IN THE SUPREME COURT OF OHIO

REBEKAH R. RADATZ, individually and on behalf of all others similarly situated,	)	CASE NO. 14-1126
Plaintiff/Appellee,	)	On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District Case No. CA-13-100205
v.	)	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	Cuyahoga County Court of Common Pleas Case No. CV-03-507616
Defendant/Appellant.	)	

AMICUS CURIAE REPLY BRIEF OF FEDERAL HOUSING FINANCE AGENCY IN SUPPORT OF DEFENDANT-APPELLANT FEDERAL NATIONAL MORTGAGE ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

The consent Cease and Desist Order issued by the Federal Housing Finance Agency ("FHFA") employs straightforward mandatory language to prohibit Fannie Mae from making any payment in this case. FHFA issued the Consent Order imposing this absolute prohibition to enforce compliance with its determination that any such payment would violate 12 U.S.C. 4617(j)(4) (the "Penalty Bar"). Neither the order itself nor the determination on which it is based is subject to review, modification, or vacatur by this or any other state or federal court. *See* 12 U.S.C. 4635(b).

Plaintiff's argument that the Consent Order makes no determination regarding the Penalty Bar's application to this case—and therefore did not bar the court below from exercising jurisdiction to make such a determination—is simply incorrect. Contrary to Plaintiff's contention, FHFA did not leave the question whether amounts awarded pursuant to R.C. 5301.36 violate the Penalty Bar to be decided by the court below or any other court. FHFA resolved that question in the affirmative and issued the Consent Order to assure Fannie Mae's compliance with the Penalty Bar by expressly prohibiting it from making any payments in this case. Accordingly, the trial court correctly dismissed this action. This Court should reverse the Eighth District's decision and remand this case to the trial court for reentry of a judgment of dismissal.

ARGUMENT

I. The Consent Order Unequivocally Bars Payment of Any Amount in This Case

FHFA issued the Consent Order in its capacity as regulator of Fannie Mae and Freddie Mac. As noted in FHFA's opening amicus brief, final orders to cease and desist issued by consent, such as the Consent Order in this case, are no different than orders issued following a hearing. FHFA Br. at 6. And Congress did not require that FHFA hold a hearing in order for it to issue an order to cease and desist to enforce compliance with the agency's determination that the Penalty Bar is applicable to this case. *See, e.g.*, *In re JPMorgan Chase Mortgage Modification Litigation*, 880 F. Supp. 2d 220, 229 n.11 (D. Mass. 2012) (describing "findings" that were expressly set out in the consent order); *Bakenie v. JPMorgan Chase Bank, N.A.*, C.D.Cal. No. SACV-12-60 JVS, U.S. Dist. LEXIS 137809 (Aug. 6, 2012) (summarizing the "findings" that the regulator set out in the consent order).

The Consent Order here does just that. The first paragraph of the Order addresses both Fannie Mae and Freddie Mac; it directs both not to violate the Penalty Bar. Appellant's Appx. A-039. Of dispositive relevance here, the second paragraph of the order explicitly prohibits Fannie Mae from paying any amount "pursuant to any judgment in connection with [this case]." *Id.*

Let there be no doubt: the second paragraph of the order mandates compliance by Fannie Mae with FHFA's determination that payment of any amount in this case would, as a matter of federal law, violate the Penalty Bar. FHFA said this clearly in its opening *amicus* brief. *See, e.g.*, FHFA Amicus Br. at 3 ("FHFA was acting as Fannie Mae's Regulator when it ordered Fannie Mae not to pay any judgment that might be entered on Plaintiff's claims in this case because federal law immunizes Fannie Mae from liability for penalties while in FHFA conservatorship or receivership."); *id.* ("The Order reflects FHFA's determination that the remedy Plaintiff seeks constitutes a penalty barred by 12 U.S.C. 4617(j)."). As also stated in the *amicus* brief, this agency's issuance of a Consent Order enforcing this legal determination forecloses judicial review of the order and any determinations by the agency on which it was based. *Id.* at 2 ("[U]pon issuance of the final Order against Fannie Mae *all courts* were divested of authority to review or affect the Order."); *see also* 12 U.S.C. 4635(b). FHFA reiterates these points here because Radatz contends otherwise in her brief to this Court.

Simply stated, Plaintiff's reading of the Consent Order is incorrect. Under her interpretation, the Order is little more than an unenforceable reminder to Fannie Mae and Freddie Mac not to violate the Penalty Bar, and leaves unanswered the core question whether amounts imposed under R.C. 5301.36 against Fannie Mae while in conservatorship would violate the Penalty Bar. This is a misreading of the plain text of the Consent Order.

