

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION No. _____

14-1763 D

COMMONWEALTH OF MASSACHUSETTS,)
)
 Plaintiff,)
)
 v.)
)
 FEDERAL HOUSING FINANCE AGENCY,)
 FEDERAL HOME LOAN MORTGAGE)
 CORPORATION, and FEDERAL NATIONAL)
 MORTGAGE ASSOCIATION,)
)
 Defendants.)
 _____)



COMPLAINT

1. The Commonwealth of Massachusetts, by and through its Attorney General Martha Coakley, brings this action against defendants Federal Housing Finance Agency (“FHFA”), Federal Home Loan Mortgage Corporation, (“Freddie Mac”) and Federal National Mortgage Association, (“Fannie Mae”) to require them to comply with a Massachusetts law that forbids banks and lenders from refusing to allow the sale of homes in foreclosure to non-profit organizations if the property will be resold or leased by the non-profit to the former homeowner. As described more fully below, Fannie Mae, Freddie Mac and their regulator and conservator, FHFA, have employed policies that restrict the sale of properties owned or guaranteed by Fannie Mae or Freddie Mac, in direct violation of M.G.L. c. 244, §35C(h). The Commonwealth asks the Court to enjoin the Defendants’ unlawful practices in Massachusetts.

PARTIES

2. The Commonwealth of Massachusetts, through the Office of the Attorney General, is located at One Ashburton Place, Boston, Massachusetts.

3. Defendant Federal Housing Finance Agency (FHFA) is a federal agency that was created by the Housing and Economic Recovery Act of 2008 (HERA). FHFA supervises and regulates Fannie Mae, Freddie Mac and the twelve Federal Home Loan Banks. At present and pursuant to authority granted under HERA, FHFA also holds Fannie Mae and Freddie Mac in conservatorships.

4. Defendant Federal National Mortgage Association (FNMA or Fannie Mae) is a federally chartered private corporation, commonly referred to as a government-sponsored enterprise (“GSE”).

5. Defendant Federal Home Loan Mortgage Corporation (FHLMC or Freddie Mac) is a federally chartered private corporation. Freddie Mac is also a GSE. Together with Fannie Mae, Freddie Mac owns or guarantees about half the residential mortgage loans in the United States.

JURISDICTION AND VENUE

6. Jurisdiction is conferred on this Court by M.G.L. c. 93A, §4 and M.G.L. c. 12, §10, and under its general equity powers as set forth in M.G.L. c. 214, §1.

7. Pursuant to M.G.L. c. 223, §5 and M.G.L. c. 93A, §4, venue lies in Suffolk County.

FACTS

8. In 2012, the Massachusetts General Court passed “An Act Preventing Unlawful and Unnecessary Foreclosures,” which was signed into law by Massachusetts Governor Deval Patrick on August 3, 2012. The law is designed to prevent unnecessary residential property foreclosures involving mortgage loans with certain characteristics. *See* M.G.L. c. 244, §§14, 35B-35C (the “Massachusetts Foreclosure Law”).

9. The Massachusetts Foreclosure Law creates a layer of protection prior to foreclosure for those borrowers in Massachusetts with the riskiest, most expensive and least sustainable subprime mortgage loans.

10. The Massachusetts Foreclosure Law was designed to achieve several goals. First, by requiring advance proof of an entity’s authority to foreclose, it codified recent Massachusetts court decisions detailing what is required to legally foreclose on a secured property. Second, where a mortgage loan has any one of several “subprime” characteristics, the “creditor” must evaluate the borrower for a loan modification prior to initiating foreclosure. If the modification would result in an affordable payment for the borrower and is less costly to the creditor than the anticipated costs of foreclosure, the loan modification must be offered.

11. The law explicitly defines “creditor” to include Defendants Fannie Mae and Freddie Mac. M.G.L. c. 244, §§35B(a) and 35C(a).

12. In addition to this legislative action, various Massachusetts community leaders and non-profit groups have devised programs to stabilize vulnerable neighborhoods and address the blight caused by large numbers of foreclosures. These efforts have been directed to “hardest hit” neighborhoods, including areas with the largest volume of distressed mortgage

loans and abandoned homes, and with high percentages of “underwater” borrowers (borrowers whose mortgage loan indebtedness exceeds the current value of their home). Some non-profit groups offer programs to purchase homes in these areas at their current fair market value, either post-foreclosure or otherwise, and then sell (or rent) the property back to the original homeowner, provided the homeowner financially qualifies.

