12-2399

To Be Argued By:
ELLEN LONDON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-2399

EMANUEL KU,

Plaintiff-Appellant,

—v.—

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN, Secretary of the United States Department of Housing and Urban Development, CUTLER, TRAINOR & CUTLER, LLP, Foreclosure Commissioner, CITY OF NEWBURGH, BURTON TOWERS LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN, AND CUTLER, TRAINOR & CUTLER, LLP

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EMANUEL KU,

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BRIEF FOR DEFENDANTS-APPELLEES UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SHAUN DONOVAN, AND CUTLER, TRAINOR & CUTLER, LLP

Preliminary Statement

Emanuel Ku appeals from a final judgment of the United States District Court for the Southern District of New York (Vincent L. Briccetti, J.), entered on May 15, 2012, dismissing his amended complaint against defendants the United States Department of Housing

and Urban Development ("HUD"); Shaun Donovan as Secretary of HUD; Cutler, Trainor & Cutler, LLP, as Foreclosure Commissioner; the City of Newburgh; and Burton Towers, LLC. (SPA 14).* The judgment was entered pursuant to a memorandum decision dismissing Ku's claims against HUD, Secretary Donovan, and Cutler, Trainor & Cutler, LLP (together, the "Government") pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and denying Ku's request for leave to file a second amended complaint. (SPA 1-12).

In order to protect the elderly low-income tenants at an apartment building that was subject to a HUD foreclosure sale, HUD imposed certain bidding restrictions to ensure that the new owner would be well qualified to own and operate housing for the elderly, to undertake badly needed repairs, and to maintain the property in a safe and sanitary condition. In HUD's experience, restricting bidding in this way has been an efficient and effective way to protect the vulnerable population at similar housing facilities, and the statute governing HUD's ability to dispose of mortgages on multifamily properties grants it broad discretion to set such terms and conditions.

Nevertheless, Ku commenced this action challenging the bidding restrictions, alleging that he was unlawfully excluded from the bidding process. His

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* Citations to the Special Appendix appear herein as "SPA __," and citations to the Joint Appendix appear as "JA __," with the relevant page numbers inserted. Citations to Ku's brief in support of his appeal appear herein as "Br. __."

contentions are meritless. To begin with, the district court correctly concluded that it lacked subject matter jurisdiction because the Government has not waived its sovereign immunity over Ku's claims. Moreover, the governing statute commits HUD's actions regarding the terms and conditions of a foreclosure sale to the agency's unreviewable discretion. Finally, Ku has failed to establish that he is entitled to the equitable relief he seeks, a conclusion the district court properly reached but Ku does not challenge on appeal. For all those reasons, the judgment of the district court should be affirmed.

Jurisdictional Statement

Ku asserted that the district court had subject matter jurisdiction over his claims pursuant to 28 U.S.C. § 1331. The district court correctly held that it lacked subject matter jurisdiction because Ku failed to establish a waiver of sovereign immunity by the Government. (SPA 4-8). Final judgment was entered on May 15, 2012 (SPA 14), and Ku timely appealed on June 13, 2012 (JA 335). Accordingly, this Court has jurisdiction over Ku's appeal pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court properly held that it lacked subject matter jurisdiction to review HUD's actions pursuant to 12 U.S.C. § 1715z-11a, when that statutory provision is not part of the National Housing Act ("NHA") and thus not covered by the NHA's waiver of sovereign immunity or any other waiver, and when there is no law to apply that would allow for review under the APA.

2. Whether the district court correctly held that Ku has not established that he should be granted equitable relief.

3. Whether the district court properly denied Ku leave to amend his complaint in light of the fact that any amendment would be futile.

Statement of the Case

On September 29, 2011, Ku filed a complaint against the Government alleging violations of the Multifamily Mortgage Foreclosure Act ("MMFA"), 12 U.S.C. § 3701 *et seq.*, and seeking an injunction preventing the Government from limiting participation at foreclosure auctions conducted pursuant to the MMFA. (JA 10-17). On December 22, 2011, Ku filed an amended complaint adding the City of Newburgh and Burton Towers, LLC, as defendants and adding a request to void the deeds of sale resulting from the allegedly improper sale at issue in this case. (JA 18-34). The defendants, including the Government, moved to dismiss the amended complaint on February 3, 2012 (JA 85, 95, 96), and Ku moved to further amend his complaint on March 2, 2012 (JA 282). On May 14, 2012, the district court (Vincent L. Briccetti, J.) issued a memorandum decision granting defendants' motions to dismiss and denying Ku's motion to amend his complaint. (SPA 1-12). Judgment was entered on May 15, 2012 (SPA 14), and Ku now appeals (JA 335).

Statement of Facts

A. Foreclosure of Burton Towers

Burton Towers ("Burton Towers" or the "Property") is an apartment building located in Newburgh, New York, with 126 units. (JA 19, 90). All of the tenants at Burton Towers are low-income and elderly. (JA 90). In October 1979, the New York State Urban Development Corporation conveyed the Property to the Burton Towers Housing Development Fund Corporation ("Burton Towers HDFC"). (JA 22). HUD provided Burton Towers HDFC with a loan pursuant to section 202 of the National Housing Act of 1959, 12 U.S.C. § 1701q, which is a direct loan program designed to finance housing for the elderly. (JA 22, 89-90). Burton Towers HDFC granted a mortgage to HUD to secure this loan, and the mortgage was recorded on November 5, 1979, with the clerk of Orange County, New York. (JA 89).

The Property is subject to a project-based rental subsidy contract pursuant to section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, under which HUD provides housing assistance payments to the Property's owner to subsidize the tenants' rent payments. (JA 90). The contract is tied to the Property, meaning that the tenants cannot use the rent subsidy at any other rental properties. (JA 90). The contract requires the Property's owner to lease the units to eligible low-income tenants and to maintain and operate the facilities in a decent, safe, and sanitary condition. (JA 90).

Owners of HUD properties are required to maintain these properties in accordance with the standards set

out at 24 C.F.R. §§ 5.701-5.705 in order to be considered decent, safe, sanitary, and in good repair. (JA 90). Burton Towers failed physical inspections in 2007 and 2008 due to numerous safety-related deficiencies. (JA 90). On July 9, 2010, HUD's New York Multifamily Housing Hub Director referred Burton Towers to HUD's Office of Multifamily Asset Management, with a recommendation of foreclosure based on the owner's default on the mortgage for "failure to maintain the Property in good and substantial repair and condition." (JA 90).

On or about February 4, 2011, HUD provided notice of its intent to foreclose to the relevant units of local government (the "ULGs"). (JA 91, 100). The notice contained preliminary terms and conditions of the proposed disposition of the Property and allowed for input from the ULG. (JA 91). These preliminary terms included the requirement that Burton Towers be maintained as affordable rental housing for the elderly for twenty years and that the purchaser would perform all necessary repairs. (JA 91). The estimated total repair cost was over $2,000,000. (JA 91).