More to the point, Plaintiff's argument makes little sense on a practical level. FHFA is a federal regulatory agency, and the question whether payment of an amount in this case would violate the Penalty Bar is a question of federal law. Plaintiff's argument, however, is premised on the implausible suggestion that FHFA would issue a Consent Order for the explicit purpose of enforcing the Penalty Bar in this case, and then leave the determination of the applicability of the Penalty Bar in this case to be decided by the very court that is presiding over the case. Accordingly, as explained in FHFA's opening amicus brief, Plaintiff's central contention that the Consent Order left unanswered whether an award under R.C. 5301.36 against Fannie Mae in this case would violate the Penalty Bar is wrong, and the trial court therefore should be directed to reinstate its order of dismissal. FHFA Br. at 3-6.

II. FHFA's Interpretation of the Intended Effect of its Own Order is Entitled to Substantial Deference

Even if the Consent Order itself were open to interpretation—and, for the reasons stated above, it is not—FHFA's interpretation of its own order is entitled to substantial deference. "It is well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous." *Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998) (quoting *Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 871 (D.C. Cir. 1991)). When an agency submits a legal brief, including an amicus brief, interpreting the meaning of its own orders or regulations, courts must defer to this interpretation. *See Auer v.*

Robbins, 519 U.S. 452, 461 (1997) (Secretary of Labor's interpretation of his own regulations in an *amicus* brief is "controlling unless plainly erroneous or inconsistent with the regulation" (citation and internal quotation marks omitted)); *AT&T Communications of Cal., Inc. v. Pac-West Telecomm., Inc.*, 651 F.3d 980, 998 (9th Cir. 2011) (applying *Auer* and deferring to FCC's interpretation of its own orders that FCC provided in an *amicus* brief).

Here, FHFA's interpretation of the intended effect of its own order is controlling, because it is neither clearly erroneous nor plainly inconsistent with the order. FHFA ordered Fannie Mae to cease and desist "from violating 12 U.S.C. 4617 (j)(4) by paying, for any reason, directly or indirectly, any amount pursuant to Ohio Code 5301.36 or pursuant to any judgment in connection with [this case]." Appellant's Appx. A-039. The only plausible interpretation of this order is that FHFA ordered Fannie Mae not to pay a judgment in this case because FHFA had determined that R.C. 5301.36 imposes amounts in the nature of penalties and fines within the meaning of Section 4617(j)(4). But even if some other interpretation of the order were possible, FHFA's interpretation is sufficiently consistent with the order that it is not "clearly erroneous."

The language in the Stipulation—that Fannie Mae and Freddie Mac consented to the issuance of the Order "before the finding of any issues of fact or law"—does not validate Plaintiff's interpretation. These words mean what they say—that Fannie and Freddie "consent[ed]" to the issuance of the Order "before" findings were made, *i.e.*, before the order was issued. They do not suggest that the Order itself was not issued on the basis of the agency's factual and legal determinations.[1] And a stipulation to a consent order is nothing more than

[1] Similar boilerplate language appears in many stipulations that precede consent orders. *See, e.g.*, Stipulation and Consent to the Issuance of a Consent Order, *In re Fannie Mae* (May 23, 2006) ("Fannie Mae, in the interests of compliance and cooperation, consents to the issuance of a Consent Order, dated May 23, 2006 ('Order'), before the filing of any notice and before the finding of any issues of fact or law."), *available at* http://www.fhfa.gov/Media/

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that—an agreement to consent—so it is not determinative of the meaning or scope of an agency order.

Even if there were some ambiguity about the meaning of the words in the Stipulation, the Order is the operative document here, and FHFA's interpretation of the Order is controlling because it is not clearly erroneous. As in *Auer*, there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *See Auer*, 519 U.S. at 462. Plaintiff would have this Court believe that FHFA intentionally drafted the Order in a way that would have no impact on this case (Pl.'s Br. at 11), but inexplicably changed its position to argue that the Order requires dismissal (*id.* at 12). This version of events has no factual or logical basis. The intended effect of the Order has not changed, and FHFA's interpretation of the Order in its *amicus* briefs controls.

