes shake out, is there a way they might shake out where some entities are actually made whole?

MR. RACHLIS: I hate to sort of say, it depends on what -- the way you define "whole." But -- and, as Your Honor

knows from reviewing the Group 1 submissions, that, you know, there are questions that have been raised about the propriety of, for example, collecting interest or other things.

So if you focus on principal, on principal alone, I think that the answer to Your Honor's question is yes, there will be some that will recover back their principal amounts associated with their investments.

THE COURT: And that's a fair point.

I am, I suppose, focused on principal. Because what I am worried about -- again, just big picture -- is people, victims fighting each other over scraps that won't satisfy anyone anyway. And I wonder if there is some other way to make everybody unhappy but make them unhappy sooner rather than later without continuing to fight in a way that spends money on the receiver that nobody is going to see at the end of the day other than the receiver. And is there a way for everybody to be unhappy and walk away with something instead of what we are doing now.

And I understand the pursuit of individual self-interest can lead to the thinking of: Well, but I have a high-priority claim, and that might give me more cents on the dollar than somebody who has a low-priority claim, and it's in my self-interest to stake out that position. But I wonder, as we think about the fact that we don't have a big-enough pool of money to make that work for everybody, then shouldn't we think

about this in a maybe less self-interested way?

So that's an observation. Maybe this is an observation that has not -- I don't think is an earth-shattering observation. And I am just wondering whether there's anything I can do to help you get there.

And I see some hands being raised. Let me ask the SEC first to chime in on that.

MR. HANAUER: Thank you, Your Honor.

THE COURT: You can stay seated, but just speak into a microphone.

MR. HANAUER: Yes. Thank you, Your Honor. Ben Hanauer for the SEC.

Just to correct one of the Court's impressions. It's not a matter of the victims fighting over the scraps. What we've actually seen so far is it's the victims on one hand and an institutional lender on the other.

And that was how Judge Lee, with input from all the parties, actually structured the claims process. Each group or each tranche has investors on one side and a single institutional lender on the other. And that was designed to streamline things.

It was also an intention of Judge Lee and also the parties that for, you know, efficiency's sake, however the Court resolved Group 1, it's not going to be binding on any other groups, but I think everyone sort of had the view that it

could very well be informative. And once we saw a decision on the first group, that could also lead to a speedier resolution for the following ones.

And then, finally, you know, just the Court's suggestion of, is there any way for, you know, folks to, you know, possibly be made whole in this case. I would just, you know, remind the point that I think for just about every one of these properties where there's an institutional lender involved. The institutional lenders, unlike the investors, all have title insurance, so the SEC's had the consistent position the whole time that even if the institutional lenders lose on a priority issue, they still will be made whole by virtue of the insurance policies they purchased.

THE COURT: And is it the sense of everybody that: You've already thought of all of this. I am not adding anything new to your considerations. That's the reason why you have the Group 1 issues teed up, is because that's what you need in order to move on to the next stage. There's nothing else that I can do to help other than resolve that issue?

Is that also the sense of the parties, Mr. Gale?

MR. GALE: No, I -- a couple of thoughts, Your Honor.

In terms of the question that Your Honor asked, I think that it is possible that Your Honor might be able to provide some guidance to the parties, even those that are before you here today, with respect to Group 1.

I can tell you that I have had preliminary conversations with Mr. Stein, who, as I understand it, represents more of the individual investors in Group 1 than anyone else. I believe that he has talked to some counsel who represent some of the other individual investors. And we have a mutual interest in trying to pursue some sort of a mediated resolution because of all the uncertainties that Your Honor raised, because of the timing of what's going on and some of the other issues, so that everyone might be able to be at least equally unhappy at some level.

Of course, Magistrate Judge Kim started that process by choosing -- I believe it's fourteen properties that had four or fewer investors. And I can tell you, outside of Group 1, I have heard interest from some other counsel for insureds -- I should drop a footnote here to give a moment's context.

I was retained by a title insurer who has roughly 40% of the properties that are part of this case. And so some of the insureds who have slightly more than four investors per property have reached out to wonder whether it might make sense to start some sort of a mediated process there.

Now, when we're talking about these particular properties in Group 1, there are a whole lot more than four investors to each of the five properties. And so it would be a complicated process, a lengthy process, and it could be a difficult process to complete.

From our perspective, none of those are reasons not to try. So we are interested in that.

If I could have a moment of indulgence from Your Honor, though. I would like to say that much of what Mr. Hanauer said we strongly disagree with.

We certainly disagree that the fact that there is title insurance should have absolutely any impact on the lien priority determination in this case. We find that completely improper to bring up.

