

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 14-1028 (RMC)
)	
SUNTRUST MORTGAGE INC.,)	
)	
Defendant.)	
_____)	

**FEDERAL PARTIES’ NOTICE IN RESPONSE TO MINUTE ORDER
REQUIRING NOTICE ON THE PROPOSED CONSENT JUDGMENT**

Plaintiffs United States of America and the Consumer Financial Protection Bureau respectfully submit this Notice in response to the Court’s July 11, 2014, Minute Order requesting the parties explain the meaning of three provisions in the proposed Consent Judgment’s Enforcement Terms (Exhibit E):¹

- Exhibit E § J.2 (“An enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee.”);
- Exhibit E § C.5 (“It shall be the responsibility of the Monitor to determine whether Servicer is in compliance with the Servicing Standards . . .”); and
- Exhibit E § E.6 (“In the event a Potential Violation is cured . . . then no Party shall have any remedy . . .”).

For the reasons explained in this Notice, these Enforcement Terms authorize any Party (the Federal Government, the States, and the Servicer) to initiate an enforcement action for any violation of an obligation under the Consent Judgment, including compliance with all of the

¹ The defined terms used in this Notice refer to the definitions under the proposed Consent Judgment.

Servicing Standards regardless of whether they are tested by a metric, subject to a single exception: a Plaintiff may not bring an action to enforce a Potential Violation of a Servicing Standard that is tested by a metric unless the Servicer has failed to successfully and timely cure the Potential Violation in accordance with the Enforcement Terms of the Consent Judgment.²

BACKGROUND

The Consent Judgment provides relief in various categories, one of which is relevant here: Servicing Standards. Judgment, ¶ 6. The Servicer “shall comply with the Servicing Standards,” Consent Judgment at ¶ 2, which consist of more than 300 requirements governing the Servicer’s business practices, of which a significant number are subject to enhanced oversight by the Monitor. Judgment, Ex. A. The Servicing Standards “are incorporated . . . as the judgment of this Court and shall be enforced in accordance with the authorities provided in the Enforcement Terms,” which are attached as Exhibit E to the Consent Judgment.³ Judgment, ¶ 6. The Enforcement Terms in Exhibit E establish:

- a timeline for implementing the Servicing Standards (§ A);
- the creation of the Monitoring Committee (§ B);
- the appointment of Joseph A. Smith as the Monitor, whose responsibility is to assess the Servicer’s compliance with the Consent Judgment and to report findings to the Monitoring Committee and the Court (§§ C.1, C.5, D);
- the creation of a Work Plan that incorporates specific evaluation metrics that cover a substantial portion of the Servicing Standards and governs the manner in which the Monitor carries out his responsibilities, including providing for the testing methods and

² The Monitoring Committee, which consists of representatives from the Federal Government and the States, may also bring an enforcement action. The Committee’s right to bring an enforcement action is coextensive with the defined Parties, except for the 21-day notice period.

³ The Parties’ arguments over the Servicing Standards do not impact the enforceability of the Consumer Relief Requirements or other obligations under the Consent Judgment, nor limit any other remedies available to harmed borrowers under the Consent Judgment.

procedures by which the Monitor will review the Servicer's compliance with the metrics (§§ C.6, 11-15);

- the creation of an Internal Review Group within the Servicer with responsibility for performing compliance reviews in accordance with the terms of the Work Plan (§ C.7);
- the Servicer's obligation to cure "Potential Violations" of the metrics and remediate material harm to borrowers, and a limitation on the Servicer's liability under the Consent Judgment for successfully cured Potential Violations of the metrics (§ E);
- a dispute resolution procedure governing disagreements between the Servicer, Monitor, and Monitoring Committee (§ G); and
- the authorization for "any" Party to bring an enforcement action before the Court and, if an action is based on the Servicer's failure to cure a Potential Violation in accordance with Section E, limiting the Servicer's liability to non-monetary equitable relief and monetary civil penalties up to \$5,000,000 per uncured Potential Violation (§ J).

THE ENFORCEMENT TERMS

I. Section J — Enforcement

Section J.2 establishes that an "enforcement action under this Consent Judgment may be brought by any Party to this Consent Judgment or the Monitoring Committee." Ex. E at 15.

Within the text of Section J.2, there are only two explicit restrictions on a Party's right to bring an enforcement action: (a) the Servicer's obligations under the Consent Judgment are enforceable solely in this Court; and (b) the requirement that the Party provide the Monitoring Committee with notice and 21 days to determine whether to bring an enforcement action. If the Monitoring Committee declines to bring an enforcement action, the Party must then wait an additional 21 days before commencing an enforcement action. But notice is not required if "immediate action is necessary in order to prevent irreparable and immediate harm." *Id.*

Section J.3 goes on to define the relief that the Court may order in a single type of enforcement action: "In the event of an action to enforce the obligations of Servicer and to seek remedies for an uncured Potential Violation for which Servicer's time to cure [under Section E] has expired, the sole relief available in such an action will be" (a) non-monetary equitable relief

and (b) a limited amount of monetary civil penalties if the Servicer has failed to timely cure the Potential Violation under Section E. Ex. E at 15. This means that when the action is based on the Servicer's failure to timely cure a Potential Violation of a Servicing Standard that is tested by a metric in accordance with Section E, a Plaintiff may seek non-monetary equitable relief and monetary civil penalties up to the agreed upon amount per uncured Potential Violation. Section J.3 does not limit the relief available to any Party in any other enforcement action, including an action to enforce a Servicing Standard that is not tested by a metric.

Taken together, these provisions mean that the only limitations on a Party's authority to initiate an enforcement action are (a) the designated venue and notice procedure under Section J.2 and, (b) if applicable, the cure procedure under Section E for Potential Violations of those Servicing Standards which are tested by a metric.

