IN THE SUPREME COURT OF OHIO

REBEKAH R. RADATZ, individually and on behalf of all others similarly situated,	:	Case No. 2014-1126
Plaintiff-Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Case No. CA-13-100205
vs.	:	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	:	Cuyahoga County Court of Common Pleas Case No. CV-03-507616
Defendant-Appellant.	:	

PLAINTIFF-APPELLEE'S MERITS BRIEF

Patrick J. Perotti, Esq.* (#0005481)
James S. Timmerberg, Esq. (#0067499)
*Counsel of Record
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*
jtimmerberg@dworkenlaw.com

Brian Ruschel, Esq. (#0046631)
925 Euclid Avenue, Suite 660
Cleveland, Ohio 44115-1405
(216) 621-3370 (216) 621-3371 Fax
Email: *bruschel@aol.com*

Counsel for Plaintiff-Appellee, Rebekah R. Radatz

Richard S. Gurbst, Esq. (#0017672)
Squire Patton Boggs (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114—1304
(216) 479-8500 (216) 479-8780 Fax
Email: *richard.gurbst@squirepb.com*

J. Philip Calabrese, Esq. (#0072709)
Porter Wright Morris & Arthur LLP
950 Main Avenue, Suite 500
Cleveland, OH 44113-7206
(216) 443-2504 (216) 443-9011 Fax
Email: *pcalabrese@porterwright.com*

Counsel for Defendant-Appellant, Federal National Mortgage Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

APPENDIX

PLAINTIFF-APPELLEE'S MERITS BRIEF

INTRODUCTION

In 2003, the Plaintiff filed her class action Complaint alleging that Fannie Mae violated R.C. 5301.36 by failing to timely record the satisfaction of her and numerous other class members' mortgages. The relief sought by the Plaintiff is statutory damages under R.C. 5301.36.

Fannie Mae removed this matter to federal court twice. Both times the federal court concluded that Fannie Mae had not identified any federal legal issue and sent the matter back to state court.

This matter proceeded to class certification. Upon certifying the class, the trial court instructed Fannie Mae and the Plaintiff to identify the class members but Fannie Mae refused to assist with that process, so the Plaintiff's counsel identified the class. In February, 2013, as soon as class member identification was complete, class counsel contacted Defendant to discuss settlement. Fannie Mae responded by soliciting its regulator, the Federal Housing Finance Agency ("FHFA"), to sign a Consent Order (ten years after the complaint was filed), so that Fannie Mae could move again to dismiss this case.

The motion to dismiss was premised on the claim that the regulator had determined in the consent order that paying a judgment in this case would be payment "in the nature of a fine or penalty" prohibited by federal law, and under 12 U.S.C. § 4635, the trial court was divested of jurisdiction. However, the FHFA consent order contained no such findings of law or fact. Instead, it simply orders Fannie Mae not to violate 12 U.S.C. § 4617(j)(4), which provides that FHFA is not liable for any amounts in the nature of penalties or fines. This Court has already determined that the award of statutory damages sought by Radatz under R.C. 5301.36 is not a penalty. The trial court nevertheless granted Fannie Mae's motion to dismiss.

Radatz appealed the dismissal. The court of appeals, after reviewing both state and federal law, held that: (1) the consent order prohibits Fannie Mae from paying a penalty; (2) under Ohio law, requiring Fannie Mae to pay a judgment in this case would not impose a penalty on Fannie Mae; and (3) under federal law, requiring Fannie Mae to pay a judgment in this case would not impose a penalty on Fannie Mae. Therefore, the court of appeals reversed the trial court's decision. Fannie Mae appealed to this Court which 4-3 granted review. The briefing before this Court on the merits now suggests the issues raised by Fannie Mae are very unique and unlikely to ever repeat.

The statute that FHFA has ordered Fannie Mae not to violate, 12 U.S.C. § 4617(j)(4), is part of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 ("HERA"), which was enacted on July 30, 2008. Fannie Mae refers to § 4617(j)(4) as the "penalty bar" because it relieves <u>FHFA</u> (Fannie Mae's regulator and conservator) from any obligation to pay a judgment in the nature of a penalty. (The penalty bar is silent about relieving <u>Fannie Mae</u> of the obligation to pay fines and penalties.) Because the penalty bar was enacted as part of HERA, it has been in place since July 2008. Although Fannie Mae now insists that the penalty bar is dispositive, between 2008 and the issuance of the consent order in 2013, the three law firms representing Fannie Mae never once argued in state or federal court that this case should be dismissed because Fannie Mae would violate the penalty bar by paying a judgment in this case.

Immediately after HERA was enacted, Fannie Mae removed this matter to federal court expressly citing HERA as a basis for removal. Indeed, Fannie Mae relied on § 4617 in claiming a federal question. Fannie Mae knew about the penalty bar contained within HERA in 2008. But when it removed this matter to federal court citing HERA, it did not argue that the penalty bar raised a question of federal law to be resolved by a federal court. In fact, it never even mentioned the penalty bar. Similarly, Fannie Mae never moved to dismiss Radatz's claim under the Supremacy Clause.

When Fannie Mae failed again to convince the federal court that there was any federal law impediment to a judgment in this wholly state-law proceeding, it created a "consent order." seeking to resurrect the issue. Its effort was unsuccessful. Because the payment of a judgment here was neither a penalty nor fine, Fannie Mae could not convince FHFA to make a finding supporting Fannie. The best it could do was a consent order, which was issued without notice and a hearing, and expressly confirms that it made no findings of fact or law. Because FHFA never found that Fannie Mae *would* violate HERA by paying a judgment in this case from its $84 billion in profits in 2013, it left that determination up to the courts.

The consent order expressly states that FHFA made *no* findings of fact or law: "Fannie Mae and Freddie Mac ... consent to the issuance of a consent order dated March 6, 2013 ('Order'), before the filing of any notice and before the finding of any issues of fact or law[.]" Fannie Mae's Appx., A-035. Therefore, the court of appeals properly held: "The consent order merely orders Fannie Mae to cease and desist violating 12 U.S.C. 4617(j)(4)." *Radatz v. Federal National Mortgage Association*, 11 N.E.3d 1230, 2014-Ohio-2179, at ¶ 12 (8th Dist.) (Fannie Mae's Appx. A-013).

As the court of appeals observed, the consent order does nothing more than mimic the immunity language of 12 U.S.C. § 4617(j)(4). *Id*. at ¶ 13 (Fannie Mae's Appx. A-015). The court of appeals had to address the ultimate issue: whether Fannie Mae would violate HERA by paying a judgment in this case. The panel held that "any judgment awarded by the lower court would <u>not</u> violate any immunity conferred by 12 U.S.C. 4617(j)(4)." (Emphasis added.) *Id*. at ¶19 (Fannie Mae's Appx. A-018).

The consent order ordered Fannie Mae not to violate HERA. Fannie Mae would not violate HERA by paying a judgment in this case. Therefore, this Court should affirm the decision of the court of appeals.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Appellee Rebekah Radatz was the mortgagor on a mortgage held by Fannie Mae. Radatz paid her mortgage in full on August 28, 2002. Complaint, ¶ 2. Fannie Mae did not record the satisfaction of Radatz's mortgage until December 11, 2002. Fannie Mae violated R.C. 5301.36 by recording the satisfaction more than 90 days after payoff.

Radatz filed her class action complaint on August 7, 2003 in Cuyahoga County Common Pleas Court. The complaint alleges at ¶ 4 that Fannie Mae failed to timely record her mortgage satisfaction, and seeks statutory damages under R.C. 5301.36(C). The complaint only has four paragraphs and a prayer for relief, all of which fits on two pages. Fannie Mae responded to the complaint by claiming the case is a federal question and filing a notice of removal on September 15, 2003. Fannie Mae argued that under its charter, federal subject matter jurisdiction is conferred upon claims against Fannie Mae, and that Radatz' claim was against an officer (or any person acting under that officer) of the United States or an agency thereof.

In a September 23, 2004 order, the district court rejected both of Fannie Mae's arguments and remanded the matter. *Radatz v. Federal National Mortgage Association*, No. 1:03 CV 1945, Doc 21, PageID 139 (N.D. Ohio, Sept. 23, 2004) (App. 8-18). The court held that "Fannie Mae's charter does not confer federal courts with subject matter jurisdiction such that Fannie

Mae may remove cases from state to federal court." *Id*. at PageID 143 (App. 12). The court also held that there was nothing to suggest that Fannie Mae's violation of Ohio law was "dictated by, controlled, or required by a federal officer." *Id*. at PageID 148 (App. 17).

After the matter was remanded to state court, Fannie Mae filed two motions to dismiss on October 22, 2004, based on alleged failure to state a claim and failure to join indispensable parties. Those motions were denied on February 4, 2005.

Radatz moved for class certification on October 17, 2005. On November 1, 2006, the trial court granted the class certification motion and certified the following class:

> All persons who, since May 9, 1997 and thereafter, paid off an Ohio residential mortgage (as defined by R.C. 5301.36) where Federal National Mortgage Association was the mortgagee at the time of the payoff, and a satisfaction was not recorded with any Ohio county recorder within 90 days from the date of the payoff.

Fannie Mae appealed, and the Eighth District affirmed the trial court's class certification ruling. *Radatz v. Federal National Mortgage Association*, 176 Ohio App.3d 319, 2008-Ohio-1937 (8th Dist.). Fannie Mae then sought review from this Court, which declined jurisdiction on October 15, 2008. Fannie Mae then moved this Court to vacate its October 15, 2008 entry declining jurisdiction, because Fannie Mae had removed the matter to federal court on October 6, 2008, divesting this Court of jurisdiction. On December 31, 2008, this Court granted Fannie Mae's motion to vacate but in the same entry reinstated its October 15, 2008 order declining jurisdiction and dismissing Fannie Mae's appeal.

In its second notice of removal to federal court on October 6, 2008, Fannie Mae argued that the federal government controlled 79.9% of Fannie Mae's common stock and that removal was statutorily authorized under 12 U.S.C. § 4617(b)(11)—the same statute cited in the consent order which provides that FHFA "shall have all the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to federal court[.]" *Radatz v. Federal National Mortgage Association*, No. 1:08-cv-02369-SO, Doc 1, PageID 4-5.

