

# Arnold & Porter

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February 27, 2023

**VIA ECF**

Office of the Clerk of the Court  
United States Court of Appeals for the Seventh Circuit  
Everett McKinley Dirksen United States Courthouse  
219 S. Dearborn Street, Room 2722  
Chicago, IL 60604

Re: *Securities and Exchange Commission v. Equitybuild, Inc.*, No. 22-3073: Response to Mr. Duff's Submission of Supplemental Authority

Dear Clerk of Court:

FHFA respectfully responds to Mr. Duff's February 23, 2023 letter. Stripped of the curious assertion that FHFA was "wrong" to note that statements Mr. Duff's counsel made *February 8* became available only "after briefing [on Mr. Duff's pending motion to dismiss this appeal] concluded *February 3*," and shorn of its colorful rhetoric about "whimper[s]," "skosh[es]," and "untimely, incomplete, and piecemeal plucking," Letter (Dkt. 22) at 1-2 (emphasis added), Mr. Duff's letter boils down to a notice of supplemental authority—particularly,, "the District Court's 2/15/2023 ruling on claimant priority," *id.* at 2.<sup>1</sup>

Mr. Duff is mistaken to suggest that the February 15 ruling implies "FHFA's appeal ... is premature and may be mooted by a future District Court priority ruling relat[ing] to the two FHFA properties." *Id.*

Specifically, Mr. Duff overlooks a fundamental provision of FHFA's organic statute that protects FHFA's liens from subordination or extinguishment. *See* 12 U.S.C. § 4617(j)(3). While Fannie Mae and Freddie Mac are in FHFA's conservatorship, that statute prevents any lien that might otherwise be granted priority over a Fannie Mae or Freddie Mac lien from being enforced in a way that impairs the conservatorship's interest in the collateral. *See, e.g., Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); *M&T Bank v. Brown*, Civ. Action No. 19-587, 2022 WL 7003740 (D.D.C. Oct. 12, 2022).

The process or doctrine by which a protected lien would be impaired is immaterial—the *effect* of the action, not its label, is what matters. Courts have therefore applied the substantively identical FDIC statute to bar judicial actions that would cause "any deprivation" of a protected property interest. *See, e.g., Trembling Prairie Land Co. v. Verspoor*, 145 F.3d 686, 691 (5th Cir. 1998) (emphasis added); *S/N-1 REO Liab. Co. v. City of Fall River*, 81 F. Supp. 2d 142, 150 (D. Mass. 1999) (similar).

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<sup>1</sup> The parties seemingly agree that regardless of whether FRAP 28(j) formally applies, FRAP 2 allows the Court to consider these submissions and responses.

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Because a federal statute protects FHFA's liens from subordination or extinguishment without FHFA's consent, the February 15 ruling cannot moot the issues FHFA raised.

Respectfully submitted,

/s/ Michael A.F. Johnson

Michael A.F. Johnson

cc: All Counsel of Record (via ECF)

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## CERTIFICATE OF COMPLIANCE AND SERVICE

Counsel for FHFA certifies that this letter complies with the type-volume limitations of Fed. R. App. P. 28(j), because the body of the letter contains no more than 350 words. Specifically, the body of the letter contains 350 words, as counted by the word-count feature of Microsoft Word.

On this 27th day of February, 2023, I filed the foregoing document electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF system, which will provide electronic service on all counsel of record.

/s/ Michael A.F. Johnson

Michael A.F. Johnson