

**NOS. 12-17241, 12-17327
13-16164, 13-16181
(Consolidated Appeals)**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**In the Matter of SUNNYSLOPE HOUSING LIMITED
PARTNERSHIP, Debtor.**

**FIRST SOUTHERN NATIONAL BANK
Appellant/Cross-Appellee,**

v.

**SUNNYSLOPE HOUSING LIMITED PARTNERSHIP,
Appellee/Cross-Appellant.**

**Appeal from the United States District Court
for the District of Arizona, Phoenix
Nos. 2:11-cv-2579-HRH and 2:12-cv-27100
Hon. Russell Holland, presiding**

**BRIEF OF THE ARIZONA BANKER'S ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF THE APPELLANT**

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Amicus Curiae Disclosure Statements

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, the undersigned counsel for *amicus curiae* Arizona Bankers Association (the “AZBA”) hereby certify that: (1) the AZBA is a non-profit corporation that has no issued stock and has no parent corporation or owners; (b) a party’s counsel did not author *amicus curiae*’s brief in whole or in part; (c) a part or a party’s counsel did not contribute any money that was intended to fund preparing or submitting an *amicus curiae*’s brief; and (d) no person, other than the AZBA, its members, or its counsel contributed money that was intended to fund preparing or submitting *amicus curiae*’s brief.

Interest of the Amicus Curiae

The AZBA submits this brief in support of the appellant First Southern National Bank and respectfully urges the court to uphold the prior panel decision in this case in holding that the proper valuation of a creditor’s collateral in this case should not be reduced by the impact of affordable housing restrictions that were expressly subordinate to the creditor’s claim.

The AZBA is a non-profit corporation and has been the voice of

Arizona's banking industry for over 100 years. The AZBA counts over 50 banks and financial services providers in its membership throughout the state of Arizona. The AZBA maintains that banks are the most important component of Arizona's economy in lending to local companies and individuals, by employing thousands of people, reinvesting in their communities, and providing financial and social stability in their markets. The AZBA supports the Appellant's position that the Court uphold the express subordination of certain affordable housing covenants contained in the documents at issue.

The AZBA has an interest in this case because it believes that its constituents, several of whom are participants in the secondary loan re-sale market, are best served when Courts uphold the express contractual restrictions and subordination agreements entered into by the parties. Complying with the plain language of agreed-upon and bargained-for loan documents provides predictability to the secondary loan resale market, which maximizes loan re-sale values and the return to the U.S. Department of Housing and Urban Development ("HUD") on non-performing loans.

The AZBA is authorized to file this brief pursuant to the

concurrently-filed Motion for Leave to File Brief of Amicus Curiae and this Court's order granting of the AZBA's Motion for Leave of Court to Extend Time to File and Leave to File *Amicus Curiae* Brief filed entered on November 23, 2016 at docket entry no. 111.

I

Introduction

This Court's majority opinion noted:

[F]ailure to recognize the priority of a senior secured creditor would discourage lenders from making the loan in the first place or would make those loans much more expensive. Future prospective lenders would have to factor in the risk that the value of their secured interest would be substantially diminished. It would, in addition, surely make it much more difficult for HUD to sell defaulted loans on the secondary market and would drastically reduce the amount that HUD could obtain from reselling those loans. Consider what a buyer would pay for HUD's loan to Sunnyslope if it were known that the affordable housing restrictions would remain in place. HUD would either be saddled with more underperforming loans that it could not sell or would salvage substantially less money from defaulted loans, leaving it with substantially less money for future projects.

In re Sunnyslope Hous. Ltd. P'ship, 818 F.3d 937, 949 (9th Cir. 2016).

The AZBA agrees with the Court's earlier comments that Petitioner's desired result would have a probable negative impact on the HUD secondary loan resale market. The AZBA submits this brief to provide the Court with concrete numbers and analysis regarding the size and scope of the HUD loan sale program so that the Court may appreciate the consequential effects of its decision.