In a March 29, 2010 order, the U.S. District Court once again remanded the matter to the common pleas court, finding no federal question. *Radatz v. Federal National Mortgage Association*, No. 1:08-cv-02369-SO, Doc 21, PageID 340 (N.D. Ohio, March 29, 2010) (App. 27). The court held that because the federal government held warrants to purchase stock, as opposed to owning actual stock, the federal government did not own Fannie Mae. *Id*. at PageID 345 (App. 32). And Fannie Mae did not have the authority to remove this case as a federal agency. *Id*. at PageID 351 (App. 38).

After this matter was remanded to state court, in a September 14, 2010 journal entry, the trial court ordered both parties to "search public records in order to narrow the list of class members" and when finished to request a conference with the court. Radatz's counsel complied with the trial court's order while Fannie Mae refused to participate. After completing the work, Radatz's counsel notified Fannie Mae in February, 2013, that the class members had been identified and invited settlement of the case.

In response, on March 13, 2013, Fannie Mae filed a new motion to dismiss, arguing that it had recently (in the last 14 days) obtained a "consent order" from its regulator which allegedly stripped the trial court of jurisdiction. Since the "order" was issued without notice, hearing or findings, Radatz only learned of it as an exhibit to Fannie Mae's motion to dismiss.

Fannie Mae's motion to dismiss was granted on July 8, 2013 in the following judgment entry:

89 Dis. w/ prej – final

> This matter is before the court on defendant Federal National Mortgage Association's 03/13/13 motion to dismiss pursuant to Ohio R. Civ. P. 12(H)(3) for lack of subject matter jurisdiction over plaintiff's claims.
>
> Pursuant to the Federal Housing Finance Agency ('FHFA') consent order against defendant Federal National Mortgage Association entered on 03/09/13, and 12 U.S.C. § 4635(b), which states, 'no court shall have jurisdiction to affect [effect], by injunction or otherwise, the issuance or enforcement of any notice or order under section [...] or to review, modify, suspend, terminate, or set aside any such notice or order," this court finds that it is divested of jurisdiction over this matter.
>
> Accordingly, defendant Federal National Mortgage Association's 03/13/13 motion to dismiss is granted. There is no just cause for delay.
>
> Court cost assessed to the plaintiff(s).

Fannie Mae's Appx. A-022.

Radatz filed a notice of appeal on August 5, 2013. The court of appeals reversed the trial court in a May 22, 2014 decision. In reversing the trial court, the appellate panel noted that the consent provision did not determine if payment would constitute a penalty or forfeiture under § 4617. Reviewing that statute, the court of appeals noted: The "result is the same either under Ohio's interpretation of its own statute or the federal analysis. R.C. 5301.36(C) awards compensatory damages. Those damages are not in the nature of a penalty or fine. Therefore, any judgment awarded by the lower court would not violate any immunity conferred by 12 U.S.C. 4617(j)(4)." *Radatz v. Federal National Mortgage Association*, 11 N.E.3d 1230, 2014-Ohio-2179, ¶ 19 (8th Dist.) Fannie Mae's Appx. A-018.

On October 22, 2014, the Supreme Court accepted Fannie Mae's appeal of the Eighth District's decision by a 4-3 vote (in favor of review O'Neill, Terrence O'Donnell, Kennedy, French; opposing review O'Connor, Lanzinger, Pfeiffer).

LAW AND ARGUMENT

I. **Fannie Mae's Proposition of Law I:** Under 12 U.S.C. 4635(b), no federal or state court has jurisdiction to review or affect a cease-and-desist order issued by the Federal Housing Finance Agency in its capacity as Regulator.

Radatz's Response: The court of appeals did not review, affect, or modify the consent order from FHFA.

A. FHFA made no findings of fact or law that the court of appeals could affect or modify.

12 U.S.C. § 4635 prohibits a court from affecting or modifying an order of FHFA. The provisions of 12 U.S.C. § 4617 bar payments in the nature of fines or penalties but do not determine which payments would be a fine or penalty. For that, the courts have adopted state and federal tests. *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736; *Murphy v. Household Finance Corp.*, 560 F.2d 206, 209 (1977). Since nothing in § 4635 bars a court from making findings of law where FHFA has not done so, Fannie Mae claims that in its order, FHFA made a determination that payment in this case would be in the nature of a fine or penalty, and that it cannot be revisited. That argument fails.

FHFA in issuing the consent order made no findings at all, let alone any that the court of appeals could have affected or modified.

Fannie Mae has included an appendix with its brief. At page A-035 of that appendix is the first page of a stipulation and consent to the issuance of a consent order. The last paragraph of page A-035 states: "Fannie Mae and Freddie Mac, in the interests of compliance and cooperation, consent to the issuance of a consent order dated March 6, 2013 ('Order'), before the filing of any notice and **before the finding of any issues of fact or law**." (Emphasis added.)

Because FHFA made no findings of fact or law, the Eighth District correctly held that the "consent order merely orders Fannie Mae to cease and desist violating 12 U.S.C. 4617(j)(4).

Radatz v. Federal National Mortgage Association, 8th Dist. No. 100205, 2014-Ohio-2179, at ¶ 12. The Eighth District noted that "[i]t is undisputed that through the sole directive in the consent order, the FHFA director decreed that Fannie Mae was to cease and desist violating 12 U.S.C. 4617(j)(4)[.]" *Id.* at ¶ 4. Whether Fannie Mae could violate 12 U.S.C. § 4617(j)(4) by paying a judgment in this case, was not resolved by FHFA. Having made no findings, FHFA could not have found that the statutory damages in this case are in the nature of a penalty. Thus, the only conclusion that the Eighth District could reach is that "for a judgment in the underlying case to affect the consent order, Fannie Mae **must assume** that the damages awarded pursuant to R.C. 5301.36(C) are in the nature or a penalty or fine." (Emphasis added). *Id.* at ¶ 14. The Eighth District rejected that assumption.

The problem with Fannie Mae's assumption is that this Court already concluded that damages under R.C. 5301.36(C) are not a penalty: "To conclude that R.C. 5301.36(C) creates a penalty, this court would have to delete the term 'damages,' a word used by the legislature, and insert the term 'penalty' or 'forfeiture,' words not chosen by the legislature. Doing so would flout our responsibility to give effect to the words selected by the legislature in enacting a statute." *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, ¶ 13. Having assumed that *Rosette* is not good law, Fannie Mae insists that its assumption is not subject to review by any court. The court of appeals disagreed.

B. Fannie Mae tries to obscure the lack of any findings by claiming that FHFA made a "determination."

Fannie Mae, realizing that it cannot overrule the Supreme Court of Ohio, insists that FHFA has done so. Fannie Mae's conundrum in making that argument is that FHFA made no findings. Trying to dodge that flaw in its argument, Fannie Mae's brief substitutes the words "determine" and "determination" for "find" and "finding." Variants of "determined" are scattered through Fannie Mae's merit brief:

- "the Order reflected and enforced [FHFA's] specific determination" (p. 1);
- the Eighth District "rejected FHFA's determination" (p. 2);
- "[b]ased on FHFA's determination" (p. 6);
- "FHFA determined" (p. 7); and
- "effectuating [FHFA's] determination" (p. 8).

But Fannie Mae has not explained how FHFA made a "determination" without making any findings of law.

Findings of law are required to reach a determination: "On questions of law, the Court will uphold an agency's determination as long as the findings of law are not arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law." *Lady Kim T. Inc. v. United States Secretary of Agriculture*, 491 F.Supp.2d 1366, 1371 (C.I.T. 2007); *Total Terminals International, LLC v. City of Oakland*, 2010 Cal. App. Unpub. LEXIS 3082, at *12 (Cal. App. Apr. 28, 2010) ("[t]his determination is a finding of law"); *Merrick v. United States*, 18 Cl. Ct. 718 (Cl. Ct. 1989) ("[t]he IRS's determination is a mixed finding of law and fact"); *In re Sentinel Management Group, Inc.*, 728 F.3d 660, 662 (7th Cir. 2013) ("we review the district court's findings of law—including the district court's determination of actual intent to hinder ... de novo"); *Lindsey v. Bill Arflin Bonding Agency, Inc.*, 645 So.2d 565, 566 (Fla. App. 1994) ("[a]lthough labelled a 'finding of law,' the trial court's determination ... was in part the resolution of a central fact in dispute"); *In re Union Bank of the Middle East*, 127 B.R. 514, 518 (E.D.N.Y. 1991) ("[t]hese findings ... constitute findings of law since they involve a determination of whether particular conduct was sufficient to satisfy a legal standard").

Here, FHFA made no findings; therefore, it could not have made a "determination" overruling the Supreme Court of Ohio.

C. The consent order does not state that FHFA made a finding or a determination.

The consent order does not state that FHFA made any findings. Nor does it state that FHFA made a "determination." As the Court of Appeals noted, it tracks § 4617 that Fannie Mae abstain "from violating 12 U.S.C. § 4617(j)(4)[.]" Fannie Mae Appendix, A-039. Under § 4617(j)(4), "[FHFA] shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, or recording tax or any recording or filing fees when due."

Because FHFA did not find that Fannie Mae would violate § 4617(j)(4) by paying statutory damages from its $84 billion in profits in 2013,[1] nothing affects or modifies the consent order unless statutory damages under R.C. 5301.36 are a penalty or fine. The Eighth District reviewed controlling state and federal law and noted that the statutory damages are not a penalty or fine. The "result is the same either under Ohio's interpretation of its own statute or the federal analysis. R.C. 5301.36(C) awards compensatory damages. Those damages are not in the nature of a penalty or fine." *Radatz*, 2014-Ohio-2179, at ¶ 19 (Fannie Mae's Appx. A-018). Fannie Mae wanted FHFA to make a finding to the contrary. But without notice or hearing, it is not surprising that the Agency was unwilling to do so, and went out of its way to note the fact that its order was issued without "the filing of any notice and before the finding of any issues of fact or law."

[1] "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." SEC filing at http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2013/10k_2013.pdf, at p. 3.

