

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

SUNTRUST MORTGAGE, INC.,

Defendant.

Case No. 1:14-cv-1028-RMC

**THE STATE MEMBERS OF THE MONITORING COMMITTEE’S NOTICE REGARDING THE
ENFORCEMENT PROVISIONS OF EXHIBIT E OF THE PROPOSED CONSENT JUDGMENT**

This Notice is filed pursuant to the Minute Order issued by the Court on July 11, 2014, which requires the parties to file a notice “setting forth the meaning of the following portion of Exhibit E to the proposed Consent Judgment with regard to Servicing Standards: Section J.2 (“An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee”) in light of Section C.5 (“It shall be the responsibility of the Monitor to determine whether Servicer is in compliance with the Servicing Standards”) and Section E.6 (“In the event a Potential Violation is cured... then no Party shall have any remedy...”).” This Notice is filed by the State Members of the Monitoring Committee (“Monitoring Committee”) on behalf of itself and the Plaintiff States.

The provisions cited in the Minute Order are better understood in the broader context of Exhibit E and the Consent Judgment. The enforcement provisions of Exhibit E contemplate two types of enforcement actions that may be filed by the Monitoring Committee or any Plaintiff in the District Court: (1) those alleging that the servicer failed to cure a “Potential Violation” of the metric testing, and (2) those alleging that the servicer violated an “obligation” under the

proposed consent judgment. *See* Exhibit E, §J.2 and §J.3 (“In the event of an action to enforce the obligations of Servicer and to seek remedies for an uncured Potential Violation . . .”).

“Potential Violation” is a specifically defined term within Exhibit E that occurs when the servicer exceeds the error threshold on a servicing standard that is tested by a metric. *See* Exhibit E, §E.1. The occurrence of a Potential Violation triggers a corrective procedure that gives the servicer a mandatory right to cure under Sections E. 2 and E.3 and requires the servicer to remediate any material borrower harm under Section E.5. In that context, Section E.6 provides: “In the event a Potential Violation is cured as provided in Sections [sic] E.3, above, then no Party shall have any remedy under this Consent Judgment (other than the remedies in Section E.5) with respect to such Potential Violation.” Exhibit E, §6. In short, Section E.6 prohibits the Monitoring Committee or any Plaintiff from filing an enforcement action on servicing standards that are measured by metric testing, unless the Defendant has failed to cure any violation or remediate the borrower harm arising out of that metric testing.

By contrast, the term “obligation” is used in varying contexts throughout the entirety of the proposed consent judgment.¹ Exhibit E similarly uses the term “obligation” in a number of different contexts, including references to servicing standards (§C.24 and §K), consumer relief requirements (§C.7 and §C.11), payment obligations (§D.1 and §D.6), and the servicer’s responsibility to cure Potential Violations (§E.5). Moreover, in Section J of Exhibit E, the term

¹ For example, in the consent judgment itself, the term “obligation” is used to describe consumer relief requirements, servicing standards, both or neither. *See, e.g.*, Proposed Consent Judgment, §III.5 (referring to consumer relief), §VII.15 (referring to servicing standards and consumer relief requirements) and §VII.17 (referring to servicer’s continuing responsibility to comply with federal and state law). The term “obligation” is used throughout the Servicing Standards and is specifically defined as including both the servicing standards and the actions necessary to comply with the standards. Exhibit A, §IX.B.1. (“In each instance in this Agreement in which Servicer is required to ensure adherence to, or undertake to perform certain obligations, it is intended to mean that Servicer shall: (a) authorize and adopt such actions on behalf of Servicer as may be necessary for Servicer to perform such obligations and undertakings; (b) follow up on any material non-compliance with such actions in a timely and appropriate manner; and (c) require corrective action be taken in a timely manner of any material non-compliance with such obligations.”). The term “obligation” is likewise used to describe consumer relief requirements. *See, e.g.*, Exhibit D, §11; Exhibit I, §8.a.xv; and Exhibit I, §3.

“obligation” appears without any qualification when describing who can bring an enforcement action (§J.2) and what remedies are available (§J.3). Thus, the term “obligation” in Section J refers to any promise, duty or responsibility contained within the proposed consent judgment. This reading is confirmed by the similar use of the term “obligation” without limitation in the federal and state releases, which exempt “Liability based on SunTrust’s obligations created by this Consent Judgment.” Exhibit G, §IV.3; Exhibit F, Terms and Conditions, §11(n).

Section J of Exhibit E distinguishes the remedies available to enforce obligations and uncured Potential Violations. A party enforcing an obligation may seek non-monetary equitable relief. *See* Exhibit E, §J.3.a. Moreover, if the servicer fails to meet its obligation to provide consumer relief, the party may seek payment of the amounts described in Section 10.d of Exhibit D. *See* Exhibit E, §J.3.c. The Monitoring Committee or any Plaintiff seeking to enforce an obligation may not, however, seek a civil penalty; civil penalties may only be awarded where the servicer has failed to cure a Potential Violation. *See* Exhibit E, §E.6 and §J.3.b.