The City of Newburgh (the "City") and the Newburgh Housing Authority expressed interest in the Property. (JA 91). The Newburgh Housing Authority subsequently withdrew from consideration, and the City entered into a contract of sale with HUD. (JA 91). This contract was contingent on HUD's obtaining title to the Property. (JA 250).

HUD has submitted a declaration in this case stating that a non-competitive sale to a ULG "is an efficient and effective method of disposing of properties, particularly those such as Burton Towers, that involve

a specialized, and particularly vulnerable, tenant population." (JA 92-93). When conducting these sales, HUD requires that when a ULG conveys a property, the ULG reviews the experience, qualifications, and capacity of the proposed purchasers. (JA 93). In HUD's experience, ULGs have "superior knowledge of the local development community and their track records." (JA 93).

In this case, HUD imposed bidding restrictions, namely that the bidding at the Burton Towers foreclosure sale would be limited to governmental entities, local Housing Development Fund Corporations, and lien holders. (JA 23, 91). The purpose of these bidding limitations was for "HUD to maximize the chances that the new owner of Burton Towers would be the most qualified to provide much-needed repairs and operational expertise for the elderly tenants." (JA 91). In the past five years, HUD has limited bidding in this manner approximately ten times, "with very successful results," as "the owners have proven to be high-quality owners and operators of HUD properties." (JA 93).

HUD began preparing for the sale of Burton Towers, which required certain actions pursuant to the MMFA. (JA 22, 91-92). HUD prepared a "bid kit," which included the bidding limitations discussed above* and

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* The bid kit also provided that "[a]t any time prior to closing, HUD reserves the right to reject any and all bids, to waive any informality in any bid received, and to reject the bid of any bidder HUD determines lacks the experience, ability or financial responsibility needed to own and manage the project." (JA 93). A separate

designated the law firm of Cutler, Trainor & Cutler, LLP, to serve as Foreclosure Commissioner and to conduct the sale. (JA 22, 23, 91). The Foreclosure Commissioner prepared a Notice of Default and Foreclosure Sale, which also provided that bidding would be limited to governmental entities, local Housing Development Fund Corporations, and lien holders. (JA 23, 91).

The Burton Towers foreclosure sale was scheduled for September 21, 2011, and the Foreclosure Commissioner accordingly mailed and published notices of the sale. (JA 92). On September 19, 2011, Ku demanded in writing that HUD cancel the sale. (JA 23). The sale was adjourned until September 30, 2011,* and notices reflecting this adjournment were published on September 27, 28, and 29, 2011. (JA 23, 92). On September 29, 2011, Ku again demanded that HUD cancel the foreclosure sale. (JA 23). That same day, Ku sought a temporary restraining order from the district court to stop the sale; this request was denied. (JA 23-24).

On September 30, 2011, HUD bid the outstanding debt on the Property at the Burton Towers foreclosure

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section stated that "HUD reserves the unconditional right to cancel this Invitation and reject any and all bids at any time prior to the closing of the purchase." (JA 93).

* The Declaration of Jan W. Haber dated February 3, 2012, incorrectly lists the final foreclosure sale date as September 29 (JA 5); the correct date is September 30, 2011 (JA 24).

sale, and the Foreclosure Commissioner declared HUD the high bidder. (JA 24, 92). The Foreclosure Commissioner prepared a foreclosure deed and transferred title to the Property to the Secretary of HUD. (JA 24, 92). Later that day, HUD transferred the Property to the City for one dollar with use restrictions requiring, among other things, that the City repair and maintain Burton Towers as decent, safe, and sanitary rental housing for the elderly for a period of twenty years. (JA 27, 92). HUD also required that any owner, for a period of thirty years from the transfer, pay a portion of any future sale or refinance proceeds to HUD, to prevent any future owner from being enriched at HUD's expense. (JA 92).

Also on September 30, 2012, the City transferred the Property to Burton Towers, LLC, which is "an entity controlled by an affordable housing developer that had significant successful experience in rehabilitating and operating this specific type of property." (JA 92). The transfer to Burton Towers, LLC, also was for one dollar, with the same use restrictions as HUD imposed on the City. (JA 27, 92).

As of February 3, 2012, approximately $1,000,000 had been spent or committed on repairs to Burton Towers. (JA 93). This included $300,000 for an elevator upgrade. (JA 93). In addition,

> A second elevator has been repaired but will be replaced after the other elevator is complete. A new camera and intercom system have been installed; the compactor has been repaired but is also scheduled for replacement; almost all units have been painted; all units

> have been treated for bedbugs; new air conditioner sleeve covers and insulation have been provided; and new domestic hot water tanks have been installed.

(JA 93; *see also* JA 103 (describing further repairs)). "The [HUD] Inspection Report noted that 'multiple residents expressed their thanks for the work that had been conducted stating that they had waited such a long time for repairs to be made to their apartments.' " (JA 93-94, 103).

B. Ku's Amended Complaint

Ku filed an amended complaint on December 22, 2011, seeking a declaratory judgment that HUD impermissibly restricted the bidding at the Burton Towers foreclosure sale and impermissibly transferred the Property subsequent to the sale. (JA 19). Ku further sought a permanent injunction preventing HUD from using such restrictions in future foreclosure sales and "voiding any and all deeds that resulted from or followed this improper foreclosure sale of the [Property]." (JA 19). Ku asserted that bidding restrictions were inconsistent with the MMFA, constituted an unlawful taking of property, and were issued without proper notice. (JA 19-25). Ku further claimed that the proceeds of Burton Towers' sale were improperly distributed and that the transfer of the property was the culmination of a "sweetheart deal" between HUD and the City, in violation of the MMFA. (JA 26-28). These alleged violations were to Ku's detriment, he asserted, because they deprived him of

the ability to bid at the foreclosure sale and to own and derive earnings from the Property. (JA 28-29).

C. The District Court's Decision

In its Memorandum Decision dated May 14, 2012, the district court first considered whether Ku's claims against the Government are barred by sovereign immunity. (SPA 4). Because "[t]he MMFA, the statute upon which Ku bases his case, does not contain a waiver of sovereign immunity," the court considered whether the waivers of sovereign immunity contained in the NHA and the APA apply. (SPA 4-8).

The district court concluded that because 12 U.S.C. § 1715z-11a(a)—the provision under which HUD disposed of the property—is not part of the NHA, the waiver set out in the NHA does not apply here. (SPA 5-6). Specifically, the court explained that § 1715z-11a(a) was not enacted as a part of the NHA, but, as noted in the codification to § 1715z-11a, it was enacted "as part of the Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997." (SPA 5-6).