D. FHFA rewrites the consent order in its amicus brief.

FHFA effectively concedes in its amicus brief that the consent order does not contain any findings, because instead of quoting the actual language of the consent order, it rewrites it. FHFA states: "The Order unequivocally prohibits Fannie Mae from paying, for any reason, any amount pursuant to R.C. 5301.36 ***because*** the payment would be for amounts 'in the nature of penalties or fines' under federal law in violation of the Statutory Penalty Bar." (Emphasis added.) FHFA amicus brief, p. 7. The "because" in the amicus brief is not in the consent order.

The consent order orders Fannie Mae to "CEASE AND DESIST from violating 12 U.S.C. § 4617(j)(4) by paying ... any amount[.]" The consent order does not state that FHFA found that Fannie Mae would violate § 4617(j)(4) by paying any amount. Nor does the consent order state that FHFA is entering the order "because" the payment of any amount would violate § 4617(j)(4). FHFA recognizes this fact, which is why, in its amicus brief, it declines to quote its own consent order, and instead, rewrote it.

Could FHFA have prepared a consent order with both findings of law and the language that FHFA inserted into its amicus brief instead of the actual language of the consent order? With notice and hearing, it could have done so. 12 U.S.C. § 4631(c). Neither of those things happened in the four short days between when Fannie handed the consent order to its regulator and the regulator signed what it was given.

E. 12 U.S.C. 4635(b) does not prohibit a court from reading a FHFA consent order.

Under 12 U.S.C. § 4635(b), no court has jurisdiction "to affect by injunction or otherwise" a FHFA consent order, or "to review, modify, suspend, terminate, or set aside such notice or order." But when a defendant files a motion to dismiss, attaching a consent order, the court must do something more than simply take the defendant's word as to what the order says.

It must read the order to determine if going forward affects the order. *Rex v. Chase Home Finance LLC*, 905 F.Supp.2d 1111 (C.D. Cal. 2012); *In re JPMorgan Chase Mtge. Modification Litig.*, 880 F.Supp.2d 220 (D. Mass. 2012). "Analysis of any challenged action is necessary to determine whether the action falls within the broad, but not infinite, conservator authority." *County of Sonoma v. Fed. Hous. Fin. Agency*, 710 F.3d 987, 994 (9th Cir. 2013). The requirement that the court read the consent order to determine if it divests the court of subject matter jurisdiction is reflected in multiple cases dealing with consent orders issued to banks under 12 U.S.C. § 1818 (which has language identical to § 4635(b)).

In *Rex v. Chase Home Finance LLC*, 905 F.Supp.2d 1111 (C.D. Cal. 2012), homeowners Michael and Naomi Rex obtained a written agreement from Chase to release them from the deficiency on a short sale. When Chase tried to collect, Rex sued. *Id.* at 1119-20. Chase asked for dismissal based on a consent order it entered into with the OCC, in which Chase agreed to develop a plan for 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, Chase argued that the consent order divested the district court of jurisdiction over the plaintiffs' claims. *Id.* at 1124. After reading the consent order, the district court rejected Chase's argument.

The *Rex* court explained that the "non-interference" language of § 1818 was to prevent the *regulated party* from appealing consent orders to which it had agreed: "'The primary purpose of [§ 1818] is to prevent federal courts from usurping the OCC's power to enforce its own consent orders *against the parties to the orders*.'" (Emphasis sic.) *Id.* at 1126. Therefore "'the jurisdictional bar is not meant to displace a non-party's right to present its claims to a federal court, or the jurisdiction of the court to hear those claims.'" *Id.*

Having placed the consent order in the proper context, 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." (Brackets omitted.) *Id*. at 1129.

Similarly, in *In re JPMorgan Chase Mtge*. *Modification Litig*., 880 F.Supp.2d 220 (D. Mass. 2012) a damages suit was filed against Chase for breaching mortgage modification agreements it had entered into with borrowers. *Id*. at 227. Evidently, the OCC was aware of Chase's misconduct, because it issued a consent order requiring Chase to develop a plan to reimburse borrowers for impermissible or excessive penalties and take steps to remediate any foreclosure sale where the foreclosure was not authorized. *Id*. at 229-30. Chase argued the court did not have jurisdiction because of a consent order. The district court rejected Chase's argument and held that the OCC consent order did not preclude it from exercising jurisdiction: "federal courts have jurisdiction to enforce contracts, and can do so even where a party is subject to a consent order—so long as the enforcement action does not 'affect' (or upset) the underlying order." *Id*. at 232. Thus, the court read the consent order and concluded it did not bar the plaintiffs' claims. *Id*. at 232-33.

In *American Fair Credit Assoc*. *v*. *United Credit Natl*. *Bank*, 132 F.Supp.2d 1304 (D. Col. 2001), on which Fannie Mae relies, the defendants entered into a series of consent orders with the OCC. *Id*. at 1307. American Fair Credit ("AFCA") provided educational materials to individuals seeking to establish credit. *Id*. at 1306. United Credit National Bank ("UCNB") issued credit cards to AFCA's customers. *Id*. Presumably because UCNB was insolvent, the OCC ordered UCNB's parent, United Insurance Companies, Inc. ("UICI") to assume all of UCNB's contingent liabilities, and to provide UCNB with $92 million in cash and collateral. *Id*.

at 1307. The $92 million was to be used only for the retirement of UCNB's deposit liabilities. *Id*. The OCC also ordered UCNB to cease and desist all activities with AFCA, including the payment of any funds to AFCA. *Id*. at 1306.

The district court read the consent orders and found that the "June 29, 2000 UICI Consent Order does not prohibit Defendant UICI from making payments to Plaintiff as Defendants maintain." *Id*. at 1311. The court made that finding based on its reading of the consent order. It did not simply defer to the defendant's interpretation of the consent order, as Fannie Mae insists that a trial court must do.

In this case, the court of appeals read the consent order which has as its "sole directive" a ban against payments by Fannie Mae that violate 12 U.S.C. 4617(j)(4). The Eighth District considered whether a judgment in favor of Radatz and the class would violate § 4617(j)(4) and concluded it would not.

Fannie Mae insists that this case is indistinguishable from *American Fair Credit*, in which the court dismissed *some* counts of the complaint based on a consent order. *American Fair Credit*, 132 F.Supp.2d at 1312. The plaintiff in *American Fair Credit* sought money damages from the defendant, and the consent order instructed the defendant to "'cease and desist all activity and transactions relating to the products of [plaintiff], including but not limited to <u>payment of funds for any reason to [plaintiff].</u>'" *Id*. at 1307. The directive here prohibits payments violating § 4617. Fannie Mae's Appx. A-039.

It is notable that the consent order to Fannie Mae admonishes against paying "fines or penalties imposed by ***any*** state mortgage satisfaction law[.]" (Emphasis added.) Fannie Mae's Appx. A-039. Fannie Mae cannot plausibly argue that this language means that FHFA reviewed all of the state mortgage satisfaction laws, and found that the recoveries available under all of those laws are in the nature of fines or penalties. How could FHFA have done that without making any findings? And, it didn't have time to conduct such a review in the short period of time between Radatz's counsel informing the trial court that all of the class members had been identified, and the issuance of the consent order. The issue presented in cases of payments for late releases turns on the particular judicial decisions holding whether the provision imposes a fine or penalty. Whether an Ohio statute imposes a penalty under federal law is "guided by reference to [Ohio] state law[.]" *Irving Independent School District v. Packard Properties*, 741 F.Supp. 120, 123 (N.D. Tex. 1990), *aff'd*, 970 F.2d 58 (5th Cir. 1992) (applying Texas law to determine if collection costs with respect to Texas state taxes were a "penalty" as that term is used in 12 U.S.C. 1825(b)(3)).

The consent order in *American Fair Credit* did not order the regulated entity to cease and desist from violating a law. Instead, it ordered the regulated entity to cease and desist conducting any transactions with the plaintiff. Therefore, there was no legal issue under the consent order for the court to decide.

In the absence of any finding by FHFA in this case, the court of appeals looked to both Ohio and federal law to determine if Fannie Mae's payment of statutory damages under R.C. 5301.36 claim subjects Fannie Mae to any fines or penalties. The case law from both sources holds that the payment of statutory damages in this case is not a penalty for fine.

F. The cases cited by Fannie Mae are inapposite.

Fannie Mae cites *Bakenie v. JPMorgan Chase Bank, N.A.*, No. 12-60 JVS, U.S. Dist. LEXIS 137809, **10-11 (C.D. Cal. Aug. 6, 2012), at page 13 of its brief. *Bakenie* does not apply here because the § 1818 consent order in that case "expressly covers the conduct of third-party providers." *Id*. at *11. *Bakenie* also was rejected as totally non-persuasive in *Rex,* 905 F.Supp.2d at 1133:

> The court provided little reasoning for its conclusion other than the observation that Section 1818(i)(1) is intended to be 'far reaching.' [Bakenie at *9.] The court neither mentioned nor distinguished *In re JPMorgan Chase* [880 F.Supp.2d 220 (D. Mass. 2012)].
>
> This Court declines to follow *Bakenie* and instead follows *In re JPMorgan Chase* [which] is a published, lengthy opinion replete with cogent reasoning and citations to numerous authorities and was issued in a multi-district litigation case in which the plaintiff-borrowers were represented by counsel. In contrast, *Bakenie* is an unpublished, four-page opinion in a case where four of the five plaintiff-homeowners were pro se. The grim reality of our adversarial system [is] that sometimes the party that fails to make an argument loses, even if the law and evidence is on its side. Thus, given the absence of reasoning and brevity of *Bakenie*, combined with its plaintiffs' pro se status, the Court suspects that the outcome of *Bakenie* was dictated more by the absence of plaintiffs' argument than the language of and authority surrounding Section 1818(i)(1).

Fannie Mae also cites *Newton v. American Debt Servs. Inc*., 2014 U.S. Dist. LEXIS 173741, *24 (N.D. Cal. Dec. 16, 2014), claiming parenthetically that this case "reject[ed] plaintiff's request to put the court 'in a position of adjudicating and, in that process, interpreting the [FDIC's] Order,' because this 'most certainly would "affect . . . enforcement" of the Order' in violation of Section 1818(i)(1) (quoting 12 U.S.C. 1818(i)(1)[.]" But in *Newton*, the plaintiffs, who were not parties to the cease-and-desist order issued by the FDIC (intended in part to stop unsavory debt settlement and restructuring services offered to consumers), were *seeking to enforce that order* against American Debt Services. Radatz and the class are not trying to assert a cause-of-action based on enforcement of a consent order.

