

ORIGINAL

IN THE SUPREME COURT OF OHIO

REBEKAH R. RADATZ,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellee,

vs.

FEDERAL NATIONAL MORTGAGE
ASSOCIATION,

Defendant-Appellant.

: Case No. 2014-1126
:
: On Appeal from the
: Cuyahoga County Court of Appeals,
: Eighth Appellate District
: Case No. CA-13-100205
:
: Cuyahoga County Court of Common Pleas
: Case No. CV-03-507616
:
:
:

AMICUS CURIAE MEMORANDUM OPPOSING JURISDICTION

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Amicus Curiae First Priority Title Agency



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AMICUS CURIAE MEMORANDUM OPPOSING JURISDICTION

I. STATEMENT OF INTEREST OF AMICUS CURIAE

First Priority Title Agency is a real estate title agency operating in the State of Ohio and handling real estate transactions involving residential properties which are covered by R.C. 5301.36. One of the most important parts of a real estate transaction is identifying the exact, correct status of title of the property being sold or refinanced. This can only occur if liens on properties are timely cleared when there is a pay-off of the mortgage. Failure to timely remove a paid lien clouds the property title and prevents the owner from pledging the property for improvement loans; prevents the timely approval of purchase loans; and injures the credit rating of the owner due to loan balances appearing unpaid beyond their maturity date. The Ohio General Assembly sought to remedy this problem through R.C. 5301.36 which requires prompt and achievable removal (90 days) of paid liens, and allows owners a modest \$250 damages if timely removal does not occur.

Your amicus relies heavily on compliance with this statute in the daily operations of its business. Before the statute was enacted, lenders on a wholesale basis did not release liens on Ohio loans, at all. It was claimed that was expensive and time consuming. Since the enactment of the statute, and especially the judgments in myriad class actions to achieve compliance with that law, banks have diligently kept titles clear and removed paid-off liens in a timely manner. Fannie Mae is not exempt from Ohio law on this subject. Nothing justifies giving it special treatment, especially since both the state and federal courts have uniformly ruled that payments under R.C. 5301.36 and statutes like it are damages and not penalties. The unanimous Court of Appeals got it right and there is no basis for jurisdiction in this court. An argument on an issue which is unique, will not repeat, and which involves a unanimous court of appeals opinion is not

of great public or general interest.

II. EXPLANATION OF WHY THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

This case does not meet this Court's jurisdictional requirement of a case "of public or great general interest." Ohio Constitution, Article IV, Section 2(B)(2)(e). The case is fact-specific to Fannie Mae about a unique consent order specific to this case, related to a statute which has never been involved in any case before this court. The issue presented is limited in time to Fannie Mae's temporary conservatorship which is near its end. (Fannie Mae is a privately-owned, publicly-traded corporation¹ that had a net income of \$84 billion in 2013² and is ready to exit conservatorship.) This case does not present an issue of any major controversy or uncertainty in the law, does not ask to clarify or explain recent policy changes by this Court, and does not involve a conflict with any earlier Ohio Supreme Court decision. There are no appellate court conflicts with other districts; and there was no disagreement among the three panel judges, with the decision being unanimous.

There is only one other known remaining case in Ohio seeking damages under R.C. 5301.36(C), and that lender defendant (in *Rimmer v. CitiFinancial*) is not in conservatorship. Lenders uniformly have dramatically fallen into compliance with R.C. 5301.36 so no additional cases are possible. Thus, this case is limited to one consent order involving one pending lawsuit, with issues which would never re-appear.

¹ Fannie Mae is still a private corporation that is not part of the federal government. See *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 95–96 (D.D.C. 2012) ("the government has not acceded to permanent control over the entity and Fannie Mae remains a private corporation"; "Fannie Mae was not converted into a government entity when it was placed into conservatorship").