Sections E.6 and J.3.b represent the parties’ negotiated compromise to limit the Monitoring Committee’s and the Plaintiffs’ right to seek monetary penalties to instances where the Defendant has failed to cure a Potential Violation. Section E.6 prohibits the Monitoring Committee and Plaintiffs from filing enforcement actions based on Potential Violations unless the remediation procedure described in Section E results in an uncured Potential Violation or the servicer has failed to remediate borrower harm. This is the only restriction on the Monitoring Committee or the Plaintiffs’ right to file an enforcement action, and Section J.3 describes the relief that may be available when an enforcement action is authorized under Section E.6. Moreover, Sections J.2 and J.3 preserve the right of the Monitoring Committee or any Plaintiff to file an enforcement action for equitable relief that arises outside the scope of metric testing,

which would include any servicing standard obligation that is not measured by a metric, or any other obligation under the proposed consent judgment.

Section C.5 of Exhibit E does not limit the authority of the Monitoring Committee or any Plaintiff to file an enforcement action. Section C sets forth the responsibilities of the Monitor and describes how the monitoring regime will test compliance with servicing metrics and consumer relief requirements. Although Section C.5 states that “[i]t shall be the responsibility of the Monitor” to determine whether the servicer is complying with the servicing standards and consumer relief, this provision is not intended as a limitation on the power of either the Monitoring Committee or any Plaintiff to ensure Servicer compliance with the consent judgment. Indeed, Section B of Exhibit E specifically contemplates the creation of a Monitoring Committee of State Attorneys General and the federal parties that “shall monitor Servicer’s compliance with this Consent Judgment.” And Section J.2 specifically authorizes the Monitoring Committee or any Plaintiff to file an enforcement action if the servicer fails to meet its obligations under the Consent Judgment.

With respect to the servicing standards, the Monitor’s primary role is to implement and perform metric testing of select standards. There are 304 servicing standards but only 33 metrics. While the metrics map to multiple servicing standards, the metrics do not cover every standard. As a result, there are over 100 servicing standards that exist beyond the purview of metric testing and the Potential Violation procedure. For example, the servicer is required to refrain from using compensation arrangements that encourage speed over accuracy in the preparation of foreclosure or bankruptcy documentation (I.A.10); the servicer is prohibited from intentionally destroying or disposing of the original mortgage note (I.C.5); and the servicer is required to provide accurate and complete information to third party service providers (II.A.5).

While the importance of these improvements to the mortgage servicing industry is obvious, these standards—and over a hundred more like them—are not subject to metric testing. The National Mortgage Settlement parties agreed to limit the number of metrics because of the burden imposed by establishing and administering metric testing, which includes drafting and implementing hundreds of pages of testing protocols to accurately cull the requisite information for those metrics out of the servicer's system of record. It was not the intention of the Plaintiffs in the National Mortgage Settlement (or the present Plaintiffs in SunTrust) to relinquish the right to enforce servicing standards that are not measured by metrics. Nor was it the Plaintiffs' intention to limit enforcement rights over these servicing standards to instances where the Monitor utilizes his ability to create and implement additional metric testing based on his own determination of noncompliance. Sections J.2 and J.3 preserve the right of any party or the Monitoring Committee to enforce the obligations of the settlement, subject to the express limitations described above.

By establishing a Monitor and metric testing, the parties agreed to restrict the Monitoring Committee and the Plaintiffs' right to enforce compliance with the servicing standards in only one instance. The Plaintiffs have agreed that they will not seek equitable relief or monetary penalties for a metric failure, unless the servicer has failed to adequately cure and remediate that failure as required under Section E. There is no other limitation on the Plaintiffs' or the Monitoring Committee's right to seek equitable relief should the Defendant fail to meet one of its other obligations under the settlement.

In conclusion, Sections J.2 and J.3 of Exhibit E authorize the Monitoring Committee or any Plaintiff to bring an equitable action to enforce any obligation, including an uncured Potential Violation, and to bring an action for civil penalties for an uncured Potential Violation.

Section E.6 prohibits any action for a Potential Violation that has been cured pursuant to Section E.3. Section C.5 provides that the Monitor is responsible for the metric testing process but does not limit the ability of the Monitoring Committee or any Plaintiff to bring an enforcement action that is otherwise authorized by Exhibit E.

Respectfully submitted,

The State Members of the Monitoring Committee

By: /s/ Patrick Madigan

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One of the Attorneys for the Monitoring Committee

Original filed.

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties of record.

By: /s/ Patrick Madigan