The position of the *Newton* court is consistent with Radatz's position here. Discussing *In re JPMorgan Chase*, 880 F.Supp.2d. 220 and *Rex*, 905 F.Supp.2d. 1111, the *Newton* court noted that a consent order does deny a court jurisdiction over consumer protection claims:

[Those] district court[s] concluded that the jurisdiction-divesting clause of Section 1818(i)(1) did *not* prevent the court from adjudicating plaintiffs' claims that the defendant banks violated various state consumer protection laws. But those courts' decisions are entirely consistent with this Court's holding: In both *Rex* and *In re JPMorgan Chase*, the defendant bank was attempting to use a regulatory cease-and-desist order as a shield against liability for practices that allegedly violated other consumer protection laws, whereas here, Newton is attempting to use the FDIC Order itself as a sword [enforce the FDIC Order against RMBT], and asks the fact-finder to hold that RMBT actually violated the Order. In short, Section 1818(i)(1) does not prevent a court from adjudicating the legality of conduct under substantive laws and regulations simply because the FDIC has taken similar or parallel actions. What it bars is enforcement of an FDIC cease and desist order itself (as distinct from the substantive regulatory law being enforced) other than by a court specifically vested with such jurisdiction under Section 1818(i)(1).

***

The *Rex* court made this clear. Following the reasoning of *In re JPMorgan Chase*, [fn.] the court first explained that the 'jurisdictional bar' in Section 1818 '"is not meant to displace a nonparty's right to present its claims to a federal court, or the jurisdiction of the court to hear those claims,"' where the claims are related to, but not inextricably intertwined with, issues touched upon in an OCC cease-and-desist order. *Id*. (quoting *In re JPMorgan Chase*, 880 F.Supp.2d at 232). As the court explained, '"it is clear that the Jurisdiction-Divesting Clause of Section 1818 was not intended to prohibit non-parties from exercising their *separate remedies* at law."' *Id*. (quoting *In re JPMorgan Chase*, 880 F.Supp.2d at 232) (internal modification omitted) (emphasis added). 'Rather, "the primary purpose of Section 1818 is to prevent federal courts from usurping the OCC's power to enforce its own consent orders against parties to the orders."' *Id*. (quoting *In re JPMorgan Chase*, 880 F.Supp.2d at 232) (internal modification and emphasis omitted).

> [Fn.] The district court in *In re JPMorgan Chase* rejected nearly the same argument later rebuffed in *Rex*, namely that the cease-and-desist order between Chase and the OCC robbed the court of jurisdiction to hear a challenge to conduct addressed in the cease-and-desist order brought by non-party plaintiffs under state consumer protection laws. *See In re JPMorgan Chase*, 880 F.Supp.2d at 231 (noting that 'Chase argues that a review by this court of plaintiffs' claims may well yield a result inconsistent with the Consent Order . . . a result which Congress intended to avoid,' but ultimately rejecting Chase's interpretation of Section 1818).

The *Rex* court then went on to explain that Congress did not intend Section 1818's jurisdiction-stripping provision to permit regulated banks to hide behind

> regulatory cease-and-desist orders whenever those banks faced independent lawsuits challenging their conduct under state or federal consumer protection laws. . . .
>
> Particularly in light of the purposes of Section 1818, the *Rex* court concluded that it would be 'absurd' to allow Chase to avoid liability for various state law violations simply because it had agreed to the entry of a cease-and-desist order with the OCC:
>
> > [Chase]'s interpretation of Section 1818(i) would require this Court to read a regulatory statute . . . as actually creating a jurisdictional mechanism by which banks can escape millions of dollars of liability in consumer class actions. Essentially, Defendants' rule allows any defendant-bank to insulate itself from liability for practices that violate state contract and consumer laws simply by entering into an OCC consent order . . . .
>
> *Id*. (emphasis omitted). Consequently, the court concluded that it did not lack jurisdiction to adjudicate plaintiffs' various state law claims . . . . [Fn.]
>
> > [Fn.] In effect, the court in *Rex* rejected an argument that was tantamount of a claim of field preemption—a result not justified in light of the statute's wording and purpose.

Newton, at *25-30.

In *Law Offices La Ley Con John H. Ruiz, P.A. v. Rust Consulting, Inc*., 982 F.Supp.2d 1307, 1312 (S.D. Fla. 2013), cited by Fannie Mae at page 13 of its brief attorneys sought payment of attorney fees from a settlement fund created by the consent orders issued under § 1818(b). The court found it did not have jurisdiction to order payment of attorneys' fees out of the funds, where the consent orders "all . . . require payment of funds directly to Eligible Borrowers—not payment to the Eligible Borrowers' attorneys." *Id*. at. 1311. The trial court found that it lacked jurisdiction to modify the terms of the consent order and order a different distribution method to the borrowers. *Id*. at 1312.

In *Anderson v. Deutsche Bank Natl. Trust Co*., No. 13-cv-12854, U.S. Dist. LEXIS 32550, **11-12 (E.D. Mich. Mar. 13, 2014), cited by Fannie Mae at pages 13-14 of its brief, Deutsche Bank was *not* using the consent order to defeat a meritorious claim. Instead, in the absence of the consent order, the plaintiffs had no claim. As the court noted, "Plaintiffs premise their relief entirely on the Consent Orders." *Id*. at *14. "Plaintiffs seek a stay of eviction until the Court determines that Wells Fargo develops loss mitigation actions in compliance with the Consent Orders. And loss mitigation is what is mandated by the Consent Orders." *Id*. at *13. In this context, the court noted that "the existence of the Consent Order does not create state action in the eviction proceedings." *Id*. at *16.

Fannie Mae also cites *DeNaples v. Office of Comptroller of Currency*, 404 Fed. Appx. 609, 612–613 (3d Cir. 2010) and *Bd. of Governors of Fed. Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 43–44 (1991) but these cases focus on the fact that—as parties to the administrative orders—the litigants had adequate legal substitutes for review. Here, following Fannie Mae's arguments, Radatz and the class, who are non-parties, are not entitled to any review of any FHFA orders.

Fannie Mae cites *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035 (D.C. Cir. 1998) for support. But *Ridder* stands for the proposition that courts cannot modify consent order because to do so would allow the regulated party to interfere with the regulator's powers: "'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 1039 (emphasis added), quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995).

G. The court of appeals properly addressed the consent order.

Fannie Mae argues that the "Eighth District erroneously construed and impermissibly modified the [consent order] to prohibit Fannie Mae from paying a judgment in this case only *to* *the extent that* the Eighth District independently determined that such a payment would violate the Penalty Bar." Fannie Mae brief, p. 16. Fannie Mae insists that the court of appeals "misread" the consent order. *Id*. But Fannie Mae ignores the critical language in the Eighth District's decision which states the "consent order merely orders Fannie Mae to cease and desist violating 12 U.S.C. 4617(j)(4)." *Radatz*, 2014-Ohio-2179, ¶12. How did the Eight District reach that conclusion? It read the consent order, which, not once, but twice, orders Fannie Mae to refrain "from violating 12 U.S.C. § 4617(j)(4)[.]"

The consent order does <u>not</u> state that FHFA has reviewed R.C. 5301.36 and found that statutory damages under that provision are in the nature of a fine or penalty, because FHFA made no findings of law. Fannie Mae's Appx. A-035 ("Fannie Mae ... consent[s] to the issuance of a consent order ... before the ... finding of any issue of fact or law"). Nor does the consent order cite any decision by any court stating that statutory damages under R.C. 5301.36 are in the nature of a fine or penalty. And, it is not Fannie Mae's role to determine what constitutes a violation of 12 U.S.C. § 4617(j)(4). The court of appeals noted that "for a judgment in the underlying case to affect the consent order, Fannie Mae must assume that the damages awarded pursuant to R.C. 5301.36(C) are in the nature of a penalty or fine." *Radatz*, 2014-Ohio-2179, at ¶ 14. The appellate panel rejected Fannie Mae's assumption, since the law is the opposite.

H. The context in which the consent order was issued shows that it is nothing more than a late effort by Fannie Mae to avoid liability in this case.

If the statutory damages in this case actually constituted a penalty that federal law prohibits Fannie Mae from paying by judgment, defense counsel would have moved to dismiss this claim when HERA was enacted in 2008. A state court cannot order a defendant to violate federal law. *Chaney v. Plainfield Healthcare Ctr*., 612 F.3d 908, 914 (7th Cir. 2010) ("When two laws conflict, one state, one federal, the Supremacy Clause dictates that federal law prevails.”).

In September 2010, more than two years after the passage of HERA, the trial court ordered the parties to search public records to identify class members. The whole time this was occurring, Fannie Mae never raised the claim that the payment of a judgment in this case would violate federal law. The Eighth District observed: “Plaintiff completed the list [of class members]—in February 2013, and promptly notified Fannie Mae. Seemingly in response, on March 13, 2013, Fannie Mae filed a motion to dismiss all claims, arguing that the trial court lacked jurisdiction because of a consent order[.]” *Radatz*, 2014-Ohio-2179, at ¶ 4. Under 12 US.C. § 4631, there are a number of procedural requirements the Director of FHFA must follow before issuing an agency order. He must serve upon “[a] regulated entity ... a notice of charges in respect thereof.” 12 U.S.C. § 4631(a). A hearing must be scheduled. 12 U.S.C. § 4631(c)(1). The purpose of a hearing is to “determine on the record whether an order to cease and desist from such practice or violation should issue[.]” *Id*. And, after the hearing, “the Director shall render the decision (which shall include findings of fact upon which the decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders[.]” 12 U.S.C. § 4633(b)(1). Here, no notice of charges was served, no hearing was held, and no findings were made.

Instead, the order was written by Fannie and issued by consent. This eliminated notice and hearing, but also any findings. FHFA was never investigating Fannie Mae violating the penalty bar for issuance of charges on that matter. The Agency drew the line at making findings without the required notice and hearing. FHFA never found that paying a judgment under a state mortgage satisfaction law is a penalty, and review of applicable law shows it is not.