II. Section E — Potential Violations and the Servicer's Obligation to Cure

Section E.1 establishes that a "Potential Violation" occurs if the Servicer exceeds the error rate for a metric used by the Monitor in evaluating the Servicer's compliance with the relevant Servicing Standards that are tested by the metric. Under Section E.2, the Servicer is obligated to cure "any Potential Violation." Sections E.3-4 define the procedure by which the Servicer can cure the Potential Violation and how a Potential Violation may become an uncured Potential Violation. Section E.5 obligates the Servicer to remediate material harm to borrowers. Section E.6 establishes that if a Potential Violation is cured according to the Section E.3 process, "no Party shall have any remedy under this Consent Judgment (other than the remedies in Section E.5) with respect to such Potential Violation." Ex. E at 11-12.

Nothing in the text of Section E purports to govern the procedures and relief available with respect to the Servicer's compliance with Servicing Standards that are not tested by metrics.

By its own terms, Section E applies only when a Servicing Standard is tested by a metric and the Servicer has exceeded the error rate for that metric.

III. Section C — Monitor

Section C is entitled “Monitor” and comprehensively governs the duties of the Monitor and the monitoring process. Section C.5 establishes the scope of the Monitor’s responsibilities: “It shall be the responsibility of the Monitor to determine whether Servicer is in compliance with the Servicing Standards and the Mandatory Relief Requirements . . . in accordance with the authorities provided herein and to report his or her findings as provided in Section D.3.” Ex. E at 3. That provision mandates what the Monitor is required to do (determine compliance and report findings) and how he must do it (in accordance with the authorities set forth in Exhibits D and E).

For example, Sections C.23-25 provide a process by which the Monitor may propose and create additional metrics if he concludes that the Servicer is not in material compliance with the Servicing Standards. Nothing in the text of Section C states that this process is the exclusive remedy for enforcing Servicing Standards not tested under the metrics.

Nothing in the text of Section C affects the Enforcement Terms under Section J or establishes an independent limitation on a Party’s right to request relief from this Court to enforce the Servicing Standards. Ex. E at 8-9. And it does not state that the Monitor has the exclusive authority to determine all compliance issues, including whether the Servicer is in compliance with Servicing Standards that are not tested by a metric.

ANALYSIS

Read together, the Enforcement Terms establish the following procedure for enforcement actions. As a general rule, Section J.2 authorizes “any Party” to seek relief from this Court to

enforce the Consent Judgment, subject to the notice requirements. Ex. E at 15. Section J.3 applies to a specific type of enforcement action — to enforce an uncured Potential Violation of a Servicing Standard tested by a metric — and limits the Servicer’s liability in those actions to non-monetary equitable relief and up to \$5,000,000 in monetary civil penalties per violation. *Id.* Section E’s cure provisions, which apply only to Potential Violations of Servicing Standards tested by metrics, obligate the Plaintiffs to refrain from commencing or maintaining an enforcement action when the Servicer is undertaking its obligation to cure a Potential Violation and to limit the Servicer’s liability when it successfully and timely cures a Potential Violation. Ex. E at 11-12.

Nothing else in the Enforcement Terms changes that procedure, including the provisions under Section C that establish the duties of the Monitor and the monitoring process. The Monitor is an independent, third-party who is tasked with, among other things, evaluating and reporting on the Servicer’s compliance with the Servicing Standards, including via metrics that test a limited subset of the Servicing Standards. And because the Monitor’s authority is derived solely from the Consent Judgment, what the Monitor is required to do, what the Monitor may choose to do, and how the Monitor can fulfill those responsibilities must be explicitly stated in the Consent Judgment. The Consent Judgment does not give the Monitor the exclusive power to enforce the Consent Judgment. And giving the Monitor discretion to expand how he exercises his duties by initiating a process for the creation of new metrics in limited circumstances is not the exclusive avenue for enforcing Servicing Standards that are not tested by an existing metric. How the Monitor exercises his duties under the Consent Judgment does not impair the Parties’ enforcement rights under Section J, including the Plaintiffs’ right to enforce Servicing Standards that are not tested by metrics.

Respectfully Submitted,

STUART F. DELERY
Assistant Attorney General, Civil Division

RONALD C. MACHEN JR.
United States Attorney for the District of Columbia

/s/ Brian P. Hudak

KEITH V. MORGAN
BRIAN P. HUDAK
Assistant United States Attorneys
555 Fourth Street, NW
Washington, DC 20530
Tel.: (202) 252-2500
Fax: (202) 252-2599

RAMONA D. ELLIOTT
Deputy Director/General Counsel
NOAH M. SCHOTTENSTEIN
DIARMUID GORHAM
Trial Attorneys
United States Department of Justice
Executive Office for United States Trustees
441 G Street, NW, Suite 6150
Washington, DC 20530
Tel.: (202) 307-1399
Fax: (202) 305-2397

MICHAEL D. GRANSTON
RENÉE BROOKER
WILLIAM C. EDGAR
DANIEL H. FRUCHTER
United States Department of Justice
Civil Division
Commercial Litigation Branch
601 D Street, NW, Room 9936
Washington, D.C. 20004
Tel.: (202) 353-7950
E-Mail: William.Edgar@usdoj.gov
Tel.: (202) 305-2035
E-Mail: Daniel.Fruchter@usdoj.gov

Attorneys for the United States of America

LUCY E. MORRIS
Deputy Enforcement Director
CARA PETERSEN
Assistant Litigation Deputy
RACHEL RODMAN
Enforcement Attorney
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Tel.: (202) 435-7964

Attorneys for the Consumer Financial Protection Bureau