Turning to the APA, the district court explained that according to 5 U.S.C. § 701(a)(2), there is no jurisdiction when the agency action in question is "'committed to agency discretion by law.'" (SPA 6 (quoting § 701(a)(2))). If the relevant statute or regulation governing the agency action in question provides "'*no meaningful standard* against which to judge the agency's exercise of discretion,'" then the action is committed to agency discretion as a matter of law. (SPA 6 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985))). "Therefore, Section 701(a)(2) requires

dismissal when there is 'no law to apply.'" (SPA 6 (quoting *Lunney v. United States*, 319 F.3d 550, 558 (2d Cir. 2003))).

The district court concluded that although a separate provision, 12 U.S.C. § 1701z-11, contains guidelines for HUD's disposition of properties like the one at issue here, the discretion provided to HUD in § 1715z-11a(a) "supersedes any conflicting provisions of other statutes, including Section 1701z-11." (SPA 6-7). The court explained that even if there were a conflict between § 1715z-11a(a) and § 1701z-11, then § 1715z-11a(a) would control, both because of its "notwithstanding any other provision of law" language and because it was enacted after § 1701z-11. (SPA 7). The court thus concluded that § 1715z-11a(a) "provides the Secretary with broad discretion to set the 'terms and conditions' for disposing of multifamily properties and mortgages owned or held by the Secretary." (SPA 8). "Because the bidding restrictions at the auction were a 'term or condition' pursuant to this discretion, there is 'no law to apply' for APA review." (SPA 8).

The district court then noted that in addition to the "lack of any statutory basis for judicial review," there are "sound policy considerations" that support the court's determination of nonreviewability. (SPA 8). These policy considerations include the fact that tenants at Burton Towers are low-income and elderly; that there were serious safety concerns at the Property; and HUD's experience that a limitation on bidding such as the one used here is "the most effective way to ensure that an experienced owner would purchase the property and make the necessary repairs." (SPA 8). While these policy considerations were not dispositive,

the court found that they were "worthy of deference and support the preclusion of review." (SPA 8).

After dismissing Ku's claims against the Government for lack of a waiver of sovereign immunity, the district court dismissed Ku's claims as to the City and to Burton Towers, LLC, for lack of standing. (SPA 9). The court held that Ku failed to establish the required "invasion of a legally protected interest" that is the first of the three requirements for constitutional standing. (SPA 9). Here, Ku could not show such injury for two reasons: "HUD has statutory discretion to set the terms of the auction," and "Ku has no legally protected interest in the property itself." (SPA 9).

The court also dismissed Ku's constitutional claims, addressing both the Takings Clause and the Due Process Clause, as it was not clear which provision Ku was invoking. (SPA 9). Under either theory, Ku would need to establish that he has a legally cognizable property interest, and the district court held that because Ku had no reason to expect to win the auction and because there were "no rules or understandings to support the claim that plaintiff was entitled to participate in the auction," he could not establish such an interest. (SPA 10).

The district court further held that Ku was not entitled to the equitable relief of a declaratory judgment or a permanent injunction. (SPA 11). Specifically, the court held that Ku was not entitled to declaratory relief because he had "failed to establish either past or future injury." (SPA 11). The lack of past or future injury also was relevant to the district court's denial of Ku's request for injunctive relief, and, in addition, the court held that "the balance of hardships

tips decidedly in defendants' favor" and "the public interest would be disserved by unwinding such a complex and costly transaction." (SPA 11).

Finally, the court denied Ku's request to file a second amended complaint because any amendments would be futile. (SPA 12).

Summary of Argument

This Court should affirm the district court's dismissal of Ku's amended complaint against the Government. The district court properly held that it lacked subject matter jurisdiction to review Ku's challenges to the bidding restrictions at the foreclosure sale because the Government has not waived sovereign immunity as to these claims. *See infra* Point I. Specifically, the Government has not waived sovereign immunity over actions taken pursuant to § 1715z-11a, as Ku argues, because this statutory provision is not part of the NHA and thus is not covered by the NHA's waiver of immunity. *See infra* Point I.B.1. The Government has not waived sovereign immunity pursuant to the APA either, because HUD has discretion to set the terms and conditions of foreclosure sales such as the one at issue here as a matter of law. *See infra* Point I.B.2. The Court also should affirm the dismissal of Ku's amended complaint because the district court held that Ku is not entitled to the equitable relief he seeks, and Ku has not argued to the contrary in his brief to this Court; even if he had, the district court did not abuse its discretion in denying Ku's request for such relief. *See infra* Point II. Finally, Ku's request to amend the complaint was properly denied because amending the complaint would be futile.

See infra Point III. For all these reasons, the district court's judgment should be affirmed.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED KU'S COMPLAINT AGAINST THE GOVERNMENT FOR LACK OF SUBJECT MATTER JURISDICTION

A. Standard of Review

In reviewing the dismissal of a complaint for lack of subject matter jurisdiction, this Court "'review[s] factual findings for clear error and legal conclusions *de novo*.'" *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) (quoting *Close v. New York*, 125 F.3d 31, 35 (2d Cir. 1997)).

B. No Waiver of Sovereign Immunity Applies to This Case

"It is well established that in any suit in which the United States is a defendant, a waiver of sovereign immunity with respect to the claim asserted is a prerequisite to subject matter jurisdiction." *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 374 (2d Cir. 1999). "'Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.'" *Lunney*, 319 F.3d at 554 (quoting *Dorking Genetics v. United States*, 76 F.3d 1261, 1263 (2d Cir. 1996)). "[A] waiver of sovereign immunity is to be construed strictly and limited to its express terms." *Id.* As with any question on which subject matter jurisdiction depends, the plaintiff bears the burden of establishing that a

waiver of sovereign immunity applies. *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Lunney*, 319 F.3d at 554, 559.

Ku alleged no waiver of sovereign immunity, nor does any apply. As the district court correctly held, neither of the statutes Ku now relies on—the APA and the NHA—provides a basis for jurisdiction over this action. Accordingly, the judgment should be affirmed.

1. The NHA Does Not Waive Sovereign Immunity over This Action

The district court correctly held that "Section 1715z-11a(a) is excluded from the waiver of sovereign immunity found in Section 1702." (SPA 6). Ku concedes that § 1715z-11a "is not part of the NHA," and does not contest that HUD acted under that provision in this case. Br. 12. But he asserts that the Government waived sovereign immunity under § 1715z-11a, because this section has been codified as part of subchapter II, chapter 13 of Title 12 of the United States Code and thus is covered by the NHA's waiver of immunity. Br. 12. This argument is contrary to both the case law and the statute's history.