II. Fannie Mae's Proposition of Law II: FHFA'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 Home Loans, Inc*., 105 Ohio St.3d 296, 2006-Ohio-1736, 852 N.E.2d 599.

Radatz's Response: Under Ohio and federal law, the R.C. 5301.36 does not impose a penalty or fine on those who violate the statute.

A. Under Ohio law, the statutory damages sought by Radatz are not fines or penalties.

Radatz and the class seek damages of $250 per violation under R.C. 5301.36(C) and this Court already ruled those not to be penalties or fines:

> The statutory language is clear. R.C. 5301.36(C) expressly provides that a mortgagor 'in a civil action' may sue for 'damages.' To conclude that R.C. 5301.36(C) creates a penalty, this court would have to delete the term 'damages,' a word used by the legislature, and insert the term 'penalty' or 'forfeiture,' words not chosen by the legislature. Doing so would flout our responsibility to give effect to the words selected by the legislature in enacting a statute.

Rosette v. Countrywide Home Loans, Inc., 105 Ohio St.3d 296, 2005-Ohio-1736, 825 N.E.2d 599, ¶ 13.

Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless, 113 Ohio St.3d 394, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 13 clarified that R.C. 5301.36(C)'s damages are "more akin to stipulated or liquidated damages" than punitive damages meant to punish wrongdoers (noting at ¶ 14 the difference between damages awarded in the nature of compensatory damages and treble damages which serve a punitive objective).

B. This Court's interpretation of Ohio law controls.

Fannie Mae does not like the holding in *Rosette*, so it insists that whether statutory damages under R.C. 5301.36 are in the nature of a penalty is a matter of federal law. But the Sixth Circuit and other federal courts that have considered whether federal law controls the interpretation of a state statute disagree.

The issue of whether a federal court applies state law to determine if an amount is a penalty or fine under a federal statute was addressed in *Irving Independent School District v. Packard Properties*, 970 F.2d 58 (5th Cir. 1992). In *Irving*, the FDIC, citing 12 U.S.C. § 1825(b)(3), claimed exemption from paying collection costs under a Texas law, because the collection costs were penalties or fines. *Id*. at 64. Similar to § 4617(j)(4) here, § 1825(b)(3) says the FDIC "shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of any person to pay any real property, personal property, probate or recording tax or any recording or filing fees when due." To determine whether collection costs due under a Texas law were penalties or fines, the Fifth Circuit looked at state-law precedent. The Fifth Circuit observed—in a holding on point here—that not only had the highest court in the state decided the question, it did so by reading the plain language of the state law: "In the eyes of the Texas Supreme Court . . . charges labeled penalties—even if they compensate collection costs—are penalties. The text of the provision contains two separate references to collection costs as penalties." *Irving*, 970 F.2d at 66.

The decision in *Irving* is consistent with the approach taken by other federal courts. "When a state statute is at issue, federal courts are bound by the state courts' interpretation of the statute[.]" *Walters v. Warden, Ross Corr. Inst.*, 521 Fed. Appx. 375, 377 (6th Cir. 2013) (applying Ohio court interpretations); *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). *See also County of Fairfax*, 1993 U.S. Dist. LEXIS 19854 at *11, noting that whether payment was penalty within meaning of 12 U.S.C. § 1825(b)(3) "is guided by reference to Virginia state law"; *R.F.C. v. State of Texas*, 229 F.2d 9, 11 (5th Cir. 1956) ("Since Congress did not define the term 'taxation' as that word is used in Section 8 of the [Reconstruction Finance Corporation] Act, it is, therefore, clear . . . that the Congressional purpose can best be accomplished by application of settled State rules in determining whether the word 'taxation' as used in Section 8 includes penalties and interest."); *Federal Reserve Bank of Richmond v. City of Richmond*, 957 F.2d 134, 136 (4th Cir. 1992) ("applying state law to determine whether penalties and interest are a part of the tax would not impair the federal interest"); *Natl. Loan Investors L.P. v. Town of Orange*, 204 F.3d 407, 412 (2d Cir. 2000) ("Whether a charge constitutes a penalty for purposes of § 1825(b)(3) is a federal question informed by state law.").

Fannie Mae is wrong that federal law controls the interpretation here. Fannie Mae cites *Missouri Pacific RR Co. v. Ault*, 256 U.S. 554 (1921) which has nothing to do with any issues here. There, a judgment was entered against the federal government, to be paid from federal monies, which the Court said involved a question of federal law. Here, the defendant is not the federal government and "there is no evidence that federal regulations or orders specifically affected Fannie Mae's relationship with Plaintiff or Fannie Mae's decision to not record Plaintiffs mortgage satisfactions in the statutory time period, which is the root of this dispute." *Radatz*, No. 1:03-cv-1945, PageID 148 (App. 17).

Here, the Supreme Court of Ohio did exactly the same, looking to the language of R.C. 5301.36, to hold that statutory damages under R.C. 5301.36(C) are not a penalty. Thus, the test which Fannie Mae demands be followed under federal law is exactly that used by this Court.

C. Even the cases cited by Fannie Mae hold that the question of whether statutory damages under Ohio law are in the nature of a penalty looks precisely to state law.

Fannie Mae cites *National Loan Investors* and *Irving Independent School District* for the proposition that federal law governs the issue of whether statutory damages under an Ohio law constitute a penalty. Fannie Mae brief, p. 19. But those cases stand for the proposition that federal law looks to state law in interpreting a state statute. *Irving*, 741 F.Supp. at 123 (relief sought for class under state law is "guided by reference to Texas state law" and applying Texas law to determine if collection costs with respect to Texas state taxes were a "penalty" as that term is used in 12 U.S.C. 1825(b)(3)); *National Loan Investors*, 204 F.3d at 412 ("Whether a charge constitutes a penalty for purposes of § 1825(b)(3) is a federal question informed by state law."). If the resolution of the penalty issue is informed by *Rosette*, R.C. 5301.36 does not impose a penalty on Fannie Mae for violating Ohio's recording statutes.

D. If this case raised issues of federal law, this matter would be in federal court.

The crux of Fannie's argument is the state courts lack jurisdiction here because this is a federal agency matter within federal law. While Fannie Mae insists that this case is a matter of federal law, an Ohio district court has twice rejected that argument. Fannie Mae twice removed this matter to federal court insisting the case is a matter of federal law, and twice this matter was remanded to state court. The second removal was in October 2008, <u>after</u> HERA had been enacted. Most important, Fannie Mae removed under § 4617 (the same statute recited by Fannie Mae in its consent order) but the federal court rejected Fannie Mae's attempt and again returned this case to state court.

If, as Fannie Mae now insists, the interpretation of what constitutes a penalty was a matter of federal law, it would have raised that issue when it removed this case in October 2008, after Congress enacted HERA. Fannie Mae would have argued that the issue of what constitutes a penalty under HERA was a basis for the federal court's jurisdiction over this matter. *Reimer v. Case W. Reserve Univ*., 2012 U.S. Dist. LEXIS 152794, at *8 (N.D. Ohio 2012) (removal proper where "vindication of a right under state law necessarily turn[s**]** on some construction of federal law."). That is especially true since Fannie's basis for removal in October, 2008 was 4617—the exact statute it raises now. But in the briefing over whether the federal district court had jurisdiction over this matter, Fannie Mae never argued court that the interpretation of R.C. 5301.36 is a matter of federal law, or that the state court would be violating § 4617 by issuing a judgment.

E. The only federal court to directly address the issue of whether statutory damages under a state recording statute were in the nature of a penalty held that they were <u>not</u> in the nature of a penalty.

In *Higgins v. BAC Home Loans Servicing, LP*, No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278 (E.D. Ky. Mar. 31. 2014), a Sixth Circuit district court rejected the exact argument that Fannie Mae is making in this case—that statutory damages under a state recording statute constitute a fine or penalty under federal law.

The *Higgins* decision addresses a Kentucky statute, KRS § 382.365(5), which provides for damages not to "exceed three (3) times the actual damages, plus attorney's fee and court costs, but in no event less than five hundred dollars ($500)." *Higgins*, 2014 U.S. Dist. LEXIS 43278, at *4. Applying Sixth Circuit law (the court did not consider the issue of whether to apply Kentucky or federal law), the federal court held that the statutory damages under KRS § 382.365(5) were "not properly characterized as a fine or penalty[.]" *Id*. at *16. Therefore, "12 U.S.C. § 4617(j)(4) does not prohibit them from being assessed against the [FHFA] or Fannie Mae." *Id*.

In reaching that conclusion, the *Higgins* court held that the following factors favored a finding that the statutory damages were not a penalty:

- The recovery runs only to the individual not the government. *Id*. at *15.
- The recording statutes are "aimed at ensuring that individuals can readily determine the name of the entity that currently owns their mortgage and note." *Id*.

- The court viewed the $500 damages provided for in the statute as a type of liquidated damages provision "recognizing the difficulty of quantifying the costs and expenses incurred by an individual whose mortgage is assigned without his knowledge." *Id*. at *16.

The key distinction between the Kentucky statute under consideration in *Higgins* and R.C. 5301.36 is that the Kentucky statute provides for treble damages, while R.C. 5301.36 does not. If a statute that sets minimum damages at $500 and allows for treble damages is not in the nature of a penalty under federal law, a statute that sets minimum damages at $250 and does not allow for treble damages is certainly not in the nature of a penalty under federal law.

F. Under Sixth Circuit law, the statutory damages at issue in this case are not a penalty.

The test used in *Higgins* is consistent with federal law addressing whether a damages provision is in the nature of a penalty or a fine.

1. The Sixth Circuit looks to three factors to determine if statutory provisions are penal in nature.

The Sixth Circuit applies a three-part test to assess if a statutory provision is penal in nature: "1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered." *Murphy v. Household Finance Corp*., 560 F.2d 206, 209 (6th Cir. 1977). Each of these factors contradicts Fannie's claim that R.C. 5301.36 is in the nature of a penalty.

The wrong to be redressed is individual—the failure to timely record the satisfaction of Radatz's mortgage. R.C. 5301.36(A). The recovery runs to the individual—"the mortgagor may recover, in a civil action, damages of two hundred fifty dollars." R.C. 5301.36(C). And, the $250 in damages is not wholly disproportionate. *Hocking Valley R. Co. v. New York Coal Co.*, 217 F. 727, 729-30 (6th Cir. 1914) (holding that a statute "is not rendered penal by the fact that it provides a minimum recovery of $500 'for any violation of this section'").