III. Consent Orders Are Treated the Same as Orders Issued After a Formal Hearing

Plaintiff asserts that FHFA's use of a consent order rather than an order issued after a formal hearing means that the Consent Order is devoid of any "findings" (including, Plaintiff asserts, any factual or legal determinations). (Pl.'s Br. at 12). This argument, for which Plaintiff cites no authority, has no merit. As a threshold matter, the determination made by FHFA as the basis for issuance of the Consent Order—that the amount sought by Plaintiff is in the nature of a penalty under federal law, and thus foreclosed by the Penalty Bar—is a pure legal conclusion for

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PublicAffairs/PublicAffairsDocuments/Stipulation%20and%20Consent%20Order.pdf; Stipulation at 3, *In the Matter of First Baird Bancshares, Inc.*, No. 06-023-B-HC (June 13, 2006) ("NOW, THEREFORE, before the filing of any Notice or taking of any testimony or adjudication of or finding on any issues of fact or law herein . . . ."), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20060622a1.pdf. If Plaintiff's interpretation of the boilerplate were correct, courts could ignore or override any factual or legal statements that appear in these consent orders.

which no fact-finding is necessary. Just as a court could reach such a conclusion without holding a hearing, so too can FHFA in exercising its statutory power to issue orders to cease and desist.

Moreover, federal financial regulators routinely enter into consent orders with regulated entities. When analyzing the analogous provisions of the Federal Deposit Insurance Act, courts repeatedly have affirmed that financial regulators have the authority to enter consent orders and that these orders are treated no differently from other orders. *See, e.g.*, *Henry v. OTS*, 43 F.3d 507 (10th Cir. 1994) (rejecting plaintiff's argument that consent orders were "not the type of 'orders' contemplated by § 1818(i)(1)"); *In re JPMorgan Chase Mortgage Modification Litigation*, 880 F. Supp. 2d at 229 n.10 (12 U.S.C. 1818(b), which is materially identical to 12 U.S.C 4631(b), "gives the [regulator] the authority to address by consent orders 'unsafe or unsound' practices or violations of law by financial institutions."); *Spiegel Holdings, Inc. v. OCC*, 2003 WL 21087707, at *3 (D. Or. Apr. 28, 2003) ("There is no dispute that the [regulator] was within its statutory authority to enter into the Consent Order . . . ."). Moreover, courts have recognized that regulators may include "findings" in consent orders. In *In re JPMorgan*, for example, the court noted that the regulator made "findings" and that they were reflected in the consent order. 880 F. Supp. 2d at 229 n.11; *see also Bakenie v. JPMorgan Chase Bank, N.A.*, 2012 WL 4125890, at *2 (C.D. Cal. Aug. 6, 2012) (summarizing the "findings" in the consent order).

IV. FHFA Issued the Consent Order to Effectuate the Penalty Bar and the Underlying Statutory Policy

FHFA entered the Consent Order with Fannie Mae and Freddie Mac to prevent a violation of the Penalty Bar, 12 U.S.C. 4617(j)(4). The Penalty Bar reflects Congress's intent to maximize the assets available for Fannie Mae and Freddie Mac while they are in conservatorship, while still allowing plaintiffs to be compensated for any actual harm suffered.

To make clear that the Penalty Bar should be read expansively, Congress exempted the Conservator, Fannie Mae, and Freddie Mac not only from "penalties or fines" but also "amounts *in the nature of* penalties or fines." FHFA issued the Consent Order to prevent the Ohio Court of Common Pleas from imposing the statutory penalties of R.C. 5301.36 on Fannie Mae in violation of the Penalty Bar. This Court previously had deemed those amounts not to be penalties for purposes of *state* law. However, because R.C. 5301.36 imposes a fixed sum without regard to actual damages, and allows a plaintiff to recover that fixed sum in addition to actual damages, R.C. 5301.36 is in the nature of a penalty under federal law. *See, e.g.*, *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 341 (N.D.Ill.2002) (explaining that under similar statutes, "[i]t is because the statutory damages are allowed in addition to compensatory (actual) damages that they are considered a penalty"). Thus, the Consent Order was issued in furtherance of the congressional policy underlying the Penalty Bar that Fannie Mae should not be held liable for amounts in the nature of a penalty or fine during conservatorship.