13. The non-profit Boston Community Capital (“BCC”), through one such program, purchases foreclosed (or pre-foreclosure) homes at current fair market value and then re-sells (or rents) them to the former homeowner, after first evaluating the homeowner’s ability to pay on a mortgage loan based on the property’s actual value. Since its inception in 2009, the BCC’s Stabilizing Urban Neighborhoods (“SUN”) Initiative has prevented the displacement of approximately 475 Massachusetts families.

14. Among its other provisions, the Massachusetts Foreclosure Law facilitates these community stabilization efforts through a provision of the law which prohibits “creditors” from conditioning the sale of a property to a 501(c)(3) non-profit organization on an agreement “limiting ownership or occupancy” of the property by the former homeowner. M.G.L. c. 244 §35C(h). Under the so-called “Non-profit Buyback Provision,” a creditor cannot refuse to sell a property in Massachusetts to such an entity simply because that entity intends to thereafter sell (or rent) the property back to the homeowner:

In all circumstances in which an offer to purchase either a mortgage loan or residential property is made by an entity with a tax-exempt filing status under section 501(c)(3) of the Internal Revenue Code, or an entity controlled by an entity with such tax exempt filing status, no creditor shall require as a condition of sale or transfer to any such entity any affidavit, statement, agreement or addendum limiting ownership or occupancy of the residential property by the borrower and, if obtained, such affidavit, statement, agreement or addendum shall not provide a basis to avoid a sale or transfer nor shall it be enforceable against such

acquiring entity or any real estate broker, borrower or settlement agent named in such affidavit, statement or addendum.

M.G.L. c. 244 §35C(h).

15. Defendants Fannie Mae and Freddie Mac (“the GSEs”) contract with banks and other entities to service or otherwise manage the mortgage loans they hold or guarantee, and properties they own following foreclosure. These mortgage servicers are bound by the guides promulgated by each of the GSEs, respectively. Defendant FHFA takes no part in drafting or updating these guides, but, in its role as conservator of Fannie Mae and Freddie Mac, FHFA may issue directives to the GSEs to modify the guides or otherwise to restrict or govern the GSEs’ actions.

16. Through the GSE guides and an FHFA directive, Defendants have maintained policies that effectively preclude the GSEs from dealing with non-profit organizations such as BCC that offer qualified homeowners an opportunity to “buyback” or lease their homes. These policies directly contravene the Non-profit Buyback Provision of the Massachusetts Foreclosure Law.

17. The GSEs’ guides govern the disposition of GSE property including sales of post-foreclosure homes, which are often referred to as “real estate owned” or “REO” properties. With respect to the sale of REO and other properties, the GSEs have an “arm’s length transaction” requirement, under which the parties proposing to purchase the property must attest that “there are no agreements, understandings or contracts” that the borrower will remain in the property as a tenant or “later obtain title or ownership” of the property (the “ALT requirement”).

18. The ALT requirement directly contravenes the Non-profit Buyback Provision of the Massachusetts Foreclosure Law, M.G.L. c. 244, §35C(h), because it forbids a GSE sale to a non-profit buyer if the non-profit intends to sell or rent to the former homeowner.

19. In addition, Defendant FHFA has issued the so-called “make-whole” directive, which precludes the GSEs from accepting anything less than the outstanding loan amount from the former homeowner or anyone intending to sell or rent to that person. The GSEs thus refuse to sell at fair market value to a non-profit that may sell or rent to the former homeowner, instead requiring a (higher and non-market) price that is equivalent to the outstanding loan amount.

20. By requiring full payment of the outstanding loan amount from the former homeowner or from a non-profit organization such as BCC, the GSEs are effectively refusing to deal with these non-profits. Massachusetts law explicitly prohibits exactly that refusal to deal, thus the Defendants’ make-whole directive violates the Non-profit Buyback Provision of the Massachusetts Foreclosure Law, M.G.L. c. 244, §35C(h).

21. Despite several and explicit demands by the Commonwealth, Defendants have failed or refused to suspend or alter their policies to ensure compliance with Massachusetts law.

22. Defendants continue to implement their policies which violate Massachusetts law, and have pursued eviction and other legal actions against Massachusetts residents even where a competitive “buyback program” offer has been made through a valid non-profit.