2. *The first two prongs of the Murphy test are undisputed.*

Fannie Mae does not dispute in its briefing that R.C. 5301.36 redresses individual wrongs, not wrongs to the public. And, Fannie Mae does not dispute that the recovery runs to the individual, and not to the government.

3. *An otherwise remedial statutory scheme is not converted into a penal scheme by authorizing minimum recoveries greater than actual damages.*

In *Murphy*, the Sixth Circuit noted that "the Supreme Court, this court and the courts of numerous other circuits have held a number of statutory schemes authorizing multiple recoveries and minimum recoveries greater than actual damages to be remedial and not to impose penalties where the wrong addressed by the statute is primarily a wrong to the individual." *Murphy*, 560 F.2d at 210. In this context, the Southern District of Ohio observed that "a liability is not penal merely because greater than 'actual' damages are imposed. The true test is whether the wrong to be remedied or punished is primarily to an individual or to the State." *Porter v. Household Finance Corp.*, 385 F.Supp. 336, 341 (S.D. Ohio 1974).

In *Porter*, the Southern District of Ohio addressed the issue of whether the damages provision of Truth-in-Lending Act ("TILA"), which provided for a recovery of the greater of $100 or twice the finance charge, constituted a penalty. *Id*. at 342, n.8. Concluding that the damages provision was not penal in nature, the district court explained that the TILA damages provision avoided "the difficulty in calculating damages by providing for liquidated damages[.]" *Id*. at 342. The district court also observed that the "cause of action accrues to the person injured in his property interest, not to a third person or the State. The civil cause of action is not a penalty imposed by the State for a crime or offense against its laws." *Id*. Because the statute was "not primarily penal in the sense of a punishment imposed by the State for wrongdoing," the district court concluded that the primary purpose of the Act was remedial. *Id*. at 342-43.

The Sixth Circuit reviewed the *Porter* decision in *Murphy v. Household Finance Corp*., 560 F.2d 206 (6th Cir. 1977), and agreed with the district court that the damages provision in TILA was remedial. The *Murphy* court noted that the "recovery provided in § 130 runs in favor of the individual. State involvement in the enforcement of the Act is limited to the criminal liability provisions ... and the administrative enforcement provisions[.]" *Id*. at 210. Under R.C. 5301.36, there is no state involvement because it contains no criminal liability or administrative enforcement provisions.

The Sixth Circuit also noted that "Congress was aware that users of consumer credit who are not provided the disclosures required by the Truth in Lending Act would have difficulty demonstrating the precise dollar amount of their injuries." *Murphy*, 560 F.2d at 210. A similar difficulty in quantifying damages applies to Fannie Mae's failure to timely record the satisfaction of a mortgage in this case. The failure to timely release leaves a cloud on the property title. *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, ¶ 46.

The Sixth Circuit's holding in *Murphy*—that a statute providing for minimum damages is not penal in nature—is consistent with Sixth Circuit precedent dating back 100 years. In *Hocking Valley R. Co. v. New York Coal Co*., 217 F. 727 (6th Cir. 1914), the plaintiff sued under a statute that required railroads to "'secure and extend to all persons ... the same and equal opportunities for receiving and shipping freights of all kinds[.]'" *Id*. at 729. The statute provided that failure to comply with its terms subjected a railroad to liability "'in a civil action to the party injured for the damages sustained, but for any violation of this section the recovery in any such action shall not be less than five hundred dollars.'" *Id*.

Although the statute provided for minimum damages of $500 (in 1914 dollars), the Sixth Circuit held that it was clear that it was not penal in nature: "It provides no penalty or forfeiture at the instance of, or for the benefit of the public. The right of action is given only to the injured person, and is purely remedial in nature." *Id*. The *Hocking* court observed: "'Where the statute provides in terms ... for a recovery of damages for an act which violates the rights of the plaintiff, and gives the right of action solely to him, the fact that it also provides that such damages shall not be less than a certain sum, and may be more, if proved, does not, as we think, transform it into a penal statute.'" *Hocking*, 217 F.at 730, quoting *Brady v. Daly*, 175 U.S. 148, 156 (1899).

The Sixth Circuit decisions are not outliers. *Porter* and *Murphy* were followed by the Fifth Circuit in *In re Wood*, 643 F.2d 188 (5th Cir. 1980). In *Wood*, the plaintiff argued that the statutory damages available under TILA were in the nature of a penalty, because a plaintiff who has not suffered any actual damages would still recover the statutory damages. The Fifth Circuit rejected that argument, noting that "in the overwhelming majority of antitrust cases in which plaintiffs prevail treble damages *will* be imposed and the defendant required to compensate the plaintiff far beyond the amount of plaintiff's actual loss; yet the courts have repeatedly characterized treble damages as remedial." *Id*. at 193. The Fifth Circuit cited *Porter* for the proposition that "statutory damages compensate the debtor for actual damages that may in fact be 'difficult to ascertain.'" *Wood*, 643 F.2d at 193. The *Wood* court then concluded: "we see no reason to distinguish the recovery of statutory damages in a TILA action from an award of antitrust treble damages; if the latter are remedial, the former must be too." *Id*. The Fifth Circuit explained that the "fact that [a] statute allows for accumulated recovery does not convert an otherwise remedial statutory scheme into a penal one." *Id*. at 193, n.12.

In *Hooters of Augusta, Inc*. *v*. *American Global Insurance Company*, 272 F.Supp.2d 1365 (S.D. Ga. 2003), the district court addressed whether the $500 statutory damages provision for a violation of the Telephone Consumer Protection Act ("TCPA") was penal. In holding that the damages were remedial and not penal, the court noted that 47 U.S.C. § 227 was intended to provide a remedy to an individual fax machine owner, and that the award of statutory damages issues to the harmed individual, not to a third party. *Id*. at 1376. Finally, the court observed that "although the statutory damages do not closely correspond to actual damages, this fact does not convert a remedial statute into a penal one." *Id*. *See also Universal Underwriters Ins*. *Co*. *v*. *Lou Fusz Automotive Network*, *Inc*., 401 F.3d 876, 881 (8th Cir. 2005) (for purposes of applying exclusion for coverage, fixed $500 per-violation damages allowed by TCPA are not "civil penalties": "Whether we view the fixed award as a liquidated sum for actual harm or an incentive for aggrieved parties to act as private attorneys general, or both, it is clear that the fixed amount serves more than purely punitive or deterrent goals."); *Smith v*. *AS Am*., *Inc*., 2014 WL 3375466, *2 (W.D. Mo. 2014) (FMLA liquidated-damages compensatory not punitive); *Wynns v*. *Adams*, 426 B.R. 457, 466 (E.D.N.Y. 2010) (where law provided that, if preparer of bankruptcy petition violated law, debtor could recover actual damages and "greater of" $2,000 or "twice the amount paid" by debtor to preparer, and debtors had no "actual damages" but were still entitled to $2,000, this was not punitive but "intended to liquidate uncertain actual damages and to encourage victims to bring suit."); *In Rhoads v*. *FDIC*, 956 F. Supp. 1239, aff'd in part, rev'd in part on other grounds, 257 F.3d 373 (4th Cir. 2001) (liquidated damages under FMLA compensatory, not penal, for purposes of § 1825(b)(3)).

4. *<u>Bowles</u> and its progeny are consistent with Radatz's position.*

In support of its position, Fannie Mae cites *Bowles v. Farmers National Bank of Lebanon, Kentucky*, 147 F.2d 425 (6th Cir. 1945) for the proposition that if the sum to be recovered is greatly disproportionate to the actual loss, it must be a penalty. But *Bowles* is entirely consistent with the *Murphy* three-prong test.

In *Bowles*, the Office of Price Administration (i.e., the government) sued under the Emergency Price Control Act of 1942 to recover treble damages for sales of whiskey in excess of the ceiling price. *Id*. at 426. The issue before the Sixth Circuit was whether the relief sought was penal or remedial in nature. *Id*.

In *Bowles*, the first two prongs of the *Murphy* test indicated that the recovery was in the nature of a penalty. The Price Control Act was enacted in "'the interest of the national defense and security and necessary to the effective prosecution of the present war ... to stabilize prices[.]'" *Bowles*, 147 F.2d at 428. From this language, the Sixth Circuit concluded that the Price Control Act "described a threatened injury to the public." *Id*. Also, in *Bowles*, "recovery [was] to be paid not to the person injured, but to the Government." *Id*. So, the first two prongs of the *Murphy* test supported a holding that the statute was penal. And, the *Bowles* court, consistent with *Murphy,* noted that the "basic test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual." *Id*. at 428.

Finally, in *Bowles*, the statute included a treble damages provision. The treble damages in *Bowles* were close to $7 million. *Id*. at 427. Given those facts, the Sixth Circuit concluded that the "sum to be paid is so greatly in excess of the loss incurred that it cannot be explained except upon the theory that the statute intends to subject the wrongdoer to an extraordinary liability[.]" So, all three prongs of the *Murphy* test supported a conclusion that the recovery was in the nature of a penalty.

Bowles cited *Helwig v. United States*, 188 U.S. 605, 611 (1903) for the proposition that a statute is penal "if the sum exacted is greatly disproportionate to the actual loss[.]" *Bowles*, 147 F.2d at 428. Like, *Bowles*, *Helwig* is also consistent with the three-prong test in *Murphy*.

In *Helwig*, the government sought to collect additional customs duties. *Helwig*, at syllabus. Like *Bowles*, *Helwig* involved a public wrong; to be rectified by a *payment to the government*. Finally, the amount owed by Helwig under the statute was disproportionate to the actual damages, because Helwig's unpaid customs duties were $354, while the recovery sought by the government was $9,067.68. *Id*. at 611. Therefore, in *Helwig*, all three factors of the *Murphy* test for a finding that the recovery was in the nature of a penalty were met. Consistent with *Murphy*, the *Helwig* court concluded that the sum sought by the government was a penalty. *Id*. at 610-13.

