UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAIRHOLME FUNDS, INC., *et al.*, Plaintiffs, v. FEDERAL HOUSING FINANCE AGENCY, *et al.*, Defendants.	Civil No. 13-1053 (RCL)
In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations _____ This document relates to: ALL CASES	Miscellaneous No. 13-1288 (RCL)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE PURSUANT TO FED. R. EVID. 201(b)

After spending hours examining former FHFA Acting Director Edward DeMarco as their own witness and failing to ask follow-up questions about the particular legislative "bills" the Acting Director referenced during his two days of testimony, Plaintiffs now want this Court to effectively instruct the jury that the witness was not truthful, and give the Court's imprimatur to a one-sided mischaracterization of the witness's testimony. The request is improper, and allowing it would be unfairly prejudicial.

Plaintiffs had every opportunity to probe Acting Director DeMarco about what "bills" and "Senate bill" the witness was recalling, but they failed to do so. Had they availed

themselves of that opportunity, Defendants would also have had the chance to explore the witness's recollection through recross. Plaintiffs cannot obtain a do-over now.

Federal Rule of Evidence 201(b) allows the Court to take judicial notice of objective facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). It could, for example, permit the Court to take notice of *all* proposed legislation regarding reform of the Enterprises in the wake of the housing and financial crisis, which would reinforce that Acting Director DeMarco correctly recalled that legislative proposals were under discussion around the time of the Third Amendment. But Plaintiffs instead seek to use "judicial notice" to impeach the witness after-the-fact with one-sided commentary about only a slice of the relevant objective facts. This sort of "gotcha" nitpicking may be appropriate for cross examination, but it is not a proper subject for judicial instruction.

Defendants offered to discuss with Plaintiffs the introduction of objective legislative events into the record (*see* Ex. A). But Plaintiffs instead proceeded to file their request for judicial notice. Their request is at odds with Federal Rule of Evidence 201, misstates the record, and would result in unfair prejudice and jury confusion.

ARGUMENT

Plaintiffs have asked the Court to take judicial notice of either one or both of two sentences that Plaintiffs drafted:

1. "There was no legislation introduced or pending in 2011 or 2012 addressing the wind down of the GSEs that passed the Senate Banking Committee"; and/or

2. "The legislation referenced in Acting Director DeMarco's testimony passed the Senate Banking Committee in 2014, never received a floor vote, and never became law."

Pls.' Mot. at 1. They request that the sentences "be read to the jury" by the Court. *Id.* at 3. Their request is wholly inappropriate for multiple reasons.

First, "[m]atters testified to by witnesses are not facts subject to judicial notice." *Oliverez v. Albitre*, No. 1:09-cv-00352, 2014 WL 12766514, at *1 (E.D. Cal. Mar. 26, 2014) (referencing *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 386 n.1 (9th Cir. 2010)). Since trial proceedings are "recorded by a court reporter and are part of the record in this case," "a request for judicial notice of witness testimony is both misplaced and unnecessary." *Id.* The trial record speaks for itself, and Plaintiffs had the opportunity to ask Acting Director DeMarco—who testified for multiple hours, over multiple days, during multiple examinations by Plaintiffs—follow-up questions about the specific legislation that he had in mind while he was still on the stand. Had they probed Acting Director DeMarco's specific recollections, Defendants likewise would have had the opportunity on recross to ask clarifying questions regarding the witness's memory of proposed legislative solutions. Plaintiffs simply neglected to elicit testimony from the Acting Director about the issue on which they now seek a judicial instruction. That is a failure of examination, not of the witness.

Second, Plaintiffs misstate the record. The "bills" that Acting Director DeMarco was referencing during his testimony cannot be "accurately and readily determined" because Plaintiffs never asked Acting Director DeMarco what specific "bills" he was recalling. Plaintiffs called Acting Director DeMarco in their own case-in-chief. Plaintiffs claim that during discussions on the issue on October 25, 2022 (*see* Ex. A), "Defendants sa[id] the referenced

legislation was S. 1217." Pls.' Mot. at 3. But Defendants did no such thing. Rather, Plaintiffs asked Defendants to "please identify what bill you or Mr. DeMarco believe meets these characteristics or to what bill he was referring." Ex. A at 3. In response, Defendants stated that "[a]s Mr. DeMarco noted in the testimony [], there were multiple bills in Congress," and Defendants' counsel proceeded to independently reference two such bills: (i) the Mortgage Finance Act of 2011 (S. 1973) and (ii) the Housing Finance Reform and Taxpayer Protection Act of 2014 (S. 1217). *Id.* at 1. Contrary to Plaintiffs' contention, at no point did Defendants represent the specific bill that *Acting Director DeMarco* was recalling during his testimony. Regardless, if Plaintiffs wanted information from the witness, they should have sought it during their lengthy examinations.

Third, Plaintiffs' request would cause unfair prejudice to Defendants and risk confusing the jury. *See* Fed. R. Evid. 403. Plaintiffs want the Court to effectively refute the testimony of a witness by reading to the jury a one-sided, inaccurate statement about a witness's testimony. It is "the duty of the trial judge to use great care" when commenting on the evidence. *Wabisky v. D. C. Transit Sys., Inc.*, 326 F.2d 658, 659 (D.C. Cir. 1963). The reason for this is clear: "[u]nquestionably, any comment by a trial judge concerning the evidence or witnesses may influence the jury considerably," including the risk of the jury inferring that the Court is taking a side on the evidence. *Gov't of Virgin Islands v. Williams*, 370 Fed. App'x 294, 296 (3d Cir. 2010) (quotation source omitted). As framed, Plaintiffs' request for judicial notice would present that very risk.