Congress amended the NHA in 1935 to provide that the Secretary of HUD "shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal." Act of August 23, 1935, chapter 614, § 344(a), 49 Stat. 684, 722, *codified at* 12 U.S.C. § 1702.* This Court and

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* The relevant official was originally the Administrator of the Federal Housing Administration.

others have accordingly interpreted this waiver as part of the NHA. *See Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 141 (2d Cir. 1999) (discussing the "scope of the 'sue and be sued' clause of the National Housing Act"); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block Bldg. 1 Hous. Dev. Fund Co., Inc.*, 608 F.2d 28, 35-37 (2d Cir. 1979) (interpreting scope of § 1702 waiver when HUD acts in commercial capacity under the NHA); *VS Ltd. P'ship v. HUD*, 235 F.3d 1109, 1113 (8th Cir. 2000) (§ 1702 applies where HUD is carrying out the provisions "of the NHA"); *Mann v. Pierce*, 803 F.2d 1552, 1556 (11th Cir. 1986) (§ 1702 "authorizes the Secretary of HUD to sue and be sued in administering the National Housing Act"); *Armor Elevator Co., Inc. v. Phoenix Urban Corp.*, 655 F.2d 19, 20 (1st Cir. 1981) (this section "confers upon the Secretary . . . the capacity to sue and be sued only for the purpose of 'carrying out the provisions of . . . (the National Housing Act)'" (alterations in original)); *Unimex, Inc. v. HUD*, 594 F.2d 1060, 1061 (5th Cir. 1979) (§ 1702 "waives sovereign immunity for actions arising under [the NHA]").

Section 1715z-11a is not part of the NHA: it was enacted as part of a later appropriations act—the Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1997, Pub. L. No. 104-204, § 204, 110 Stat. 2874, 2894 (1996). (SPA 5). "While Congress

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The statute also initially referred only to "this title and titles II and III"; other titles were added in later amendments. *See Jewish Ctr. for Aged v. HUD*, 07 Civ. 750, 2007 WL 2121691, at *4 (E.D. Mo. July 24, 2007).

may amend or repeal a statute by means of an appropriations bill, its intention to do so must be clear." *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002). No such intention appears here. While the appropriations statute did amend one section of the NHA, *see* Pub. L. No. 104-204, § 221, 110 Stat. 2906 (amending section 236(f)(1) of the NHA), Congress did not use any language indicating amendment with regard to § 1715z-11a. *See Auburn Hous. Auth.*, 277 F.3d at 147 ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987))). This demonstrates that Congress was not in fact amending the NHA in enacting § 1715z-11a.

Furthermore, in codifying section 1715z-11a, the Office of Law Revision Counsel of the United States House of Representatives* specifically stated that § 1715z-11a "was enacted as part of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1997, and not as part of the National Housing Act which comprises this chapter." § 1715z-11a historical and

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* That Office is charged with "classify[ing] newly enacted provisions of law to their proper positions in the Code." 2 U.S.C. § 285b; *see United States v. Welden*, 377 U.S. 95, 98 (1962) (stating that the Court would look to the original statutory language as opposed to the placement chosen by the codifier in analyzing a particular provision).

statutory notes (West 2012). More generally, the Supreme Court has noted its "hesitat[ion] to place too much significance on the location of a statute in the United States Code," *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 (2004)—yet Ku asks this Court to do precisely that, by holding that the Government has waived its sovereign immunity with regard to actions taken pursuant to § 1715z-11a based solely on the fact that this provision is codified in one of the chapters referred to in § 1702. No court has accepted that argument; indeed, the only case that Ku cites pertaining to these sections held that the § 1702 waiver does not apply to actions taken pursuant to § 1715z-11a. *Jewish Ctr. for Aged v. HUD*, 07 Civ. 750, 2007 WL 2121691, at *5 (E.D. Mo. July 24, 2007), *cited in* Br. 13.

In any event, as the *Jewish Center for Aged* court explained, the language of § 1702 as codified cannot prevail over the text found in the Statutes at Large. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1962); *Stephan v. United States*, 319 U.S. 423, 426 (1943). And here, while Ku relies entirely on the word "subchapter" in the codified version, the statute as enacted by Congress and as reflected in the Statutes at Large refers clearly to the "titles" of the NHA. *See Fed. Hous. Adm'n, Region No. 4 v. Burr*, 309 U.S. 242, 244 (1940). "Thus, the Statutes' text is controlling, and its plain language states that § 1702 only applies to the listed NHA provisions."* *Jewish Ctr. for Aged*, 2007 WL

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* *Accord Giordano v. Mt. St. Francis Assocs., L.P.*, No. 08-48-S, 2010 WL 3703404, at *5 (D.R.I. Sept. 10, 2010); *Almeida v. HUD*, No. 08 Civ. 4582, 2009 WL 873125, at *3 n.3 (S.D.N.Y. Feb. 11, 2009).

2121691, at *4. The district court in this case was correct to reach the same conclusion, that the NHA does not waive sovereign immunity over this action.

2. The APA Does Not Waive Sovereign Immunity over This Action

a. APA Standards for Reviewability

Nor does the APA waive sovereign immunity over Ku's claims. Although the APA "embodies a 'basic presumption of judicial review,' " the statute provides that agency action is not subject to judicial review " 'to the extent that' such action 'is committed to agency discretion by law.' " *Lunney*, 319 F.3d at 558 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), and *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993)). "This limitation on the APA's waiver of immunity means that there is no jurisdiction if the statute or regulation said to govern the challenged agency action 'is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.' "* *Id.*

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* This Court has noted that "[i]t is uncertain in light of recent Supreme Court precedent whether these threshold limitations are truly jurisdictional or are rather essential elements of the APA claims for relief." *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). The Court need not reach this question here, though, because even if dismissal pursuant to Rule 12(b)(1) were not proper, this Court " 'could nonetheless affirm the dismissal if dismissal were otherwise proper based on failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).' " *Id.* at 92 (quoting *EEOC v.*

(quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (emphasis in original)). "Therefore '§ 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based,' and requires dismissal when there is 'no law to apply.' " *Id.* (quoting *Webster v. Doe*, 486 U.S. 592, 600 (1988), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)). Accordingly, Ku "must specify some statute or regulation that would limit [HUD's] discretion in this matter." *Id.**

St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997)).