Fannie Mae implies that the above three factors are no longer good law, mentioning *La Quinta Corp. v. Heartland Properties LLC*, 603 F.3d 327 (6th Cir. 2010) which cites *Bowles*. (Br. at 20). Nothing in *La Quinta* suggests *Huntington* or *Murphy* are outdated, and in fact *La Quinta* cited and considered the same factor that Fannie Mae says is irrelevant here (Brief at 20): does the statutory recovery run to the individual or the state? 603 F.3d at 343. Indeed, this case goes against Fannie, finding no penalty, despite the large amount of the award. In *La Quinta*, the district court awarded Baymont Franchising, LLC $117,000 in treble damages under the Lanham Act. *Id*. at 341. Although the court did not use the *Murphy* factors since the issue was whether the damages were a penalty in the specific context of the Lanham Act, the first two prongs of *Murphy* would indicate the damages were not in the nature of a penalty (no public wrong, and no money paid to the government). And, although the district court awarded the plaintiffs treble damages, the Sixth Circuit held that the treble damages award did not constitute a penalty under the Lanham Act. *Id*. at 345.

5. *The Supreme Court Cases Cited by Fannie Mae Are Consistent with Murphy*.

The two Supreme Court cases cited by Fannie Mae, *Gabelli* and *Tull*, are also consistent with the *Murphy* test.

In *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), the SEC, as part of an enforcement action, sought civil *penalties* under 15 U.S.C. § 80b-9. *Id*. at 1217. Those penalties were "payable to the Treasury of the United States." 15 U.S.C. § 80b-9(e)(A). The only issue in *Gabelli* was whether the discovery rule applied. *Gabelli*, 133 S. Ct. at 1221.

In explaining why the discovery didn't apply, the *Gabelli* court cited *Meeker v. Lehigh Valley R. Co*., 236 U.S. 412, 423 (1915) for the proposition that a penalty is "'something imposed in a punitive way for an infraction of public law.'" *Gabelli*, 133 S. Ct. at 1223. The actual holding in *Meeker* was that the "words 'penalty or forefeiture' ... refer to something imposed in a punitive way for an infraction of **public law**, **and do not include a liability imposed for the purpose of addressing a private injury,** even though the wrongful act be a public offense and punishable as such." (Emphasis added.) *Meeker*, 236 U.S. at 423. Fannie Mae also cites *Tull v. United States*, 481 U.S. 412 (1987). *Tull* is a classic "penalty" case: the Government sought civil penalties under the Clean Water Act. *Id*. at 414. The parties did not dispute that any amounts paid to the government would be in the nature of a penalty paid to the Treasury to punish the public wrong of violating the Clean Water Act. Instead, the sole issue was whether the defendant was entitled to a jury trial. *Id*. at 415. The *Tull* court resolved that issue by determining whether the action was legal or equitable in nature. *Id*. at 417. The *Tull* court never addressed how to determine if statutory damages are a penalty.

6. *Not one of the cases cited by Fannie Mae discusses a statute remotely similar to R.C. 5301.36.*

In *Murphy*, the Sixth Circuit held that the minimum statutory damages in TILA of $100 were not penal. Fannie Mae has not explained why the result in *Murphy* would not apply to R.C. 5301.36. Further, Fannie Mae has not expressly identified a single case in which a statutory damages provision provided for a minimum recovery for an individual to redress a wrong against that individual, and paid to the individual, was held to be penal in nature. It has simply quoted snippets of various decisions, without placing them in the context of their facts under federal decisions that have consistently applied a three-prong test to determine if a damages award is in the nature of a penalty.

7. *The fact that there may be more than one mortgagee subject to liability under R.C. 5301.36 does not make the statutory damages a penalty.*

Fannie Mae argues that Radatz has already been compensated by Countrywide Home Loans for Fannie Mae's failure to timely record the satisfaction of her mortgage; therefore, a recovery by Radatz on her claim against Fannie Mae would constitute a penalty. Fannie Mae's Brief, p. 21. That is false. Radatz never received the $250 provided by R.C. 5301.36. Further, Fannie Mae fails to explain how a payment made by Countrywide Home Loans as a result of Fannie Mae's violation of R.C. 5301.36 penalizes Fannie Mae.

8. *The statute does not even apply to Fannie Mae.*

By its express terms, 12 U.S.C. § 4617(j)(4) applies only to FHFA. "<u>The Agency</u> shall not be liable for any amounts in the nature of penalties or fines[.]". The Agency is defined under the statute as FHFA, not as Fannie Mae. 12 U.S.C. 4502(2). Fannie Mae is defined as a regulated entity under the statute, not as the Agency. 12 U.S.C. § 4502(20)(A). The statute grants no exemption to Fannie Mae.

Fannie Mae's response is to cite *Nevada v. Countrywide Home Loans Servicing, L.P.*, 812 F.Supp.2d 1211 (D. Nev. 2011). In that case—in direct conflict with both the language in § 4617(j)(4) limiting its application to the FHFA as the Agency, and FHFA's own position elsewhere that § 4617(j)(4) does not apply to Fannie Mae—the District Court held, without any reasoning, that "while under Conservatorship with the FHFA, Fannie Mae is statutorily exempt from . . . penalties[.]" *Id*. at 1218.

Also, the statute applies only to **payments** of fines and penalties, not to judgments. Fannie Mae is claiming that it is subject to the penalty bar while under the conservatorship of FHFA, but that conservatorship is temporary. Fannie has strongly made that clear to the courts, and the courts have agreed: "FHFA's control over Fannie Mae is temporary". *Dias v. Fed. Natl. Mtge. Assn*, 2013 U.S. Dist. LEXIS 181584 at **44-45 (D.Haw. Dec. 31, 2013). Payment arising from judgment in this case is not prohibited at all after the conservatorship has ended. Judgment being distinct from payment is no stranger to existing law, where courts regularly enter judgments against bankrupt entities or ones in receiverships which cannot be paid until the bar ends (e.g. through relief from stay, reorganization, plan confirmation, dismissal, etc.). Notably, R.C. § 2325.18 allows for an action to revive a dormant judgment ten years after the judgment has become dormant.

III. Fannie Mae's temporary conservatorship does not strip the trial court of jurisdiction over this claim.

A. The conservatorship is temporary.

"[T]he Director of the FHFA placed Fannie Mae and Freddie Mac under the FHFA's temporary conservatorship with the objective of stabilizing the institutions so they could return to their normal business operations." *Fed. Hous. Fin. Agency v. Royal Bank of Scotland Group P.L.C.*, D. Conn. No. 3:11-cv-01383, 2012 U.S. Dist. LEXIS 116292, *4 (Aug. 17, 2012). "This purpose, which centers on activities of finite duration, illustrates that the conservatorship of Fannie Mae is a temporary situation." *Lopez v. Bank of Am., N.A.* 920 F.Supp.2d 798, 801 (W.D. Mich. 2013). "[C]onservatorship is by nature temporary . . . and Fannie Mae remains a private corporation." *Herron v. Fannie Mae*, 857 F.Supp.2d 87 (D.D.C. 2012). FHFA's Director stated that FHFA's placement of Fannie Mae and Freddie Mac "into conservatorship . . . is a statutory process designed to stabilize a troubled institution with the objective of returning the entities to normal business operations." *Id.* at 90.

B. If § 4617 applies to Fannie Mae while it is in conservatorship, that temporary bar on payment would not divest the trial court of subject-matter jurisdiction.

The penalty bar can only even arguably apply while Fannie Mae is in conservatorship. Since the conservatorship is temporary, the trial court's dismissal with prejudice was improper. If Fannie Mae wants to refuse to pay a judgment, it can when collection is sought, but only during conservatorship. No law allows Fannie Mae to block any *possibility* of a money *judgment* the *payment* of which nobody disputes could be made after conservatorship, if not before.

The consent order orders 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 the pending lawsuit styled *Radatz v. Fed. Nat'l Mortgage Ass'n*, Case No. CV-03-507616 (Ohio Com. Pleas)." Fannie Mae Appx. A-039 (emphasis added). Nothing prohibits the trial court from entering a money judgment. As the Eighth District noted, the consent order "acknowledged the possibility of a judgment or imposition of damages in the pending action[.]" *Radatz v. Fed. Natl. Mtge. Assn.*, 2014-Ohio-2179, 11 N.E.3d 1230 (8th Dist.), at ¶ 11.

- "In the consent order, the acting director of the FHFA expressly provided that Fannie Mae must cease and desist from paying any amount, subject to the modifier ['in the nature of fines or penalties'] pursuant to any judgment issued in the 'pending' underlying case . . . . In simple terms, the consent order did not facially prohibit the trial court from entering a judgment against Fannie Mae in this case or generally imposing damages against Fannie Mae based on R.C. 5301.36 (C)." *Id.*

- "[T]he FHFA consent order itself contemplated a judgment. It must logically follow that the trial court was not divested of jurisdiction. Any judgment in the underlying case could not possibly affect a consent order that specifically contemplated such a judgment being imposed in the first place." *Id.* at ¶ 20.

- Further, neither FHFA nor Fannie Mae cite any "authority to infinitely immunize Fannie Mae from paying any amounts stemming from any actions." *Id.* at ¶ 10.

The purpose of a judgment is to set an obligation—which is different from separate provisions of law that might block payment. Blocking payment does not stop the setting of an obligation. *See Hodges v. State*, 158 P.3d 864, 866 (Alaska 2007) ("In civil litigation, the amount of a defendant's liability is not determined according to defendant's ability to pay; rather, damages in a civil case are determined according to the plaintiff's loss. Once the amount of liability is determined, there are various legal mechanisms that protect a defendant from immediate or complete enforcement of the judgment. . . . But the plaintiff is entitled to a judgment for the full amount of their loss.").

C. The conservatorship does not place FHFA and Fannie Mae above the law.

"'[I]f the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617(f) would not bar judicial oversight or review of its actions.'" *Leon Cnty. Fla. v. FHFA*, 700 F.3d 1273, 1278 (11th Cir. 2012), quoting *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F.Supp.2d 790, 799 (E.D. Va. 2009), itself citing

Coit Independence Joint Venture v. FSLIC, 489 U.S. 561, 575 (1989) (holding that a similar provision does not divest courts of subject matter jurisdiction) and *Chemical Futures & Options, Inc. v. RTC*, 832 F.Supp. 1188, 1192-1193 (N.D. Il. 1993) (holding that such a provision does not "elevate the [receiver] to the position of a sacred cow that may graze upon the rights of others at will, unchecked by the courts").