² "We recognized comprehensive income of \$84.8 billion in 2013, consisting of net income of \$84.0 billion and other comprehensive income of \$819 million." http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k_2013.pdf, at p. 3.

The issue being raised is actually advisory, since Fannie Mae admits that the ‘bar’ it seeks could apply, if at all, only while in conservatorship. A money judgment, even for penalties, after conservatorship ends raises no issue. If a money judgment is entered while Fannie is in conservatorship, it can then appeal. The question is not ripe until that time. FNMA seeks to short-cut the judicial process and get an advisory opinion which can be moot by the time of any judgment.³

Nor does this case involve any interference with federal jurisdictional subject-matter. The U.S. District Court for the Northern District of Ohio twice rejected Fannie Mae’s efforts to remove this case, finding no federal jurisdiction. Notably, the second removal was after Fannie Mae was put into the temporary conservatorship, rejecting the same argument being made now—that 12 U.S.C. § 4617 divested the Ohio court of jurisdiction.

Finally, this case does not obligate this court to take steps to protect the ‘federal monies’ as Fannie Mae complains. Courts have repeatedly found that Fannie Mae, including during this conservatorship, is still a private corporation not part of the federal government, and money paid by it come from its own funds, and NOT the Treasury. See *Herron v. Fannie Mae*, 857 F. Supp.2d 87, 95–96 (D.D.C. 2012) (“the government has not acceded to permanent control over the entity and Fannie Mae remains a private corporation”; “Fannie Mae was not converted into a government entity when it was placed into conservatorship”); *Judicial Watch, Inc. v. Federal Housing Finance Agency*, 646 F.3d 924, 925–926 (D.C. Cir. 2011) (Fannie Mae is structured as a private corporation); *City of Providence v. Fannie Mae*, C.A. No. 12-481L, C.A. No. 12-668L, 2013 U.S. Dist. LEXIS 104221, *4 (D.R.I. July 25, 2013) (Fannie Mae remains a publicly-traded

³ Fannie Mae argued to other courts that its conservatorship will be ending. In *Dias v. Federal National Mortgage Association*, No. 12-00394 DKW KSC, 2013 U.S. Dist. LEXIS 181584 (D. Haw. Dec. 31, 2013), *47, the district court agreed with FNMA, citing *Herron v. Fannie Mae*, 857 F. Supp.2d 87, 95 (D.D.C. 2012) noting, “‘FHFA’s control over Fannie Mae is temporary.’”

private corporation); *SEC v. Mudd*, 885 F. Supp.2d 654, 663 (S.D.N.Y. 2012) (“Fannie Mae pays its own way[.] [M]oney judgments against Fannie Mae are not paid from the United States Treasury.”).

III. PROPOSITIONS OF LAW.

1. The Federal Housing Financial Agency’s Order determining that R.C. 5301.36 is “in the nature of a penalty” under federal law is not inconsistent with *Rosette v. Countrywide Homes*, 105 Ohio St.3d. 296, 2006-Ohio-1736, 825 N.E.2d. 599.

Ten years after this lawsuit was filed, over four years after it entered conservatorship, and four days after learning that the plaintiff class owed damages had been identified at great expense, Defendant Fannie Mae secretly procured an order from its conservator Federal Housing Finance Agency (“FHFA”), plainly in a effort to manufacture a basis for seeking to dismiss this case. The ‘basis’ FNMA sought was for the conservator to make a finding which determined that payment of money in the instant lawsuit would constitute a penalty payment, prohibited by 12 U.S.C. 4617. However, the consent order which was entered did not make such finding, a key fact which both Fannie Mae and its conservator conveniently fail to mention in seeking jurisdiction. Instead, the Order did nothing more than reiterate the limit on payments by Fannie Mae under 4617 (don’t pay any penalty or fine) and ordered Fannie not to pay any judgment “violating 4617.”