The HUD multifamily loan sale program has sold billion dollars of loans and constitutes a critical source of revenue for HUD, enabling HUD's continued existence and continued ability to fund loan guarantees. In the event an FHA-guaranteed project defaults, competitive bidding at HUD auctions ensures that HUD maximizes its return on investment and allows loan purchasers to provide efficient mechanisms for dealing with backlogs of nonperforming loans. In deciding whether and how much to bid at a loan sale, market participants must have a clear picture of the value of their collateral. Petitioner's requested interpretation of *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997) would lead to adverse consequences and would depress the value achieved at HUD note sales. To maximize the return on HUD nonperforming loan sales, market participants must be

able to rely on the plain language of the loan documents they intend to purchase, including express subordination agreements and the express extinguishment of restrictive covenants.

II

Background

A. The FHA and The Positive Impact of Nonperforming Loan Sales in the Single Family Context

The Federal Housing Administration (the “FHA”) is one of the few self-funded government agencies which provides guarantees on mortgage loans issued by private lenders, enabling those lenders to provide credit to borrowers who might otherwise be unable to access capital markets.¹ The FHA oversees an insurance portfolio of over \$1.3 trillion.² As a consequence of the financial crisis, in 2012, the FHA’s single family residence mortgage insurance fund, the Mutual Mortgage Insurance Fund’s (the “MMI Fund’s”) capital reserve ratio fell below zero to negative 1.44 percent, with loans insured prior to 2010

¹ U.S. Department of Housing and Urban Development Annual Report to Congress Fiscal Year 2012 Financial Status FHA Mutual Mortgage Insurance Fund (“2012 HUD FHA MMI Report”), at 11, <https://portal.hud.gov/hudportal/documents/huddoc?id=F12MMIFundRepCong111612.pdf>.

constituting the primary source of stress on the MMI Fund.³ To avoid a taxpayer bailout and drawing funds from the United States Treasury, the FHA stated it had to “maximize recoveries on FHA’s legacy loans which are responsible for significant stress on the Fund” and stated it would continue the Distressed Asset Stabilization Program (“DASP”) (which began as a pilot program in 2010) to expand its sales of non-performing loans to maximize recoveries to the MMI Fund.^{4,5} Due in large part to the sale of nonperforming loans, by 2016, the MMI Fund’s

² *Id.*

³ The MMI Fund is required by statute to maintain a 2% capital reserve ratio. Cranston-Gonzales National Affordable Housing Act of 1990. See https://portal.hud.gov/hudportal/documents/huddoc?id=DOC_22961.pdf.

⁴ Laurie Goodman & Dan Magder, *Selling HUD’s Nonperforming Loans*, Urban Institute, Jan. 2016, at 3, <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000568-Selling-HUD-s-Nonperforming-Loans-A-Win-Win-for-Borrowers-Investors-and-HUD.pdf> (“Through the end of 2015, HUD’s single family loan sales through totaled 108,737 loans totaling unpaid principal balances of \$18.52 billion.”).

⁵ Dina ElBoghdady, *FHA Needs \$1.7 billion Taxpayer Subsidy*, Washington Post, Sep. 27, 2013, https://www.washingtonpost.com/business/economy/fha-needs-17-billion-taxpayer-subsidy/2013/09/27/dd70ef90-276b-11e3-b3e9-d97fb087acd6_story.html?utm_term=.3473a6e3a8be. Despite these efforts to avoid drawing on the Treasury and using taxpayer money, by September 2013, the FHA announced that it planned to draw \$1.7 billion from the Treasury, its first draw of taxpayer funds since its inception in 1934. *Id.*

capital ratio improved to 2.32 percent.⁶ The 2016 Annual Report stated that through the expansion of the FHA’s note sale program, the FHA netted \$2.4 billion over what would have been collected through standard foreclosure protocol and that DASP “has been especially useful in clearing up the backlog of seriously delinquent loans that have been in the foreclosure pipeline, while simultaneously providing borrowers with loss mitigation options that HUD does not have the ability or the authority to offer.”⁷ Plainly, in a declining economy, the importance of clearing backlogs of defaulted loans becomes even more important.