* Ku argues that even if there is no law to apply, the Court may still review the issue of "whether the agency has acted arbitrarily and capriciously, when the agency has departed from precedent without explanation or when the agency has failed to articulate any coherent explanation for its decision." Br. 21 (citing *Am. Bible Soc'y v. Blount*, 446 F.2d 588, 597 (3d Cir. 1971) ("[A] federal court can reverse actions which are so arbitrary and capricious as to amount to an abuse of discretion, or which are contrary to the Constitution.")). However, this Court has "note[d] that the APA's 'arbitrary and capricious standard,' *see* 5 U.S.C. § 706(a)(2), cannot be sufficient by itself to provide the requisite 'meaningful standard' for courts to apply in evaluating the legality of agency action." *Lunney*, 319 F.3d at 559 n.5 (citing *Heckler*, 470 U.S. at 829-30). Moreover, the record does not support Ku's contention that HUD departed from precedent without explanation or that HUD failed to provide "any coherent explanation for its decision." Br. 21. As the district

b. No Statute Provides a Meaningful Standard Against Which to Judge HUD's Exercise of Discretion

In this case, HUD acted pursuant to § 1715z-11a(a), a statutory provision that on its face commits the agency's action to its discretion. As reflected in the subsection's caption, Congress has granted HUD "flexible authority" with regard to multifamily projects:

> During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary . . . , and multifamily mortgages held by the Secretary *on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law*.

12 U.S.C. § 1715z-11a(a) (emphasis added). By its plain language, § 1715z-11a(a) provides the Secretary with broad discretion to set the "terms and conditions" for disposing of multifamily mortgages, such as it did here in restricting participation in the Burton Towers auction. (JA 91).

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court stated, "[a]lthough plaintiff attempts to characterize HUD's administration of the foreclosure sale as improper and without a rational basis, common sense dictates that restricting bidding on such a property is likely to advance HUD's objectives and protect the tenants who occupy the properties it administers." (SPA 8).

First, the language providing that the Secretary has the authority to set the terms and conditions as he "may determine" is an unambiguous grant of discretion. This Court has held that similar language—"as the Secretary believes appropriate"—was "open-ended" and committed the relevant agency actions "to agency discretion within the meaning of 5 U.S.C. § 701(a)(2)." *Greater N.Y. Hospital Ass'n v. Mathews*, 536 F.2d 494, 497-98 (2d Cir. 1976). Here, the language is equally broad. *See Ashton v. Pierce*, 716 F.2d 56, 65 (D.C. Cir. 1983) (holding that the phrase "if the Secretary [of HUD] determines, in his discretion, that . . . housing presents hazards of lead-based paint" committed the determination to HUD's discretion by law).

Congress's inclusion of the phrase "notwithstanding any other provision of law" further confirms the Secretary's discretion. That phrase " 'clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section.' " *Conyers v. Rossides*, 558 F.3d 137, 140, 145 (2d Cir. 2009) (quoting *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993)). The "notwithstanding" clause of § 1715z-11a(a) thus shows that Congress intended the Secretary of HUD to have discretion to set the terms and conditions of foreclosure sales unconstrained by other legal provisions.*

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* Ku asserts that the legislative history of § 1715z-11a and the nature of the action in question are determinative as to reviewability. Br. 19-21. However, the "starting point is the language of the statute granting the agency power," and if the statute provides broad discretion and "no standards at all," then "the

inquiry need go no further." *N.Y. Racing Ass'n, Inc. v. NLRB*, 708 F.2d 46, 51 (2d Cir. 1983); *see Chaney*, 470 U.S. at 830 ("review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion"); *Conyers*, 558 F.3d at 147 n.13 (Court "need not discuss the legislative history" when "plain text of th[e] statute is unambiguous" in committing matter to agency discretion, but exercising discretion to do so to address arguments put forth by plaintiff); *Greater N.Y. Hospital Ass'n*, 536 F.2d at 499 (analysis for § 701(a)(2) is whether " 'statutes are drawn in such broad terms that in a given case there is no law to apply' " (quoting *Overton Park*, 401 U.S. at 410)).

In any event, it is not clear why the legislative history that Ku cites shows the "true intent" of § 1715z-11a, and indeed, the excerpt Ku cites—stating that "Section 204 provides authority to HUD to restructure multifamily apartment mortgages that are subsidized with section 8 project-based rental assistance contracts that expire in 1997"—indicates that HUD is to have discretion with regard to the mortgages in question. Br. 18-20 (citing House Report 104-628, June 18, 1996). To the extent that Ku is arguing that the action here is not economic or managerial, Br. 20-21, that too is incorrect. Here, HUD determined that it would prioritize the needs of the elderly tenants, that the repairs necessary at Burton Towers required a certain level of experience, that the project required operational expertise given the particularly vulnerable population, and that the most efficient means for it to identify a purchaser with the requisite experience was to limit the bidding as it

Even if § 1715z-11a did not expressly confer discretion on HUD "notwithstanding any other provision of law," there is no other statute that provides a meaningful standard against which to review the bidding restrictions at issue here. Ku states that it is his "position that there is 'some law' to apply," but then fails to identify any, offering only speculation that there may be some unspecified internal agency policy that constrains HUD's actions. Br. 22-23. It is thus evident that Ku has not met his burden to demonstrate that the Government has waived sovereign immunity. Nor could he, as none of the statutes or regulations he mentions in his brief are applicable.

i. The MMFA Does Not Apply

First, the only statutory provision that Ku cites in his brief to this Court is 12 U.S.C. § 3710(b), which is part of the MMFA. Br. 2, 26. However, § 3710(b), when read in the context of the MMFA as a whole, does not in any way limit HUD's discretion to set the terms and conditions of a foreclosure sale as it did here. Section 3710(b) provides as follows:

> Written one-price sealed bids shall be accepted by the foreclosure commissioner from the Secretary and other

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did. (JA 91-92). *See Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 303 (2d Cir. 1971) (Court would not review HUD's decisions to increase rents, noting "managerial nature" of the actions, "need for expedition to achieve the Congressional objective," and "quantity of appeals that would result if [Government] authorizations to increase rents were held reviewable").

> persons for entry by announcement by the commissioner at the sale. The Secretary and any other person may bid at the foreclosure sale, including the Secretary or any other person who has submitted a written one-price bid, except that the foreclosure commissioner or any relative, related business entity or employee of such commissioner or entity shall not be permitted to bid in any manner on the security property subject to foreclosure sale.

However, other provisions of the MMFA permit HUD and the Foreclosure Commissioner to set the terms of the sale. Section 3706 requires the notice of default and foreclosure sale to include "appropriate terms of sale." The Foreclosure Commissioner is required to provide an official record (either in the deed or in an affidavit or addendum to the deed) stating "that the foreclosure was conducted in accordance with . . . the terms of the notice of default and foreclosure sale." 12 U.S.C. § 3714. In sum, any foreclosure sale held pursuant to the MMFA must be conducted in conformity with the terms of the notice of default and foreclosure sale. Here, the notice of default and foreclosure sale issued by the Foreclosure Commissioner included the requirement that participation be limited to governmental entities, local Housing Development Fund Corporations and lien holders. (JA 91).