The key which Fannie and FHFA are using in an effort to mislead this Court—as they tried unsuccessfully to do to the Court of Appeals—is the repeated claim that the Order made a finding that any judgment here would be a fine or penalty. But just the opposite, it expressly stated it did not. Indeed, since the Order was entered without any hearing or notice, no findings were allowed. The order confirms this at page one, as had to be disclosed under law, stating the Order was issued “before the finding of *any issues of fact or law.*” (Emphasis added). As such,

and contrary to the argument by Fannie and FHFA, the Order: 1) did *not* “determine that any judgment in this case would be a payment in the nature of a penalty and barred by 4617”; and 2) did not ‘order the trial court not to enter any judgment without further condition.’ Rather, and in clear terms, the Order added the condition that any judgment not be entered “violating 12 U.S.C. 4617.” As confirmed by Fannie Mae in its brief to this court, the issue before the lower courts was therefore whether actions by the trial court would affect the consent order. See, 12 U.S.C. 4635. Contrary to 12 U.S.C. 4635 and settled federal law thereunder which requires the court to determine if its actions would ‘affect’ the Order—here by entering a judgment violating 4617 (i.e., for a penalty)—the trial court simply dismissed this case. Plaintiffs timely appealed to the Eighth District Court of Appeals.

The Court of Appeals adhered to 4635 and asked if any judgment in this case would “affect” the consent order which barred payment violating 4617 (forcing Fannie Mae to pay a penalty or fine.) The Court of Appeals did precisely what every other court faced with a motion seeking to deprive it of jurisdiction under that mandate has done—reviewed the consent order to determine if proceeding with the lawsuit would “affect” the order.

Put another way, courts asked to stop based on such orders do not take that command uncritically. The courts carefully read the order and the underlying statutes on which the order is based to determine if exercising jurisdiction over the claim would, in fact, affect the order.

In *Rex v. Chase Home Finance LLC*, 905 F. Supp.2d 1111 (C.D. Cal. 2012), the district court addressed whether it had jurisdiction over a claim against Chase after the Office of the Comptroller of the Currency issued an order regulating Chase’s conduct.

In *Rex*, homeowners Michael and Naomi Rex obtained written agreement from their lender Chase to release them from the deficiency on the short sale of the home. When Chase then attempted to collect the deficiency, the homeowners sued Chase. *Id.* at 1119-20.

However, in April 2011, Chase entered into a Consent Order with the OCC, whereby Chase agreed to develop a plan to ensure effective coordination of communications with borrowers relating to loss mitigation, and to reimburse borrowers for impermissible expenses or other financial injury. *Id.* at 1121. Like Fannie Mae in this case, Chase argued that a judgment in the lawsuit would violate the consent order so that 12 U.S.C. § 1818(i)(1) (the identical equivalent of 4635) divested the district court of jurisdiction over Rex's claims. *Id.* at 1124. The district court rejected that argument after carefully reviewing the consent order and underlying statutes. The district court concluded that *Chase* had "not provided the legal authority or evidence to show that the relief in the pending lawsuit 'affects by injunction or otherwise' or 'modifies' the 2011 Consent Order." *Id.* at 1129 (brackets omitted).

In the similar case of *In re JPMorgan Chase Mortgage Modification Litig.*, 880 F. Supp.2d 220 (D. Mass. 2012), a damages suit was pending against Chase for improper lending practices. Chase was subject to a consent order which, as in our case, courts were prohibited from affecting, modifying, setting aside, etc. When Chase argued lack of subject matter jurisdiction based on the Consent Order, instead of reflexively issuing a dismissal, the court studied the consent order and the underlying statutes to see if the consent order would be affected by proceeding with the case. The court held that an OCC consent order did not preclude it from exercising jurisdiction over the claim. *Id.* at 232.

The court noted, as did *Rex*, that the statute banning judicial interference (here, § 4635) was directed to attempts *by the regulated entity* to seek a court ruling relieving it of its duties

under a consent order. The statutes did not pertain to private lawsuits by third parties *against* the regulated entity.