THE COURT: I'll pause to say, I didn't understand that to be the reason why counsel brought that up.

MR. GALE: And I'm not trying to pick a fight. But I do feel like I need to represent my clients' interests here.

And to the extent there are victims, we're all victims of what happened here, Your Honor. BC57 is a special purpose investment fund put together by Bloomfield Capital. The people who hold the shares in those are individuals very much like the individual investors before the Court. We're all the same spot.

THE COURT: Mr. Stein, could I call on you to just to, again, circle back to the big picture?

My big picture question ultimately boils down to, is it the case really that you still need the resolution of the Group 1 dispute in order to advance any other irons you might have in the fire in terms of mediation settlement, a vision for

this?

And I understand, Mr. Stein, you only represent a subset of individuals. I understand that there are individual investors out there that don't agree with your positions and your representation of others.

So I am saying that just so that people who might be listening on the line understand that I am well aware of Mr. Stein's role in this case as well. So --

MR. STEIN: And I will go even one step further, which is I represent individuals individually, and, therefore, some of my clients might not agree with other of my clients.

But I think what you have seen in miniature here this morning, Your Honor, is sort of representative of the conundrum and the opportunity.

Personally, on behalf of my clients, I agree with Mr. Hanauer's presentation of how these -- how the parties are aligned and what happened here.

Mr. Gale is also correct. He and I have had conversations. And I have checked with the other attorneys representing individual investors. And we are all -- we, on the individual investors' side, are of the view, as Your Honor put it, that it would be better perhaps to get to payments sooner even if they aren't for the full amount that might be obtained later. Because, as I said earlier, many of my clients are people who are planning or had planned to retire and need

this money, this recovery to be able to do that. So sooner is valuable even if it means it's not everything.

But, by the same token, what you also heard this morning is a bit of the argument about the merits of the case and what makes it harder to get to a settlement.

I will agree again, though, with Mr. Gale when he said that those issues exist. They are not a reason that we think it mean -- they should not mean that we don't at least try to find a resolution.

The last thing I will say is the -- perhaps what is the most efficient route to a resolution is a ruling on the Group 1 priority because that is going to answer a lot of questions.

THE COURT: Thank you.

It does sound to me like there is nothing more I can do right now other than dig in on the Group 1 issue that is fully briefed, ready for decision, and get you an answer on that in order to get you to whatever the finish line might look like.

If someone has an idea as to an alternative, I am not saying speak now or never speak again, but I am open to suggestions.

MR. RACHLIS: Your Honor, it's not an alternative, but I will sort of reiterate one point.

In May when there was a status conference that was

held by Judge Lee -- and, of course, these issues were front and center as many of the investor lenders spoke directly to the Court and expressed their concerns -- the Court had indicated then that he was working, you know, towards a Group 1 ruling, and that contemplated, once that was out there, that there would be some type of -- I don't know what the best way to phrase it, but some type of global get-together.

And that would probably be the most expeditious way to try and get to the big picture point that Your Honor has identified. I think we thought about that then, and it still seems like there is wisdom and logic associated with that approach, because that will -- you know, by being together after the millionth time and digested it, there might be numerous opportunities for the parties to really try and get to that expedited conclusion that Your Honor's contemplating.

THE COURT: Thank you.

So what that means, unfortunately, is that we've all lost time as a result of the reassignment, and whatever position Judge Lee was in in May, unfortunately, is not the position I am in --

MR. RACHLIS: Right.

(Counsel laugh.)

THE COURT: -- in October. So that is -- unfortunately, it's just time is lost. I will do what I can to make up. But that's actually not a thing. Time just moves

forward. I can't turn the clocks back.

But I do appreciate the conversation that we've had this morning, and it will -- it does lead me to think the only thing I can do right now is get you a decision on the Group 1 priorities issue as soon as I can.

I have spent enough time and given it enough consideration that I can give you a ruling on the FHFA's objection to Judge Kim's order, so why don't I do that now. I'll do that as an oral ruling now.

I am taking the order and opinion from Judge Kim as a non-dispositive decision. I appreciate the argument that the ruling and Judge Kim's order is dispositive at least as to the agency's ability to dispute the allocation itself, but in the context of this receivership, that allocation is just one step in a long road to liquidation and doesn't resolve the litigation. It is, at this stage of the case, more like, as I've alluded to earlier, an entry in an accounting ledger. The order under review says that: "The fees shall be allocated in an amount to be determined," and that absence of a sum certain also points to that being not what we would call a final dispositive ruling. This wasn't a Report And Recommendation under Rule 72(b), so I take this under Rule 72(a).