Because the Penalty Bar prevents Fannie Mae from being held "liable for any amounts in the nature of penalties or fines," 12 U.S.C 4617(j)(4), it prohibits any judgment that would require Fannie Mae to pay such amounts. Plaintiff's assertion that the Penalty Bar "applies only to payments of fines and penalties, not to judgments," Pl.'s Br. at 37, is incorrect, as the Penalty Bar bars "liab[ility]" and not merely payment. 12 U.S.C. 4617(j)(4). Therefore, courts consistently dismiss claims for amounts in the nature of penalties and fines pursuant to Section 4617(j)(4) (and the FDIC equivalent, 12 U.S.C. 1825(b)(3)), rather than entering a judgment that the entity would have to pay in the future. *See, e.g.*, *Mwangi v. Fed. Nat'l Mortg. Ass'n,* N.D.Ga. No. 4:14-cv-0079 (Mar. 9, 2015) (Dkt. #69) (attached at Appellant's Appx. A-064) (dismissing a plaintiff's demand for punitive damages against Fannie Mae under Section 4617(j)(4));

Deerborne Cottages LLC v. First Bank, W.D.N.C. No. 1:11-cv-178, 2012 U.S. Dist. LEXIS 70288, *22 (Apr. 9, 2012) (recommending that the court "dismiss the claim for treble damages" because they were barred by Section 1825(b)(3)), *adopted by* 2012 U.S. Dist. LEXIS 70286 (May 21, 2012); *Alexander v. Washington Mut., Inc.*, E.D.Pa. Civ. A. No. 07-4426, 2011 U.S. Dist. LEXIS 69906, *21 (June 28, 2011) (dismissing claim for multiple damages for "failure to state a claim upon which relief can be granted" because Section 1825(b)(3) bars amounts in the nature of penalties); *Cassese v. Washington Mutual, Inc.*, 711 F. Supp. 2d 261 (E.D.N.Y. 2010) (granting motion for judgment on the pleadings with respect to punitive and exemplary damages). The fact that the FDIC cases involved receiverships rather than conservatorships does not require a different result, because Congress applied the same bar on liability to both. *See* 12 U.S.C. 4617(j)(1) (the Penalty Bar applies "in any case in which the Agency is acting as a conservator or a receiver.").

Plaintiff asserts that courts "regularly enter judgments" against entities in receiverships which cannot be paid immediately (Pl.'s Br. at 37). As the cases cited above show, this is not true with respect to amounts in the nature of penalties and fines barred by Section 4617(j)(4) and Section 1825(b)(3). Plaintiff cites no case, and FHFA is aware of none, in which a court allowed a claim for such amounts to proceed to judgment once it was determined that the Penalty Bar (or its FDIC equivalent) applied. In contrast, courts sometimes do enter other kinds of judgments against entities in receiverships when there is doubt about the entity's ability to pay, but no absolute bar on liability. *See, e.g.*, *Landwehr v. FDIC*, 734 F. Supp. 2d 161, 167-68 (D.D.C. 2010) (declining to dismiss claims for non-penal monetary damages because it had not been proven that the receivership would have insufficient funds to pay a judgment).[2] Had Congress intended to allow judgments for amounts in the nature of penalties against entities in conservatorship or receivership, to be paid if the entity had sufficient assets, it would have treated such amounts like other damages rather than singling them out and barring all "liab[ility]" for such amounts.

CONCLUSION

For the foregoing reasons, FHFA respectfully requests that this Court reverse the decision of the Eighth District and remand this case to the trial court for entry of dismissal.

[2] When courts consider non-penal monetary claims against an entity in receivership, they perform a "prudential mootness" analysis to determine whether there is realistic chance that the entity will have sufficient assets to pay the claims. This depends not only on the assets available to the receivership, but also where the claims fit into the payment priority structure, since certain types of claims must be paid before others. *See* 12 U.S.C. 4617(c) (HERA's priority structure); *id.* 1821(d)(11) (priority structure applicable to other financial institutions). If payment is possible, courts will allow the case to proceed to judgment. *Compare Landwehr*, 734 F. Supp. 2d at 166-67 (claims were not prudentially moot because payment might be possible), *with First Indiana v. FDIC*, 964 F.2d 503, 507 (5th Cir. 1992) (claims were prudentially moot because payment was impossible). But, as explained above, courts dismiss penal monetary claims outright instead of conducting a prudential mootness analysis. When amounts in the nature of penalties are at issue, the entity's future ability to pay is irrelevant, because the statute bars not only the payment of such amounts but also any "liab[ility]" for them. 12 U.S.C. 1825(b)(3), 4617(j)(4). Instead of assigning penalties a place in the priority structure, Congress chose to bar liability for penalties and "amounts in the nature of" penalties entirely.

Respectfully submitted,

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