23. By example, in a case that originated in Boston Housing Court, counsel for Freddie Mac have sought to evict the former homeowner, Ramon Suero, and his family from a condominium in Dorchester. Mr. Suero purchased the property in 2005 for \$283,000; in September 2010, Ocwen Loan Servicing, LLC, foreclosed on the property on behalf of Freddie

Mac. Despite the fact that BCC repeatedly sought to purchase the property for current fair market value as part of the SUN Initiative, Freddie Mac declined the offers. When ordered by the Court to respond, Freddie Mac raised the make-whole directive: Freddie Mac would only accept the higher of the property's fair market value or the full amount of the indebtedness due on the mortgage loan at the time of the foreclosure. In other words, based on the ALT requirement and the make-whole directive, Freddie Mac would accept fair market value from any other buyer – but from BCC, it demanded an amount well above the property's current value.

24. In November, 2013, the Sueros filed an affirmative lawsuit asserting claims under the Massachusetts Consumer Protection Act, M.G.L. c. 93A, for Freddie Mac's failure to comply with the Non-profit Buyback Provision of the Massachusetts Foreclosure Law and for its alleged unfair conduct in the housing court proceedings. *See Suero v. FHLMC*, Case No. 1:13-cv-13014- JGD, (D. Mass). In that case, the court found persuasive the claim that Freddie Mac's "refusal to entertain fair market value offers from BCC violates ch. 93A." *See Memorandum of Decision and Order on Plaintiffs' Motion for a Preliminary Injunction (Dein, M.J.) (December 17, 2013)*. Further, the court found that the issuance of a preliminary injunction enjoining Freddie Mac from selling the condominium or evicting the Sueros was "consistent with public policy" because:

As evidenced by Mass. Gen. Laws ch. 244, §35C, the [Massachusetts] Legislature has determined that allowing the sale of property to third-parties for resale to the defaulting home owner is in the best interest of the Commonwealth. Unless a preliminary injunction is issued in this case, there is no possibility that the Property will remain in the plaintiff's hands. The plaintiffs, as well as the other members of the public, should be given the opportunity to litigate whether Freddie Mac's policy, which is inconsistent with that of the [Massachusetts] Legislature, should be enforced in the Commonwealth...

Id. at 16.

25. In another example, a BCC negotiator offered to buy a Freddie Mac REO property located at 34 Rodney Street in Worcester, Massachusetts for \$105,000 – the exact price at which Freddie Mac had previously listed the property for sale on the Multiple Listing Service. As was the case with Mr. Suero, the former homeowner had been approved by BCC for financing sufficient to support the repurchase of his home. The response came within twenty-four hours: Freddie Mac “has decided to decline” and instead “is seeking to sell the property [to BCC] at a ‘make whole’ amount which is approximately \$204,000.” Thus, Freddie Mac demanded nearly twice the property’s fair market value because the sale was to BCC.

26. In other cases involving the GSEs’ refusal to consider competitive BCC offers, courts have recognized claims based on violations of the Non-profit Buyback Provision. Citing the GSEs’ ALT requirement, the Court in two recent eviction cases allowed the former homeowner-defendant to add c. 93A counterclaims against Fannie Mae. Such claims were appropriate based on “refusal by the plaintiff to consider an offer to purchase by the nonprofit tax-exempt entity [BCC] without the purchaser’s agreement limiting ownership or occupancy of the residential property by the defendant borrower ...” Order (May 22, 2013) (FNMA v. Woodall, Commonwealth of Massachusetts, Northeast Housing Court, No. 12-SP-0080) (Kerman, J.); Order (May 22, 2013) (FNMA v. Hutchinson, Commonwealth of Massachusetts, Northeast Housing Court, No. 11-SP-4686) (Kerman, J.).

27. Defendants’ ALT requirement and the make-whole directive are inconsistent with the Non-profit Buyback Provision of the Massachusetts Foreclosure Law. By maintaining

these policies in Massachusetts, Defendants are knowingly violating a state law intended to protect consumers, rebuild hard-hit communities and advance the public interest.