But whether the standard of review is *de novo* or clearly erroneous doesn't actually matter here because the objection is a legal objection. And if Judge Kim were wrong on

the law, that would be clearly erroneous.

The joinder by the entities under conservatorship was an untimely objection. It came a couple of days late, as I calculate it. So I am not -- I am rejecting that joinder.

Again, I don't think it matters. I think the ultimate merits are articulated by the agency.

I take and read and understand Section 4617(f) as one that speaks to the power of a court, which is jurisdictional and not something that is waivable. When the Court of Appeals, the Seventh Circuit spoke of the statute as disempowering courts from taking action to restrain or affect the exercise of powers of the agency as a conservator, that is language that speaks to, as it says, the power of a court, which is jurisdictional.

And the Court of Appeals said that that statute squarely forecloses judicial interference with the agency's role as a conservator. That's *Roberts*, 899 F.3d 397, 400 to 402 (7th Circuit 2018).

The D.C. Circuit's opinion in the *Perry Capital* case wrote about this as a merits issue, but did call the statute a far-reaching limitation on judicial review. So I think sometimes courts use language, while not exactly calling it jurisdictional, they're speaking about it in terms of what the modern understanding of jurisdiction is; that is, the power of a court to decide something.

And it is consistent with how the Eighth Circuit read similar language in Section 1821(j) as jurisdictional to read 4617(f) as jurisdictional. And the Eighth Circuit case is *Hanson v. FDIC*, 113 F.3d 866, 870 to 71, and Footnote 5 (8th Circuit 1997).

The statute 4617(f) did not deprive the court of jurisdiction to enforce deadlines against the FHFA doesn't mean that the statute itself isn't speaking in terms of jurisdiction. That notion, which is in the Second Circuit decision, *New Jersey Carpenters Health Fund*, 28 F.4th, 357, 375 (2nd Circuit 2022), that notion is really just talking about whether the statute even applied to the facts of that -- those deadlines that were imposed against the agency there.

So the fact that the agency did not raise this issue sooner is not a reason to not reach the merits of it because it is a jurisdictional issue that's not waivable.

So, as I said, the statute is a limitation on the court's power. It says: "Except as provided in this section, or at the request of the Director, no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." One of the statutory powers of the agency as conservator is to preserve or conserve the assets and property of the entities.

The characterization of 4617(f) as a shield versus a sword, that, in my view, is not a dispositive distinction.

What it is is a helpful way to think about whether what is happening affects the agency's exercise of its powers. If the agency hasn't asserted any power or function that is affected by the court, then in the usual situation, 4617(f) doesn't prohibit a court from acting.

In common parlance, the statute is giving the agency a shield against court interference, but that doesn't mean that the agency can't invoke the statute to stop some action. The statute says what it says. And, of course, Congress means what it said: No court can take action that affects or restrains the agency's exercise of its conservatorship powers.

So I look at it as the question being: Is the allocation of the receiver's fees to these property accounts something that affects or restrains the agency's powers as conservator? And, as I said, one of the powers is to preserve or conserve the assets or property of the entities.

My view of this, though, is that paying the receiver's reasonable approved fees does not -- while it does diminish the amount of money on hand, my conclusion is that that does not affect the agency's powers here, because the agency has agreed that the receiver should be paid, and the agency doesn't dispute that the receiver's efforts were beneficial to the properties.

There is no identified future action by the agency that is being impaired here. Just the general control that the

agency asserts over entity assets.

I appreciate that, that point, that that control and power is broad, but it is consistent with conservatorship and preservation of assets to pay the reasonable obligations of the property or the entities. Being a free rider is not in the public interest and is not consistent with good-faith conservatorship.

So my reading of the facts that we have here is that 4617(f) doesn't prohibit a court from allocating undisputed reasonable receiver's fees to properties that are subject to the entities' mortgages that the agency has under conservatorship.

That paying for the receiver's work out of entity interests or assets is not something that affects or restrains the agency's powers. In my view, that explains why the agency didn't object until now. The receiver's work was not something that the agency ever thought affected or restrained it. Paying for that work out of accounts associated with those entities' interests is something that the agency now objects to, but that doesn't persuade me that the allocation affects or restrains its conservator powers.

That then leads me to consider the issue under 46 -- Section 4617(j)(3), which says that: "No property of the Agency shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the Agency, nor

shall any involuntary lien attach to the property of the Agency."

With respect to consent, the Ninth Circuit decisions that have been cited don't, to me, require explicit consent. They don't foreclose the possibility of implicit or implied consent.