In the context of the statute as a whole, the phrase "any other person may bid" means any person who is permitted to bid because he or she can comply with the

requirements set out in the notice of default and foreclosure sale. Ku's interpretation of this language as covering any person without any restriction whatsoever renders the statutory language regarding the notice of default and foreclosure sale meaningless. The Supreme Court has repeatedly warned against such interpretations. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Moreover, the interpretation urged by Ku, which would mean that any individual, no matter his or her qualifications, could bid at all HUD foreclosure sales, defies common sense as well as the stated purpose of the MMFA to provide a "more expeditious procedure for the foreclosure of [multifamily] mortgages." 12 U.S.C. § 3701(a)(5).

ii. The NHA Does Not Apply

Ku implies that there is law to apply in the form of "national housing objectives." Br. 23. Specifically, Ku claims that "continued restrictions of participation at foreclosure auctions will destroy an active market of persons that are willing to take over a foreclosed project, rehabilitate and operate it." Br. 23. Ku provides no citation for this argument, but he may be referring to the objective set out in the NHA that "private enterprise shall be encouraged to serve as large a part of the total need as it can." 42 U.S.C. § 1441. This statute does not provide a meaningful standard for this Court to apply in reviewing HUD's actions here.

Section 1441, in which Congress made a general declaration regarding "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family," is not a source of standards for HUD to follow but is "guidance

of the most general sort—inspiration would be a better word." *United States v. OCCI Co.*, 758 F.2d 1160, 1167 (7th Cir. 1985) (Posner, J., concurring); *accord id.* (describing § 1441 as a "protracted recital of hopes and homilies"). "If ever there was a case where judicial review was unavailable because 'agency action is committed to agency discretion by law,' which is an exception to the presumption of judicial reviewability designed precisely for cases where 'statutes are drawn in such broad terms that in a given case there is no law to apply,' this is the case." *Id.* (citations omitted). As the Supreme Court has held in a similar context, courts are not "empowered to enter general orders compelling compliance with broad statutory mandates," which, even if phrased in mandatory terms, "leave[ ] [agencies] a great deal of discretion in deciding how to achieve" their objectives and thus do not contain "the clarity necessary to support judicial action." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004).

Although some circuits have permitted the objectives of § 1441 to serve as a standard to review foreclosures under a provision of the NHA that is similar to § 1715z-11a(a), those decades-old cases—decided well before *Norton*—do not give sufficient weight to the vague nature of § 1441, nor do they involve the same discretionary language as found in § 1715z-11a(a). In *United States v. Winthrop Towers*, the court held that "HUD's decision to foreclose may be reviewed to determine whether it is consistent with

national housing objectives."* 628 F.2d 1028, 1034-35 (7th Cir. 1980). But the foreclosure statute in that case limited the Secretary's discretion to actions "for the protection of [HUD's insurance fund]" and lacked an unrestricted "notwithstanding any other provision of law" clause, *id.* at 1033 n.2, unlike the broader discretion granted by § 1715z-11a(a).**

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* Even upon finding that § 1441 provided some law to apply, the *Winthrop Towers* court noted that HUD has a great deal of discretion in deciding when and how to foreclose on a mortgage, in part "because the [NHA] was primarily intended to benefit individuals who live in inadequate housing, not commercial developers," and because § 1441 " 'sets forth broad future objectives on a grand scale which are to be accomplished over a period of many years.' " *Id.* at 1036 (quoting *Alexander v. HUD*, 555 F.2d 166, 171 (7th Cir. 1977), *aff'd* 441 U.S. 39 (1979)).

** *See also United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 494 (8th Cir. 1981) (citing *Winthrop Towers* and holding, without discussion, that HUD's decision to foreclose an insured mortgage under the NHA was "subject to judicial review"); *Russell v. Landrieu*, 621 F.2d 1037, 1040-41 (9th Cir. 1980) (reaching same holding as in *Winthrop Towers* that court would review HUD's decision to foreclose pursuant to the NHA in accordance with national policy objectives); *Lee v. Kemp*, 731 F. Supp. 1101, 1108-1110 (D.D.C. 1989) (same). A district court has applied the rationale in *Winthrop Towers* to Section 1715z-11a(a). *Cheatham v. Jackson*, No. 07-13168, 2007 WL 4572482, at *7 (E.D. Mich. Dec. 27, 2007); *but see Chicago Acorn*

Even if this Court were to review HUD's actions here in light of § 1441, there is nothing in Ku's amended complaint to support his assertion that the agency violated national housing objectives. Rather, the facts show that while Ku himself was precluded from bidding (JA 298-99), there is no evidence that HUD's practice of working through units of local government in cases of properties that house particularly vulnerable tenants is destroying any sort of "active market." Indeed, § 1441 also provides that "appropriate local public bodies [should be] encouraged and assisted to undertake positive programs of encouraging and assisting . . . the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life"—a goal furthered by HUD's actions in this case.

iii. The MMFA Regulations Do Not Apply

Finally, even if HUD's actions allegedly contrary to its own regulations are reviewable in spite of the "notwithstanding any other provision of law" language —an issue that this Court need not address—there are no regulations that limit HUD's discretion to set the terms and conditions of a foreclosure sale by determining what types of entities can bid.* Ku asserts

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v. HUD, No. 05-cv-03049, 2005 U.S. Dist. LEXIS 45970, at *29 (N.D. Ill. Oct. 5, 2005) (declining "to extend the rationale of *Withrop Towers* in this case, especially in light of the broad language of [Section 1715z-11a(a)]").

* Some courts have concluded that they have the ability to review a claim that HUD violated its own

that "it is not clear that HUD followed its[] own regulations with respect to the disposition in this case," without citing any regulation. Br. 23. Ku may be referring to 24 C.F.R. § 27.30(a), which elaborates on § 3710(b) of the MMFA, and which provides:

> The commissioner shall accept written one-price sealed bids from any party including the Secretary so long as those bids conform to the requirements described in the Notice of Default and Foreclosure Sale. . . . The commissioner shall accept oral bids from any party, including parties who submitted one-

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regulations. For example, the *Jewish Center for Aged* court noted that it might have reached a different conclusion if the plaintiffs had "pled that HUD violated its own regulations." 2007 WL 2121691, at *5 n.9. Other district courts have noted this as well. *See Massie v. HUD*, No. 06-1004, 2007 WL 674597, at *3 (W.D. Pa. Mar. 1, 2007) ("I find that this Court does have jurisdiction to review plaintiffs' claim that HUD failed to follow its own regulations."); *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, No. CV-05-4830, 2006 WL 297704, at *10 (E.D.N.Y. Feb. 7, 2006) (noting that "[i]t is of no consequence that HUD's internal procedures are more rigorous than those mandated by its flexible authority under section 1715z-11a"); *cf. Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988) (noting that the Government conceded "that the Agency's failure to follow its *own regulations* can be challenged under the APA" pursuant to a similar statute to the one at issue here, but declining to reach that issue).