One report noted that “investors compete intensely for these loans, and HUD realizes the benefit of that. And, if the loans are not sold, HUD would lose significantly more money in holding costs, and in repairs on the deteriorating properties, than it does by selling the loans to investors.”⁸ One of the benefits to HUD’s sale of nonperforming loans (in addition to the revenue generated) is that the purchasers of

⁶ U.S. Department of Housing and Urban Development Annual Report to Congress Regarding the Financial Status of the Mutual Mortgage Insurance Fund Fiscal Year 2016, at 5, <https://portal.hud.gov/hudportal/documents/huddoc?id=2016fhaannualreport1.pdf>.

⁷ *Id.* at 27.

mortgages have more options for dealing with non-performing loans than servicers operating under HUD guidelines.

HUD servicers cannot lower mortgage interest rates below current market rates, and they cannot modify loans by reducing principal. And, in short sales and deeds in lieu of foreclosure, HUD is limited in what it can pay the borrower to move. By contrast, once the NPL's are sold, the new investors have a wide range of tools available to them. They can lower the interest rate on the loan to a below-market rate, and they can reduce principal.... And hefty competition among NPL investors ensures that HUD is generally paid more on these loans than it would recover through foreclosures.⁹

The sale of non-performing loans is a critical revenue generator for the FHA. Even though this appeal does not deal with single family loan sales, it is still true in the multifamily context that: (1) loan sales are a key revenue generator for the FHA and HUD after a borrower defaults on an FHA guaranteed loan; and (2) maximizing the recovery to HUD is in the best interests of the housing system as a whole.

⁸ Goodman & Magder, *supra* note 4, at 2.

⁹ *Id.*

B. The Size and Scope of the HUD's Multifamily Nonperforming Loan Sales

HUD's publicly accessible data provides insight into the size and scope of its multifamily loan sales program. From 2000-2009, HUD sold 647 multi-family loans totaling \$3,526,000,000 in unpaid principal balance and recovered approximately \$2,235,000,000 in sale proceeds for a 63% return on the unpaid principal balance.¹⁰

In 2010, the year that Appellant purchased the loan at issue from HUD, HUD's multifamily loan sale data is broken into two reports:

	Unpaid Principal Balance	Winning Bid Totals	Percentage Recovery
2010-1 ¹¹	\$299,039,467.72	\$144,636,900.15	48.36716%
2010-2 ¹²	\$234,071,787.00	\$120,585,978.86	51.51667%
Combined	\$533,111,254.72	\$265,222,879.01	49.75000%

¹⁰ Table of Statistics, Multifamily and Healthcare Loan Sales (MHLS) from 2000 to 2009, https://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/comp/asset/mfam/mprev.

¹¹ MHLS 2010-1 Results Report, https://portal.hud.gov/hudportal/documents/huddoc?id=doc_14510.pdf.

¹² The loan sale at issue in this appeal is reported in the MHLS 2010-2 Results Report,

In 2010, HUD's reported loan sale data shows the sale of 36 multifamily projects whose unpaid principal balance totaled \$533,111,254.72. Through these loan sales, HUD was able to recover \$265,222,879.01 on these projects, for a percentage recovery of 49.75%. HUD's multifamily loan sale program encompasses billions of dollars (in 2010 alone, over \$500 million dollars) and is a significant revenue generator for HUD, enabling it to achieve a return on unsuccessful multifamily housing projects following a borrower's default.

C. Market Participants Must Have a Clear View of the Value of Collateral

Given that the nonperforming loans are sold by HUD following HUD's takeback after a borrower defaults, it is no surprise that these loans are sold at a discount. In deciding to whether to bid and how much to bid on HUD's non-performing loans, the proposed purchaser

<https://www.hud.gov/offices/hsg/comp/asset/mfam/20102rr.pdf>.

must have reliable information regarding the value of the collateral for the loan. As one industry participant, DebtX¹³, noted:

Non-performing buyers are laser-focused on the value of the underlying collateral.... Optimum pricing is achieved on bid day when the buyer with the highest underwritten value also has an investment strategy with the lowest return hurdle –be it through foreclosure, discounted payoff or refinancing the borrower. Most importantly, whether it is a local developer, a foreign private equity firm, or a sovereign wealth fund, they are submitting hard bids on the seller’s contract that can be monetized immediately.¹⁴

The value of the collateral is the primary concern of the market participants in non-performing note sales. Proposed buyers must be able to rely on the enforceability of the loan documents they are purchasing (and the attendant subordination agreements and

¹³ DebtX, or Debt Exchange, Inc., conducts non-performing loan sales on behalf of HUD and conducted the sale of the Capstone loan at issue in 2010. See MHLS 2010-1 Sales Brochure advising that qualified bidders would be able to conduct due diligence and review loan files, payment histories, asset summary reports, and other loan data online at www.debtX.com,

https://portal.hud.gov/hudportal/documents/huddoc?id=doc_14509.pdf

¹⁴ *Maximizing Loan Sale Proceeds at DebtX: Q&A with Will Mercer, CFA, Managing Director, Loan Sale Advisor*, Winter 2011-2012, at 3, https://www.debtX.com/corp/wp-content/uploads/2016/04/newsletter_2012_Winter.pdf.

subordination provisions in ancillary documents) to make an informed decision about whether to bid and what to bid at a distressed loan sale. In exchange for immediate monetization (i.e., immediate payment of millions of dollars to HUD), the purchasers of non-performing loans shoulder the risks related to the disposition of a non-performing property and perform an important role in clearing out the backlog of defaulted FHA-insured loans.

Nonperforming note sales are HUD's method of disposing with unsuccessful projects following the borrower's default. In this situation, HUD/FHA has repurchased or taken back the loan from the original lender and is bearing the financial responsibility of the failure of the project. It is incumbent on HUD to maximize the return on these failed projects to generate revenue for its continued existence and its continued activities, including the guarantee of future housing project loans. The alternative suggested by the Appellee, to ignore the clear language of loan documents, would lead to depressed values realized from nonperforming loan sales as prospective buyers would have to take into account the risk that restrictive covenants that are contractually

subordinated would nonetheless take priority over the loan being purchased.

Moreover, had the Appellee wished to preserve the restrictive covenants at issue, it had several mechanisms to do so under the Bankruptcy Code, but chose not to. This borrower should not be able to selectively enforce only those provisions in the loan documents that benefit it (namely the restrictive covenants) without treating its lender as required under the Bankruptcy Code.

III

Argument

This Court Correctly Held that the Restrictive Housing Covenants Should Not Apply to Limit the Value of Appellant's Secured Claim

A. HUD Is Obligated to Get the Best Return on Non-Performing Loans

As stated above, the size and scope of the HUD loan re-sale market comprises billions of dollars of unpaid principal balances. Loan purchasers can more efficiently deal with non-performing loans, whether through foreclosure, principal reductions (which HUD is unable to do), or other modification or workout mechanisms. HUD needs to be able to sell non-performing loans and a robust and

competitive market for non-performing loans inures to the benefit of HUD and the groups it serves by continuing the funding pipeline that enables the FHA to guarantee mortgages.

The affordable housing restrictions at issue in this appeal are expressly subordinate to loan documents in favor of the original mortgage lender, Capstone Realty. The parties' bargain was that the restrictive housing covenants would remain in place until the FHA-guaranteed mortgage was foreclosed. Once the borrower was unable to make its mortgage payment, and once it defaulted on its mortgage, which led to HUD/FHA paying off Capstone and selling the loan to Appellant, the borrower is no longer entitled to the benefit of the restrictive covenants in the event of foreclosure. Moreover as part of the parties' bargain, those restrictive covenants were expressly subordinate to the Capstone loan.

At that point, as a non-performing loan, HUD (and not the original mortgage lender) was shouldering the burden of this non-performing loan. In selling the loan at a competitive auction (and receiving \$5,050,186.24 in proceeds), HUD was fulfilling its duty to maximize the proceeds from this unsuccessful project.