SFR Investments Pool, 893 F.3d 1136, 1149 (9th Circuit 2018) says that the bar on foreclosure without FHFA consent applies by default, and that there's no requirement for express nonconsent, but I don't read that as prohibiting implied consent. If the record demonstrates that FHFA consented through its actions, that can be consent.

And in addressing implicit consent, in *Berezovsky*, B-e-r-e-z-o-v-s-k-y, the Ninth Circuit said that inaction in the context of that case did not convey consent, implicit or otherwise. It didn't say implicit consent was impossible. It said implicit consent didn't happen in that case.

The court said that the statutory language of consent required the agency to affirmatively relinquish its protection against foreclosure. *Berezovsky*, 869 F.3d 923, 929 (9th Circuit 2018). But affirmative relinquishment can come implicitly by taking affirmative steps that demonstrate consent.

Here, the agency has agreed that the receiver should take the steps it took, and has agreed that it should be paid, and now says it doesn't want the receiver to be paid out of

specific accounts created from the property sales, but it has, in my view, affirmatively relinquished the 4617(j)(3) protection by acceding to the receiver's work all the while knowing that the receiver would expect compensation.

While the agency hasn't expressly consented to the precise allocation of fees to these -- to property accounts, it has consented to receive the value of the receiver's work, and all the allocation does is complete the processing of that work.

So I do find sufficient consent here. But even if I am wrong about that, I also conclude that the allocation of receiver fees to accounts is not a levy, attachment, garnishment, foreclosure, sale, or involuntary lien attaching to agency property. What's at issue in the allocation is compensation for services rendered, and it's not analogous to the property interference that the statute is concerned about. Section 4617(j)(3) doesn't give the agency a free pass from paying for services rendered.

So the agency's objections, which is docket No. 1266 to the magistrate judge's opinion and order, which was docket No. 1258, those objections are sustained in part, overruled in part, and, at bottom, the order is affirmed.

That takes one item off my "to do" list, but leaves a substantial item on my "to do" list. What I'd like to do is continue to spend the time I need to spend on the Group 1

claims-process issues that are fully briefed and on the docket.

I will alert the parties when I am ready to talk to you again. In the meantime, I know Judge Kim is continuing to be hard at work, and I urge you to continue to tap in to his resources to help you on the other issues that you think are ready to be resolved.

And one final note that I'll express or ask the receiver about is: In terms of the ongoing work of the receivership, it does seem like the hardest part of it, that is, managing the properties, liquidating the properties, is done. And in terms of the time and expense that I should expect to be seeing from the receiver going forward should be these kinds of things, the ongoing litigation and communication with claimants and investors. But I am hopeful that I am not going to be seeing huge bills coming our way, coming down the road.

MR. RACHLIS: Well, Your Honor knows that the -- you're absolutely correct. The property management issues and things of that -- and liquidation have been completed, largely. There are still things that come in the mail and, you know, just follow-up. But generally speaking, 99% of that virtually -- virtually a hundred percent is completed. So you won't be seeing any of that.

The things that are ongoing, which I do believe will be smaller in terms of bills but nevertheless is impactful, are

these claims reviews that are part and parcel of what is going on before Judge Kim right now. Because Your Honor will -- may recognize that the entirety of establishment of the claims process was a focus on tranche by tranche. So other tranches that have investor lenders on one side and an institutional lender on the other, those claims haven't been reviewed yet. Those are going to be part of a process ongoing later. But hopefully that, too, will be streamlined based on the rulings that will be coming down the road.

So I would anticipate that those will be less, but I do anticipate that they will be focused and there will be some -- there is a good amount of work that gets done every time there's a property that's in front of Your Honor or Judge Kim as we're going through this process.

So that is something you can expect to see. But I do believe it will be a little bit different than what you had seen in the past in our fee applications.

THE COURT: And when is the next one going to come in?

MR. RACHLIS: October --

MR. DUFF: The next fee application.

MR. RACHLIS: The next -- on November 15th?

MR. DUFF: November 15.

THE COURT: November. Okay. Thank you.

MR. RACHLIS: For the -- that will be for the third

quarter of this year.

THE COURT: I appreciate everyone's time and efforts to date. And I appreciate your continued patience. But with that, I don't think there's anything else that we can cover meaningfully this morning, so I won't take more of your time than I already have.

So thank you. We are in recess.

MR. HANAUER: Thank you, Your Honor.

MR. RACHLIS: Thank you, Your Honor.

MR. GALE: Thank you, Your Honor.

(Proceedings concluded.)

C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the Status Hearing proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on October 17, 2022.

/s/ Colleen M. Conway, CSR, RMR, CRR — *10/18/22*

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date