Ultimately, Acting Director DeMarco was never asked by Plaintiffs to identify any specific bill in his testimony. Plaintiffs had the opportunity to ask probing questions but failed to do so. Plaintiffs likewise had the opportunity to seek to introduce legislative facts into the

record, but again failed to do so. The judicial notice rule should not be misused to supplement matters that could have been addressed during Plaintiffs' examinations of a key witness, much less to have the Court impugn the witness in a statement to the jury.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Request for Judicial Notice Pursuant to Fed. R. Evid. 201(b).

Dated: October 30, 2022

Respectfully submitted,

/s/ Jonathan Stern
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Attorney for the Federal National Mortgage Association

Exhibit A

From: Jones, Stanton
To: FHFADDC-Trial Team
Subject: FW: Yesterday"s DeMarco testimony
Date: Tuesday, October 25, 2022 10:10:49 PM

From: Jones, Stanton
Sent: Tuesday, October 25, 2022 10:11 PM
To: 'Samuel Kaplan' <skaplan@bsfllp.com>; Hamish Hume <hhume@BSFLLP.com>
Cc: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Subject: RE: Yesterday's DeMarco testimony

Sam: Thanks for following up about this. As Mr. DeMarco noted in the testimony quoted below, there were multiple bills in Congress. The Mortgage Finance Act of 2011 (S. 1963) had bi-partisan sponsorship but did not make it out of the Banking Committee. This bill would have put the GSEs into irrevocable receivership. The Housing Finance Reform and Taxpayer Protection Act of 2014 (S. 1217) also had bipartisan support and was voted out of the Senate Banking Committee. This bill would have eliminated the GSEs.

We do not believe that there is any need to "correct the record," nor do we believe that any curative instruction is necessary or appropriate. There were multiple bipartisan Senate bills involving winddown of the GSEs, and one of them was voted out of the Senate Banking Committee. Indeed, any instruction to the jury about this issue would be unduly prejudicial to Defendants. That said, if there are specific legislative facts that you would like in the record concerning these bills, we are open to discussing it.

Regards,
Stanton

From: Samuel Kaplan <skaplan@bsfllp.com>
Sent: Tuesday, October 25, 2022 9:06 PM
To: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Cc: Hamish Hume <hhume@BSFLLP.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>
Subject: RE: Yesterday's DeMarco testimony

External E-mail

Thanks for your reply, Jonathan, and look forward to Stanton's reply. Best,

Sam

From: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>
Sent: Tuesday, October 25, 2022 9:04 PM
To: Samuel Kaplan <skaplan@bsfllp.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Cc: Hamish Hume <hhume@BSFLLP.com>; Jones, Stanton <Stanton.Jones@arnoldporter.com>
Subject: RE: Yesterday's DeMarco testimony

Sam:

Thanks very much for your message, and please excuse our delay in replying to your email of Saturday.

I'm taking the liberty of copying in Stanton, who will be handling this for us. He will get back to you as promptly as possible.

Sorry again, and thanks.

Jon

From: Samuel Kaplan <skaplan@bsfllp.com>
Sent: Tuesday, October 25, 2022 8:56 PM
To: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Varma, Asim <Asim.Varma@arnoldporter.com>
Cc: Hamish Hume <hhume@BSFLLP.com>
Subject: RE: Yesterday's DeMarco testimony

Jonathan and Asim,

Just following up on the below. This is obviously time-sensitive in light of the impending resting of our case and charging conference.

Thank you,

Sam

From: Samuel Kaplan
Sent: Saturday, October 22, 2022 2:28 PM
To: Stern, Jonathan L. <Jonathan.Stern@arnoldporter.com>; Varma, Asim <Asim.Varma@arnoldporter.com>

Cc: Hamish Hume <hhume@BSFLLP.com>
Subject: Yesterday's DeMarco testimony

Jonathan and Asim,

Hope you are both having good weekends. In the afternoon session yesterday, Mr. DeMarco gave the following testimony which can be found at 1003-04 of the transcript.

> Q. Right. But you've said several times in your testimony with Mr. Stern, you said that part of your thinking was informed by the fact that there were numerous bills, I think you said three bills on Congress and a proposal from the Treasury Department, all of which -- they were different, but they had one thing in common: Shrinking the GSEs; correct?
> A. Yes.
> Q. But it required legislation; correct? Let me rephrase that. Excuse me. You talked about three proposed bills and a Treasury proposal; correct?
> A. We talked about multiple bills in Congress, and we talked about the Treasury plan, all of which talked about wind-down. It was the FHFA strategic plan that talked about gradually shrinking the footprint, and that was something that I could do
> without legislation.
> Q. There were some things you could do without, some things you couldn't; correct?
> A. Correct.
> Q. Okay. At that time, summer of 2012, President Obama is in the White House; correct?
> A. Yes.
> Q. And the Republicans control the House; correct?
> A. I believe so. Yeah, that's right.
> Q. Did it strike you as a time of particularly productive bipartisan unity where they were going to get together and pass legislation together?
> A. Actually, the Senate bill was a bipartisan bill that was supported by both the leader –
> Q. Did it pass?
> A. It did. It actually passed through the Senate Banking Committee and went to the Senate floor.
> Q. Did it pass into law?
> A. No, it did not.

Having previously researched the GSE legislation during this period, we are unaware of any bill that talked about winding down the GSEs passed the Senate Banking Committee, and went to the floor, much less a "bipartisan" one. If we are incorrect on this, could you please identify what bill you or Mr. DeMarco believe meets these characteristics or to what bill he was referring? If we are correct that no such bill exists, we likely will seek judicial notice and/or a curative instruction to that effect, but we are open to discussing to other ways to correct the record. Thank you. Best,

Sam

message from your computer. [v.1 08201831BSF]