COUNT I

Violation of the Non-profit Buyback Provision of M.G.L. c. 244, § 35C(h)
(M.G.L. c. 244, § 35C(h))

28. The Commonwealth re-alleges paragraphs 1 through 27 and incorporates them as if set forth fully herein.

29. Defendants Fannie Mae, Freddie Mac and FHFA have violated the Non-profit Buyback Provision of the Massachusetts Foreclosure Law, M.G.L. c. 244 §35C(h), through application of their policies and directives, including the ALT requirement and the make-whole directive, to sales of Massachusetts residential properties securing (or formerly securing) GSE-guaranteed or GSE-owned mortgage loans (namely, those sales where a non-profit seeks to purchase the property at current fair market value and intends to resell or rent the property to the former homeowner).

30. Defendants' policies and directives, including the ALT requirement and the make-whole directive, as applied to sales of Massachusetts residential properties securing (or formerly securing) GSE-guaranteed or GSE-owned mortgage loans, have caused harm to residents and the economy.

COUNT II

Declaratory Judgment

31. The Commonwealth re-alleges the preceding paragraphs and incorporates them as if set forth fully herein.

32. Defendants are subject to the Massachusetts Foreclosure Law and must comply with its mandates, including the Non-profit Buyback Provision contained in M.G.L. c. 244, §35C(h).

33. By applying the ALT requirement and the make-whole directive to certain sales or proposed sales of Massachusetts residential properties securing (or formerly securing) GSE-guaranteed or GSE-owned mortgage loans – namely, those sales where a non-profit seeks to purchase the property at current fair market value and intends to resell or rent the property to the former homeowner, Defendants are violating the Non-profit Buyback Provision of the Massachusetts Foreclosure Law.

34. The Commonwealth is entitled to a Declaratory Judgment that, with respect to sales or proposed sales of Massachusetts residential properties securing (or formerly securing) GSE-guaranteed or GSE-owned mortgage loans, application of the ALT requirement and make-whole directive, which directly or indirectly condition the sale of such property to a 501(c)(3) non-profit organization’s agreement “limiting ownership or occupancy” of the property by the former homeowner, is a violation of the Massachusetts Foreclosure Law, M.G.L. c. 244, §35C(h).

COUNT III

Unfair and Deceptive Business Practices **(M.G.L. c. 93A, §§2 and 4)**

35. The Commonwealth re-alleges the preceding paragraphs and incorporates them as if set forth fully herein.

36. Defendants are engaged in trade or commerce as defined in M.G.L. c. 93A, §1.

37. Defendants knowingly engaged in unfair or deceptive acts or practices in violation of M.G.L. c. 93A, §§2 and 4 (and regulations promulgated thereunder) by applying the ALT requirement and the make-whole directive to sales or proposed sales of Massachusetts residential properties securing (or formerly securing) GSE- guaranteed or GSE-owned mortgage loans (namely, those sales where a non-profit seeks to purchase the property at current fair market value and intends to resell or rent the property to the former homeowner) in direct violation of the Non-profit Buyback Provision of the Massachusetts Foreclosure Law.

38. Defendants committed unfair or deceptive business practices because they failed to comply with existing statutes, rules, regulations or laws meant to protect the public's health, safety, or welfare, as set forth in 940 C.M.R. §3.16.

39. By letter dated May 22, 2014, the Commonwealth informed each Defendant of its intention to bring an action under the Consumer Protection Act, thus providing the notice required pursuant to M.G.L. c. 93A, §4.

PRAYER FOR RELIEF

WHEREFORE, the Commonwealth of Massachusetts requests that this Court:

- (a) Find that Defendants violated M.G.L. c. 244, §§35B, 35C(h) and M.G.L. c. 93A, §§2 and 4;
- (b) Enter judgment (1) declaring that the implementation, maintenance or application of Defendants' policies consisting of the ALT requirement and the make-whole directive as applied to sales of Massachusetts residential properties securing (or formerly securing) GSE- guaranteed or GSE-owned mortgage loans is unlawful, and (2) declaring specific application of this judgment to certain transactions;

namely, those sales where a non-profit seeks to purchase a property secured (or formerly secured) by a GSE- guaranteed or GSE-owned mortgage loan at current fair market value and intends to resell or rent the property to the former homeowner;

- (c) After a hearing, enter a preliminary and/or permanent injunction enjoining Defendants from engaging in policies that fail to conform with M.G.L. c. 244, §35C(h) and M.G.L. c. 93A, §2;
- (d) Award penalties of up to \$5,000.00 for each unfair or deceptive act or practice as determined by this Court;
- (e) Award attorneys' fees and costs; and
- (f) Grant such other relief as the Court deems just and proper.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
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