

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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, FANNIE MAE, AND FREDDIE MAC’S
JOINT OBJECTION TO THE MAGISTRATE JUDGE’S DECISION OVERRULING
FHFA, FANNIE MAE, AND FREDDIE MAC’S JOINT OBJECTION
TO RECEIVER’S SECOND MOTION FOR APPROVAL OF
FEE ALLOCATIONS FOR INTERIM PAYMENT**

The Federal Housing Finance Agency (“FHFA”), as Conservator for the Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan Mortgage Corporation (“Freddie Mac”) (together, the “Enterprises”), along with the Enterprises, object under Federal Rule of Civil Procedure 72 to Magistrate Judge Kim’s June 21, 2023 Minute Orders (Dkts. 1490, 1491) (together, the “MJ Decision”) overruling FHFA and the Enterprises’ joint objection (Dkt. 1442) (“Second Objection”) to the receiver’s (“Mr. Duff”) second motion for approval of fee allocations for interim payment (Dkt. 1321) (“Second Motion”) insofar as it would allocate costs to properties encumbered by Enterprise liens (“Enterprise Properties”) protected by specific federal law at 12 U.S.C. §§ 4617(f), 4617(b)(2), 4617(j)(3). The MJ Decision overruled the Second Objection “[f]or the reasons stated during the June 15, 2023 motion hearing and in this court’s previous rulings on the objections to the first allocation motion.” Dkt. 1490. The MJ Decision did not otherwise address the Second Objection on its merits or provide additional reasoning for the ruling. The MJ Decision also did not stay any disbursement of fees pending the outcome of FHFA’s appeal under

28 U.S.C. § 1292(a), which remains pending before the Seventh Circuit. No. 22-03073.¹

I. Background on Receiver’s First Motion and FHFA’s Pending Appeal

On March 4, 2022, FHFA objected to Mr. Duff’s first motion to allocate his fees and costs to the Enterprise Properties because any such allocation of fees would dissipate the Enterprises’ collateral and thereby impair FHFA’s statutory powers to collect on the obligations secured by the Enterprise Properties and to preserve and conserve the Enterprises’ assets; an outcome explicitly precluded by federal law (“Initial Objection”). Dkt. 1209; *see also* 12 U.S.C. §§ 4617(f), 4617(b)(2), 4617(j)(3). Specifically, FHFA argued that (1) § 4617(f) barred the cost allocation because the requested cost allocation would restrain and affect FHFA’s statutory powers that are jurisdictional and cannot be waived, (2) § 4617(j)(3) prohibited the cost allocation because it would extinguish FHFA’s property interests, and (3) applying §§ 4617(f) and (j)(3) advanced the Housing and Economic Recovery Act of 2008’s purpose. *See* Dkt. 1209.

Magistrate Judge Kim heard FHFA’s Initial Objection and overruled it. Dkt. 1258. On July 6, 2022, FHFA timely objected to Magistrate Judge Kim’s decision. Dkt. 1266. On October 17, 2022, the Court issued an oral ruling, affirming Magistrate Judge Kim’s order, albeit on slightly different grounds. Dkts. 1325, 1327. FHFA’s appeal of the Court’s oral ruling is still pending before the Seventh Circuit.

II. Receiver’s Second Motion

To preserve its rights on appeal, on April 14, 2023, FHFA and the Enterprises objected to Mr. Duff’s Second Motion, which covered fees incurred during the period from October 1, 2021 through June 20, 2022 as set forth in Mr. Duff’s Fourteenth through Sixteenth Fee Applications.

¹ In ruling on the Receiver’s first motion for approval of fee allocations and the Initial Objection, this Court stayed disbursements sought against the Enterprise Properties. *See* Dkt. 1469.

Dkt. 1442. In the Second Objection, FHFA and the Enterprises reiterated that: (1) § 4617(f) bars the Court from allocating Mr. Duff’s fees to Enterprise accounts because allocating his fees would restrain or affect FHFA’s powers or functions; and (2) § 4617(j)(3) bars the Court from allocating Mr. Duff’s fees to Enterprise accounts because the statutory provision bars any judicially-sanctioned dissipation of FHFA’s property interests and FHFA did not explicitly consent. *See* Dkt. 1442. As noted above, on June 21, 2023, Magistrate Judge Kim issued the MJ Decision, which overruled the Second Objection “[f]or the reasons stated during the June 15, 2023 motion hearing and in this court’s previous rulings on the objections to the first allocation motion.” Dkt. 1490.

To eliminate any potential waiver or preservation issues regarding the MJ Decision,² FHFA and the Enterprises respectfully incorporate those objections and their Second Objection in their entirety herein. *See* Dkts. 1209, 1266, 1442. FHFA and the Enterprises object to the MJ Decision to the extent it allocates Mr. Duff’s fees and costs to the Enterprise Properties, as such action is precluded by federal law. FHFA and the Enterprises respectfully request that the Court carve out the Enterprise Properties from the allocation request and overrule the MJ Decision to the extent the fees and costs are allocated against Enterprise Properties. To the extent the Court disagrees—as it did with the Initial Objection—FHFA and the Enterprises respectfully request that the Court stay disbursements sought against the Enterprise Properties until the Seventh Circuit has definitively ruled on FHFA’s pending appeal, as it also did based on FHFA’s Initial Objection. *See* Dkt. 1469.

² FHFA and the Enterprises believe that this written objection is sufficient to preserve FHFA’s rights on appeal. That said, FHFA and the Enterprises will participate in oral argument if it would aid the Court.

Dated: July 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2023, I caused the foregoing **Federal Housing Finance Agency, Fannie Mae, and Freddie Mac's Joint Objection to the Magistrate Judge's Decision Overruling FHFA, Fannie Mae, and Freddie Mac's Joint Objection to Receiver's Second Motion for Approval of Fee Allocations for Interim Payment** 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