There are numerous benefits to HUD's sale of non-performing loans. Not only does HUD obtain desperately needed revenue, but HUD saves carrying costs and costs of repair. Additionally, the loans are sold to entities who may be better equipped to service nonperforming loans and who have more flexibility than HUD in deciding whether and how to modify a delinquent loan. Even in the event of a loan purchaser's eventual foreclosure, HUD benefits by saving on carrying and repair costs and by having a third party efficiently regulate the disposition of the non-performing loan.

Unfortunately, not every FHA-guaranteed project is a success. Ignoring the express subordination of restrictive covenants may be in this borrower's best short-term interests, but, as the majority of this Court noted earlier, is not in the best interests of the system as a whole. HUD's sale of nonperforming multi-family loans is a critical revenue generator and performs an important function in processing the backlog of unsuccessful projects. Appellee's desired outcome would lead to additional uncertainty in how market participants value and would likely lead to depressed values at HUD multifamily loan sales and decreased revenue to HUD and the FHA.

B. Appellee Chose Not to Exercise Alternative Avenues to Maintain the Benefit of the subordinated Restrictive Covenants

1. Petitioner Could Have Reinstated the Loan Under its Plan

Appellee chose not to exercise alternative avenues to maintain the benefit of the subordinated restrictive covenants. A debtor in a Chapter 11 has the ability to decelerate an accelerated loan and reinstate the loan by curing its default in accordance with nonbankruptcy law. 11 U.S.C. § 1123(d) provides that if a Chapter 11 plan proposes to “cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and *applicable* nonbankruptcy law.” *See In re Onco Inv. Co.*, 316 B.R. 163, 167 (Bankr. D. Del. 2004) (“Curing a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified.”) (quoting *In re Taddeo*, 685 F.2d 24, 26–27 (2d Cir. 1982)). The court in *In re Onco* further noted that cure and reinstatement allow the debtor to de-accelerate their mortgage and reinstate their original payment schedule and roll back the clock to the time before default existed. 316 B.R. at 167.

In addition, 11 U.S.C. § 1124(2) states that to be unimpaired (and therefore deemed to vote for a plan), with respect to a creditor's claim, notwithstanding any acceleration clauses or applicable law providing for acceleration, the debtor must either (A) cure any default that occurred prior to the bankruptcy (except for ipso facto defaults as a result of the filing of a bankruptcy); (B) reinstate the maturity of such claim or interest as such maturity existed before such default; (C) compensate the holder of the claim for any damages incurred as a result of any reasonable reliance by the holder of the claim on such acceleration provisions; (D) in a situation where default is a result of a debtor's non-monetary default, compensate the holder of the claim for any actual pecuniary losses incurred as a result of the debtor's failure to perform non-monetary obligations; and (E) not otherwise alter the creditor's legal, equitable, or contractual rights.

The Legislative History to 11 U.S.C. 1124 provides that

A claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan

is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5906. This Court recently interpreted 11 U.S.C. § 1123(d) and cure rights in *In re New Investments, Inc.*, 840 F.3d 1137 (9th Cir. 2016). The central issue in *In re New Investments* was what the debtor had to do to accomplish a cure in accordance with 11 U.S.C. § 1123(d) and whether the debtor had to pay default interest as required by the applicable loan documents or could avoid a contractual post default interest rate in a loan agreement in light of this Court's earlier ruling in *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1340 (9th Cir. 1988). In holding that the debtor was required to pay default interest to effect a cure under 11 U.S.C. § 1123(d), this Court noted that 11 U.S.C. § 1123(d) was "intended to limit parties to the benefit of their bargain when a debtor seeks to effectuate a cure and return to pre-default conditions. The parties bargained for a higher interest rate on the note in the event of default,

and Pacifica is entitled to the benefit of that bargain under the terms of § 1123(d).” *In re New Investments, Inc.*, 840 F.3d at 1142.

Similarly, the benefit of the parties’ bargain here was that the restrictive housing covenants were expressly subordinate to the Capstone loan and would be extinguished upon foreclosure.