The jurisdictional bar of § 1818(i)(1) [verbatim to 4635(b)] must, however, be read in the context of the entire statute, the primary purpose of which is to prevent federal courts from usurping the OCC's power to enforce its own consent orders *against parties to the orders*. Congress did not intend to also prohibit non-parties from exercising their separate remedies at law. See *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035, 1039, 331 U.S. App. D.C. 94 (D.C. Cir. 1998) ('To prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies.').

Id. at 231.

Finding no impediment to proceeding to judgment, the trial court denied Chase's motion to dismiss for lack of subject matter jurisdiction.

When our Court of Appeals similarly reviewed the Order it read ALL words contained which indicate that the order prohibits Fannie Mae from any payment "violating 4617". The Court of Appeals reviewed applicable law on whether a payment would do so. Contrary to Fannie Mae's argument our Court of Appeals looked at both state and federal law: each of them reject Fannie Mae's argument. This Court's clear decision in *Rosette* and the uniform federal case law, including the very recent federal decision in *Higgins v. BAC Home Loans Servicing, LP*, 2014 WL 1332825 (E.D. KY, Mar. 31, 2014), hold that no penalty is involved under these statutes by the payments which are made to the individual, not to the government.

In summary, Fannie Mae's argument can only be made by ignoring the actual language of the Order to which it consented. Fannie Mae insists that FHFA "determined" that paying damages under R.C. 5301.36 would amount to a penalty or fine, but it can find no words expressing that supposed determination. Fannie Mae insists that FHFA "interpreted" R.C. 5301.36 as imposing a penalty or fine, but it can find no words where that interpretation is

expressed. Fannie Mae and FHFA insist there was a “finding” that R.C. 5301.36 imposes penalties, but they can find no words where such finding was made.

Just the opposite, the specific wording of the consent order states that FHFA made no findings at all.

A final argument by Fannie Mae for review is that the Court of Appeals ‘got it wrong’ on whether this is a penalty. “Fannie Mae and FHFA disagree with *Higgins* on which the Court of Appeals relied.” Fannie Mae brief at 14. But disagreement with the lower court decision is not grounds for this court’s involvement. Indeed, put in context, the Court of Appeals decision has no adverse precedential affect moving forward, because it does nothing to limit the authority of banking regulators. The Court of Appeals did not interfere with the authority of FHFA to issue or enforce cease-and-desist orders. The Court of Appeals did not “review or enjoin” financial regulatory proceedings, nor did it examine the merits or wisdom of the consent order. If faced with a similar question in the future, courts will necessarily engage in the same analysis as the Court of Appeals, because every time the jurisdictional bar is raised, the question that the court must answer is whether proceeding with the lawsuit would affect enforcement of the order. The Court of Appeals decision threatens no violence to the regulatory scheme or the authority of federal regulators. The Court of Appeals decision affects only this defendant and only this lawsuit. This Court should deny jurisdiction.

2. No court has jurisdiction to review cease-and-desist orders issued by federal financial regulators, including FHFA, unless expressly authorized to do so by Congress.

The Amicus FHFA supporting Fannie Mae’s plea for jurisdiction argues that the Court of Appeals committed two errors. However, both those arguments depend of accepting Fannie Mae’s rewording of the consent order. That is not allowed.

First, Amicus FHFA claims that the Court of Appeals “misunderstood” the jurisdictional bar and so “assumed erroneously that it—not FHFA as federal regulator—had the authority to determine whether a payment made pursuant to Revised Code 5301.36 would violate” the Penalty Bar. (Amicus Br. p. 3). The Court of Appeals made no such error, because the consent order never made such determination. It states the opposite, indicating unambiguously that FHFA made no “findings of fact or law” in connection with the consent order. No interpretation of R.C. 5301.36 appears anywhere in the four (4) page stipulation or in the consent order.