> price sealed bids, if those oral bids conform to the requirements described in the Notice of Default and Foreclosure Sale.

Even if Ku had properly raised this as an example of law to apply that would limit HUD's discretion pursuant to § 1715z-11a(a), this regulation supports HUD's position, not Ku's. This language is further evidence that HUD may impose bidding requirements in the notice of default and foreclosure sale, and not, as Ku asserts, that any bid whatsoever must be accepted. *See supra*, Point I.B.2.b.i. There is, accordingly, no source of law to limit HUD's discretion in this matter, and its decision to impose bidding restrictions is therefore unreviewable under the APA.

3. Ku Is Not Entitled to Discovery

Ku asserts that he is entitled "to examine the Government's internal agency policies, procedures and regulations in order to properly determine if there is further evidence of 'some law' to apply." Br. 23. As discussed above in Point I.B.2.b, § 1715z-11a(a) provides that HUD has broad discretion to set the terms and conditions of a foreclosure sale such as the one at issue, and Ku has put forward no evidence of law to apply. Thus, he has offered no justification for discovery regarding "further" evidence. Discovery is not only unjustified in light of Ku's arguments, but it is particularly inappropriate for a case challenging agency action pursuant to the APA. *See Sharkey v. Quarantillo*, 541 F.3d 75, 93 n.15 (2d Cir. 2008) ("In a suit under the APA, discovery rights are significantly limited. The respondent agency must turn over the whole

administrative record as it existed at the time of the challenged agency action, but normally no more.");* *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

Ku implies that he is entitled to rely on some purely internal agency policy that has not been made public to establish that there is law to apply here in spite of the broad statutory discretion vested in HUD, but the cases that he cites do not support that proposition and, indeed, do not refer to discovery at all. To the contrary, these cases demonstrate the common-sense proposition that only certain formal public pronouncements of policy can be the type of "law" that provides for review in the context of a broadly stated statutory provision. As the Supreme Court explained in *INS v. Yang*, 519 U.S. 26, 32 (1996), "if [an agency] announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.' " Here, there is no such "rule" or "settled course of adjudication," or, indeed, any "announced" HUD policy, and Ku is accordingly not

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* The Court has recognized an exception to this general rule "whereby '[it] may require the administrative officials who participated in the decision to give testimony explaining their action' when this is 'the only way there can be effective judicial review.' " *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). That exception does not apply here as HUD has adequately explained the steps it took in the declaration it submitted in this case. (JA 88-94).

entitled to discovery.* *See Freeman v. United States*, 556 F.3d 326, 342-43 (5th Cir. 2009) ("amorphous discovery request" seeking agency directive insufficient because directive "could be found in the public realm," and even if it could not discovery request "fails to assert the existence of a particular federal regulation, order, or directive (or the potential contents of any such authority)"); *Miller v. United States*, 710 F.2d 656, 666 (10th Cir. 1983) ("The statutes, regulations and all the publications referred to in the regulations were, of course, available to both sides").

Moreover, in *Lunney*, this Court rejected the argument that internal agency memoranda from the 1940s on the issue in dispute could serve as "the 'law to

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* The other cases Ku cites in support of his request for discovery are similarly unavailing. *See M.B. v. Quarantillo*, 301 F.3d 109, 113 (3d Cir. 2002) (holding that a regulation and a memorandum issued by the acting assistant commissioner of the INS clarifying "interim field guidance with respect to special immigrant juvenile cases" provided law to apply, with no indication that this memorandum was not publicly available); *Hondros v. U.S. Civil Serv. Comm'n*, 720 F.2d 278, 294 (3d Cir. 1983) (holding that the Civil Service had adopted a program of "converting" certain term employees to career status, because the Government had made these representations to employees); *GP-UHAB Hous. Dev. Fund Corp.*, 2006 WL 297704, at *10-11 (reviewing HUD's internal procedures set forth in a Renewal Guide, with no indication that the document was not publicly available).

apply' needed for a waiver of sovereign immunity under the APA." 319 F.3d at 559. The Court explained that "even assuming that these 1940s documents did purport to limit the Navy's discretion, a unilateral discretionary action of an agency itself does not limit agency discretion by furnishing 'law to apply' under the APA." *Id.* (citing *Lincoln v. Vigil*, 508 U.S. 182, 193-95 (1993), for proposition that "agency's own statements, statements of Congress contained in legislative history of agency funding statutes, or even existence of fiduciary duty owed by agency to plaintiffs and others could [not] serve to create legally enforceable rights against agency under the APA"). Even if there were internal HUD documents on point, such documents would not suffice to limit HUD's discretion pursuant to § 1715z-11a(a). Accordingly, there is no justification for discovery in these circumstances.

POINT II

KU IS NOT ENTITLED TO EQUITABLE RELIEF

Even if HUD's bidding restrictions were reviewable, the judgment should be affirmed because the district court did not abuse its discretion in denying Ku equitable relief—a point Ku does not dispute in his brief to this Court. (SPA 11). He has therefore forfeited this argument. *See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Pelella*, 350 F.3d 73, 87 (2d Cir. 2003) ("By failing to raise the issue on appeal, the argument is deemed waived.").

Even if Ku had challenged the district court's determinations as to equitable relief, this Court should affirm these holdings. The district court held that Ku is not entitled to a permanent injunction because "(1) he

has not shown he suffered an injury or is likely to suffer another injury in the future; (2) the balance of the hardships tips decidedly in defendants' favor; and (3) the public interest would be disserved by unwinding such a complex and costly transaction." (SPA 11). The Court "review[s] a denial of a request for a permanent injunction for abuse of discretion." *Carlos v. Santos*, 123 F.3d 61, 67 (2d Cir. 1997).

The district court did not abuse its discretion in denying Ku's request that it unwind the September 30, 2011, sale and restrict HUD from entering into similar transactions in the future. Such extreme measures are not justified here, especially in light of the extensive and costly repairs that have been made in the past year by the "high quality owner[]" of Burton Towers. (JA 93 (approximately one million dollars had been spent as of February 3, 2012, in repairs to Burton Towers)). Unwinding this transaction likely would harm the vulnerable tenant population that HUD sought to protect in this transaction, and preventing HUD from taking similar steps in the future would keep the agency from acting on its reasoned determination that this method of disposing of mortgages held on this type of property is effective in ensuring orderly transitions to such highly qualified owners. (JA 93). Thus, "the balance of hardships between the plaintiff and the defendant" and "the public interest"—factors courts must consider before granting the "drastic and extraordinary remedy" of an injunction, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756, 2761 (2010)—both strongly counsel against granting equitable relief to Ku. For similar reasons, the district

court also correctly held that Ku is not entitled to declaratory relief.* (SPA 11).