Had Appellee wished to maintain the enforceability of the restrictive housing covenants (at least for valuation purposes), it could have done so by exercising its rights under 11 U.S.C. § 1123(d) and 11 U.S.C. § 1124(2) in curing and reinstating the debt owed under the Capstone deed of trust. Instead of exercising its right to cure, Petitioner seeks to retain the benefits of the restrictive housing covenants while denying the holder of the Capstone loan the benefit of its bargain, which was the express subordination of the restrictive housing covenants and their extinguishment upon foreclosure.

2. Subordination Agreements Are Enforceable in the Bankruptcy Context

11 U.S.C. § 510(a) provides that “A subordination agreement is enforceable in a case under this title to the same effect that such agreement is enforceable under applicable bankruptcy law.” A contractual subordination agreement is a contractual arrangement

whereby one creditor or entity agrees to subordinate its claim against the debtor in favor of the claim of another. *In re Best Prods. Co., Inc.*, 168 B.R. 35, 69 (Bankr. S.D.N.Y. 1994). Appellant has pointed to numerous places in the record where the affordable housing restrictions were expressly subordinate to the Capstone loan and would be extinguished upon foreclosure. 12 ER at 135. There is no reason to ignore the parties' bargained-for subordination agreements or the agreements regarding the extinguishment of the affordable housing restrictions upon foreclosure.

In focusing the valuation determination upon 11 U.S.C. § 506 (which offers no exception to § 510 affirmation of enforceable subordination agreements), Appellee fails to take into consideration the validity of subordination agreements pursuant to 11 U.S.C. § 510(a). Appellee seeks to selectively enforcement of the loan documents at issue by claiming that the restrictive housing covenants are still in place, but simultaneously selectively ignoring document provisions for subordination. The Debtor proposes to pick and choose among the loan document provisions in order to try to cram down its lender without any consequence.

Appellee could have exercised its cure and reinstatement rights under 11 U.S.C. § 1123(d) by making payments to Appellant sufficient to cure the debtor's defaults – in that situation, bankruptcy law would have treated the loan as if it had been rolled back in time prior to the events of default and Appellee would have been able to claim the benefit of the restrictive housing covenants. Despite having mechanisms to ensure the continued viability of the affordable housing restrictions, the Debtor chose not to avail itself of them and is instead seeking the piecemeal enforcement of provisions that inure to its benefit.

IV

Conclusion

As this Court noted earlier, there are good policy reasons to honor the express language and the parties' bargain in valuing the collateral without the restrictive housing covenants. The prospective buyers of the Capstone loan, in the course of their due diligence, surely would have noted the express subordination of the restrictive housing covenants as well as the numerous provisions providing for their extinguishment upon the foreclosure of the deed of trust. One would imagine that the Appellant regarded these subordination provisions as

material factors in deciding whether to bid and to bid \$5,050,186.24 for the Capstone loan.

Appellee's desired result, while beneficial to it in the short term, does not serve the housing market and the HUD system as a whole. The housing system is best served by permitting HUD to conduct competitive auctions of non-performing loans so that it can maximize the value of unsuccessful FHA-guaranteed projects. To achieve that end, market participants must have a clear picture of the value of what they are purchasing and to be able to rely on the express provisions of the loan documents they are purchasing. Enabling a debtor to continue possession of an unsuccessful project at the expense of its lender (or its lender's successors) by ignoring the express language of the parties' loan documents does not serve the housing market as a whole. This debtor gambled with FHA money and lost. The HUD multifamily loan sale program is designed to deal with that failure in a manner that maximizes the return to HUD so that the FHA can continue to guarantee new loans. A landscape where loan purchasers cannot rely on the clear language of the documents they seek to purchase will not maximize loan sale values or the return to HUD.

For the foregoing reasons, the AZBA requests that this Court affirm its earlier panel decision.

Dated: December 15, 2016.

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CERTIFICATE OF SERVICE

I certify that on January 28, 2015, I electronically filed the foregoing [] with the Clerk of the Court for the United States District Court for the District of Nevada by using the CM/ECF System.

Date: December 15, 2016

By: /s/ Janice L. Rogalla