The briefs of both Fannie Mae and FHFA highlight this conspicuously. They cite the Order no less than 15 times as “prohibiting the payment of any judgment in Radatz.” But each time they omit the key phrase, conveniently leaving off the words “violating 4617.” If the consent Order said “pay no money in this case”—period—we would have an issue. The Order did not. It barred only payments “violating 4617.” And it pointedly indicated it was making no findings—defeating Fannie’s present argument that “a finding was made that paying a judgment was an Statutory Penalty Bar violation.” Fannie Mae brief at 8.

Rather than present unsettled law, it is uniform law that a court presented with an agency order must carefully review the order to determine if its exercise of jurisdiction will affect the order. *Rex, supra*; *JP Morgan Chase, supra*. This consent order prohibits Fannie Mae from making payments of money “violating 4617”. If paying a judgment in this case would not violate the Penalty Bar, then Fannie Mae would not violate the consent order by paying that judgment.

Second, Amicus FHFA argues that the Court of Appeals misinterpreted the consent order. The argument of counsel for FHFA about paragraph 2 of the consent order—as being an unconditional bar to paying any judgment in this case without regard to whether such payment

would be a penalty—is impossible to reconcile with the specific language in the consent order. In determining the scope of consent orders courts would apply the same rules that apply to the interpretation of a contract. *United States v. Bradley*, 484 Fed. Appx. 368, 374 (11th Cir. 2012) (“We interpret a consent order—a kind of contract—the same way we interpret other kinds of contracts.”). The language must be given its plain and ordinary meaning. *Transtar Electric, Inc. v. A.E.M. Electric Services Corp.*, 2014-Ohio-3095, ¶ 9, slip. op. Where there is nothing to interpret, the exercise is at an end and the courts simply apply the wording as written. *Jirousek v. Prudential Ins. Co. of America*, 27 Ohio St.2d 62, 65 (1971). In doing so courts presume that every word or phrase serves a purpose, and so avoid an interpretation that renders words or phrases meaningless or mere surplusage. *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, ¶ 22; *Lo-Med Prescription Services, Inc. v. Eliza Jennings Group*, 8th Dist. No. 88112, 2007-Ohio-2112, ¶ 17.

FHFA counsel⁴ violates that rule by attempting to delete the words “from violating 12 U.S.C. § 4617(j)(4)” at the beginning of paragraph 2 as though they are unnecessary and mere surplusage. Neither FHFA nor Fannie can ignore the words they placed in the Order. The Order was not written, “no payment may be made under R.C. 5301.36 for any judgment in Radatz.” The Order carefully added that the prohibition was from payments “violating 12 U.S.C. §4617(j)(4).” Giving effect to all of the words prevents efforts to ignore those words: words

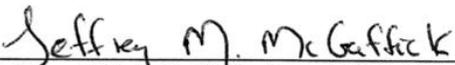
⁴ The reference is made to, “FHFA’s counsel,” because the agency did not make any findings, and did not enter an order which omits the language which counsel is asking the courts to ignore. FHFA’s counsel’s interpretation of the Consent Order is irrelevant: “It is clear that no deference is due to an agency ‘interpretation’ fashioned for the purposes of litigation.” *Alaniz v. Office of Personnel Management*, 728 F.2d 1460, 1465 (Fed. Cir. 1984). Here, FHFA’s counsel is attempting to rewrite the consent order for purposes of its memorandum in support of jurisdiction. But FHFA and Fannie Mae are stuck with the language of the consent order as written.

which don't generically prohibit payments but prohibit those which violate the Statutory Penalty Bar. And both state and federal law hold that payments here would not.

IV. CONCLUSION

For all of the foregoing reasons, this Court should deny jurisdiction and allow the well-reasoned Court of Appeals decision to stand.

Respectfully submitted,



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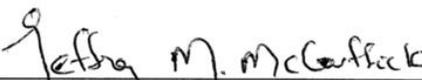
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