POINT III

KU IS NOT ENTITLED TO AMEND HIS COMPLAINT

Federal Rule of Civil Procedure 15(a)(2) provides that the "court should freely give leave [to amend a pleading] when justice so requires." This Court "review[s] a district court's denial of leave to amend for abuse of discretion." *ATSI Commc'ns, Inc. v. Shaar Fund*, Ltd., 493 F.3d 87, 108 (2d Cir. 2007). "[I]t is well established that leave to amend a complaint need not be granted when amendment would be futile." *Ellis v. Chao*, 336 F.3d 114, 127 (2d Cir. 2003). When "a denial of leave to amend . . . is based on a legal interpretation,

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* This Court has reviewed district court determinations as to declaratory judgment for abuse of discretion, as well as *de novo*. *See New York v. Solvent Chem. Co., Inc.*, 664 F.3d 22, 25 (2d Cir. 2011) ("We review a district court's refusal to grant a declaratory judgment for abuse of discretion."); *Sprint Spectrum LP v. Conn. Siting Council*, 274 F.3d 674, 676 (2d Cir. 2001) (*de novo*); *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 675 (2d Cir. 1996) (calling *de novo* standard into question after *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)); *Continental Cas. Co. v. Coastal Savs. Bank*, 977 F.2d 734, 736-37 (2d Cir. 1992) (applying *de novo* standard based on "preponderance of our caselaw" but noting "that there are decisions in this circuit stating that the applicable standard of review is to determine only whether an abuse of discretion has occurred").

such as for futility, [it] is reviewed *de novo*." *L-7 Designs Inc. v. Old Navy, LLC*, 647 F.3d 419, 435 (2d Cir. 2011). In considering a request to amend a pleading, "the trial judge's discretion is broad, and its exercise depends upon many factors, including 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . , futility of amendment, etc.' " *Local 802, Associated Musicians of Greater N.Y. v. Parker Meridien Hotel,* 145 F.3d 85, 89 (2d Cir. 1998) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Ku's proposed amendments do not change the fact that his claims are not subject to judicial review, for the reasons set forth above. (JA 290 (proposed amended complaint listing the NHA and the APA as the applicable waivers of sovereign immunity)). Accordingly, any amendment of the complaint would have been futile, and the district court properly denied Ku's request to do so. (SPA 12).

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
September 7, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 9,567 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: ELLEN LONDON,
Assistant United States Attorney

ADDENDUM

Statutes

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

12 U.S.C.A. § 1702

The powers conferred by this chapter shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties, responsibilities, and tenure and fix their compensation. The Secretary may delegate any of the functions and powers conferred upon him under this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing, and binding) as

are necessary to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this chapter . . . . The Secretary shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X of this chapter, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.

12 U.S.C.A. § 1715z-11a

(a) Flexible authority for multifamily projects

During fiscal year 1997 and fiscal years thereafter, the Secretary may manage and dispose of multifamily properties owned by the Secretary, including, for fiscal years 1997, 1998, 1999, 2000, and thereafter, the provision of grants and loans from the General Insurance Fund (12 U.S.C. 1735c) for the necessary costs of rehabilitation, demolition, or construction on the properties (which shall be eligible whether vacant or occupied), and multifamily mortgages held by the Secretary on such terms and conditions as the Secretary may determine, notwithstanding any other provision of law. A grant provided under this subsection during fiscal years 2006 through 2010 shall be available only to the extent that appropriations are made in advance for such purposes and shall not be derived from the General Insurance Fund.

12 U.S.C.A. § 3710

(b) Conduct of sale

The foreclosure commissioner shall conduct the foreclosure sale in accordance with the provisions of this chapter and in a manner fair to both the mortgagor and the Secretary. The foreclosure commissioner shall attend the foreclosure sale in person, or, if there are two or more commissioners, at least one shall attend the foreclosure sale. In the event that no foreclosure commissioner is a natural person, the foreclosure commissioner shall cause its duly authorized employee to attend the foreclosure sale to act on its behalf. Written one-price sealed bids shall be accepted by the foreclosure commissioner from the Secretary and other persons for entry by announcement by the commissioner at the sale. The Secretary and any other person may bid at the foreclosure sale, including the Secretary or any other person who has submitted a written one-price bid, except that the foreclosure commissioner or any relative, related business entity or employee of such commissioner or entity shall not be permitted to bid in any manner on the security property subject to foreclosure sale. The foreclosure commissioner may serve as auctioneer, or, in accordance with regulations of the Secretary, may employ an auctioneer to be paid from the commission provided for in section 3711(5) of this title.

42 U.S.C.A. § 1441

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and

related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation. The Congress further declares that such production is necessary to enable the housing industry to make its full contribution toward an economy of maximum employment, production, and purchasing power. The policy to be followed in attaining the national housing objective established shall be: (1) private enterprise shall be encouraged to serve as large a part of the total need as it can; (2) governmental assistance shall be utilized where feasible to enable private enterprise to serve more of the total need; (3) appropriate local public bodies shall be encouraged and assisted to undertake positive programs of encouraging and assisting the development of well-planned, integrated residential neighborhoods, the development and redevelopment of communities, and the production, at lower costs, of housing of sound standards of design, construction, livability, and size for adequate family life; (4) governmental assistance to eliminate substandard and other inadequate housing through the clearance of slums and blighted areas, to facilitate community development and redevelopment, and to provide adequate housing for urban and rural nonfarm families with incomes so low that they are not being decently housed in new or existing housing shall be extended to those localities which estimate their own

needs and demonstrate that these needs are not being met through reliance solely upon private enterprise, and without such aid; and (5) governmental assistance for decent, safe, and sanitary farm dwellings and related facilities shall be extended where the farm owner demonstrates that he lacks sufficient resources to provide such housing on his own account and is unable to secure necessary credit for such housing from other sources on terms and conditions which he could reasonably be expected to fulfill. The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

Regulations

24 C.F.R. § 27.30

(a) The commissioner shall accept written one-price sealed bids from any party including the Secretary so long as those bids conform to the requirements described in the Notice of Default and Foreclosure Sale. The commissioner shall announce the name of each such bidder and the amount of the bid. The commissioner shall accept oral bids from any party, including parties who submitted one-price sealed bids, if those oral bids conform to the requirements described in the Notice of Default and Foreclosure Sale. The commissioner will announce the amount of the high bid and the name of the successful bidder before the close of the sale.