D. A federal agency cannot order a court to stand down.

No federal agency has the power to issue a stand-down order to a court. *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 301 n.17 (3d Cir. 2012) (Social Security Administration must comply with appellate rulings "to avoid exceeding the scope of the agency's power, because it is axiomatic that it is within the province of the judiciary 'to say what the law is.' [quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).]"); *In re Fed. Natl. Mtge. Assn. Derivative Litig.*, 725 F.Supp.2d 159, 166 (D.C. Cir. 2010) (FHFA treated "the same as any other litigant when FHFA invokes the [court's authority]. Nothing in the language of Section 4617(f) purports to suspend the operation of the Federal Rules as applied to FHFA."); 12 U.S.C. § 4617(b)(10)(A)(i) (limiting FHFA's authority as conservator in litigation involving Fannie Mae to requesting a 45-day stay).

E. The cases discussed by Fannie Mae and FHFA involve regulated entities who are parties to the consent order seeking judicial review of their own consent orders.

Fannie Mae cites *Doral Bank v. Fed. Deposit Ins. Corp.*, 2014 U.S. Dist. LEXIS 127741 (Dist. Puerto Rico 2014) at page 9 of its brief, in which *Doral*, the regulated party, entered into the consent order, decided it did not like the terms, and then asked for review of the consent order. *Doral* at *9. The problem with *Doral* and similar cases cited by Fannie Mae is that the regulated entities in those cases have many federal administrative and judicial protections in relation to § 1818(b) orders. Radatz, by contrast, is not the regulated entity, and cannot obtain *any* review of the consent order. *Doral* explains the procedures, protections, and proceedings provided by § 1818(b)(1), 5 U.S.C. 701-706 (the judicial review part of the Administrative Procedure Act), and 12 C.F.R. Part 308 (the FDIC's Rules of Practice and Procedure), in relation to § 1818 orders. *Id*. at *18. "In this progression, Doral . . . may seek judicial review as part of a process with full procedural guarantees . . . ." *Id*. at *20. In contrast, Radatz and the class are not the regulated party or even a party to the consent order, thus they do not have these kinds of rights provided to the regulated entity.

Also, the entities regulated by the FDIC are typically in receivership, whereas Fannie Mae is in conservatorship. In contrast to everything in this case, the FDIC's receiverships of failed banks so often cited by Fannie Mae have a finite purpose (to liquidate) which is different from the FHFA's conservatorship here. "A conservatorship is like a receivership, except that a conservator . . . tries to return the bankrupt party to solvency, rather than liquidating it." *PNC Bank, N.A. v. Van Hoornaar*, 2014 WL 4411616, *4 (E.D. Wis. 2014).

FHFA's Amicus Brief at 8 cites *U.S. v. Leuthe*, E.D. Pa. No. CIV.A 01-203, 2002 U.S. Dist. LEXIS 4748, 20 (Mar. 20, 2002) and *Office of Thrift Supervision v. Paul*, 985 F.Supp. 1465 (S.D. Fla. 1997) for the proposition that federal trial courts do not have jurisdiction to review FDIC orders. But again, these cases address only 12 U.S.C. 1818 and show why Radatz and the class can get a judgment in Ohio court: § 1818 enables the regulated entity to get court review, for example, by appealing the order—something that Radatz and the class—who are not the regulated entity or even a party to the consent order.—cannot do. As pointed out in *Paul*, "Paul was free to argue the merits of the OTS's actions either during the administrative proceeding . . . or on appeal to the Eleventh or D.C. Circuit Courts of Appeals within thirty days of the issuance of the Final CMP Order, or in both fora. . . . He did not and cannot now attempt to remedy that error[.]" *Paul*, 985 F.Supp. at 1471. *See also Leuthe v. Office of Fin. Inst. Adjudication*, 977 F.Supp. 357, 363 (E.D. Pa. 1997) (declining jurisdiction because § 1818(h)(2) provided mechanism for appellate review). Likewise, Fannie Mae cites *Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999) in its Br. at 13 and 17, but that case highlights the difference between a party to a consent order and a non-party like Radatz: "A party may obtain review of the order issued by the banking agency by filing it in a Court of Appeals of the United States. See 12 U.S.C. § 1818(h)(2)." *Id*. at 597.

IV. If this Court finds that—regardless of whether statutory damages under R.C. 5301.36 are in the nature of a penalty—the consent order precludes the trial court from entering a judgment in Radatz's favor, then the consent order violates due process and is void.

A. Introduction.

When the government acts against one person (Fannie Mae) for the purpose of injuring another (Radatz), the affected individual (Radatz) is denied due process if she does not receive a hearing. See *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 789 n.22 (1980). Here, the consent order only cites the penalty bar found at 12 U.S.C. § 4617(j)(4), as noted by the court of appeals. But, according to Fannie Mae, the consent order expressly denies Radatz a recovery in this case, regardless of whether Fannie Mae's payment of a judgment would violate the penalty bar. If that interpretation of the order is correct, and Radatz agrees with the Eighth District that it is not correct, then the purpose of the consent order is to punish Radatz, and her due process rights have been violated.

How do we know that the consent order is directed against Radatz using Fannie Mae's approach? First, and foremost, under state and federal law, there is no penalty at issue here. Neither Fannie Mae nor FHFA (in the consent order) has cited a single case that supports the conclusion that the statutory damages at issue in this case are in the nature of a penalty. Instead, the only case that is directly on point, *Rosette*, is to the contrary. Second, FHFA made no findings of fact or law, so FHFA did not find that the statutory damages at issue in this case are in the nature of a penalty. Third, 12 U.S.C. § 4617(j)(4) is already federal law. Simply typing up a consent order that tells Fannie Mae not to violate a law that has been in place for five years does not impose any new obligation on Fannie Mae, so the only purpose in preparing the consent order would be to punish Radatz.

Because the consent order adds nothing to § 4617(j)(4), it has no effect on Radatz, unless the Court accepts Fannie Mae's interpretation of the consent order. In that case, the order would only affect Radatz, and the class members, by denying them a recovery, to which they would otherwise be entitled to receive under Ohio law, and which is not otherwise precluded by federal law.

B. When the government intentionally injures a person by action against them, without granting the injured person a hearing, the injured person's due process rights are violated.

"[W]here the government indirectly yet intentionally injures or affects the legal status of a person by an action taken directly against a private third party, the injured person [can] maintain a due process challenge against the government." *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir. 1986). In *Merritt*, the government threatened to cut off funding to Klamath Alcohol and Drug Abuse, Inc. ("KADA"), unless KADA fired Merritt. KADA fired Merritt, and Merritt sued for violation of his due process rights. *Id*. at 1370. The Ninth Circuit held that Merritt's due process rights could not be satisfied by a post-deprivation hearing, and that the defendants "should have known that they could not cause Merritt's summary dismissal without violating his due process rights." *Id*. at 1372-73.

C. The purpose of the consent order was to punish Radatz by preventing her and the class from collecting a judgment in this case.

Here, FHFA's action would be directed to Fannie Mae by ordering it to cease and desist from any payments violating § 4617(j)(4). But accepting Fannie Mae's position, the true target of the order is Radatz and the class she represents. That is clear from the process involved in the issuance of the Order. Without any objection from Fannie Mae, FHFA failed to follow all of the required statutory procedures for issuing an agency order, including charges, hearing, findings, and making a record.

The first procedural requirement for the issuance of an agency cease-and-desist-order by FHFA is that the Director of FHFA shall serve upon "[a] regulated entity ... a notice of charges in respect thereof." 12 U.S.C. § 4631(a). No notice of charges was served. Fannie Mae's Appx. A-035.

The next procedural requirement is that a hearing be scheduled. 12 U.S.C. § 4631(c)(1). The purpose of a hearing is to "determine on the record whether an order to cease and desist from such practice or violation should issue[.]" *Id*. No hearing was scheduled.

After the hearing, "the Director shall render the decision (which shall include findings of fact upon which the decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders[.]" 12 U.S.C. § 4633(b)(1). No findings of fact were made. Just the opposite, the documents went out of the way to note that the order was issued "before the finding of any issues of fact or law." Fannie Mae's Appx. A-035.

Under these circumstances, if Fannie Mae is correct that the consent order prohibits Radatz and her class from recovering without regard to whether payment would be a penalty in violation of 4617, then the consent order directly punishes Radatz and her class. She and the class would then have a due process right to a hearing that they never received.

D. A financial incentive for the regulated party to contest the enforcement decision would support a conclusion that the indirectly-affected individuals' due process rights were not violated.

The court explained in *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035 (D.C. Cir. 1998) that "parties suffering an indirect adverse effect of a government action 'clearly have no constitutional right to participate in the enforcement proceedings' when the directly regulated party had a 'strong financial incentive to contest [the government's] enforcement decision.'" *Id*. at 1041. The inverse is also true. When the directly regulated party (Fannie Mae) has no incentive to contest the enforcement decision, the party suffering an indirect adverse effect (Radatz) has a constitutional right to participate in the enforcement proceedings. Fannie Mae had no incentive to contest the consent order. To the contrary, the consent order allows Fannie Mae to safeguard its $84 billion in profits from 2013, and avoid paying a judgment to over one hundred thousand Ohio residents for its non-compliance with Ohio real property law.

E. Radatz's legal claim is a form of property that falls within the protection of the due process clause.

"There is no dispute that a legal cause of action constitutes a 'species of property protected by the Fourteenth Amendment's Due Process Clause.'" *New York State Natl. Org. for Women v. Pataki*, 261 F.3d 156, 163 (2d Cir. 2001), quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Shvartsmann v. Apfel*, 138 F.3d 1196, 1199 (7th Cir. 1998) ("legal claims . . . are forms of property that fall within the protection of the Due Process Clause."). Radatz and the class members have legal claims against Fannie Mae for statutory damages. They have a property interest that is protected by the Due Process Clause. And if Fannie is right that the Order cut off those rights with no notice, hearing or findings, they were denied due process.

An order that violates an individual's due process rights is "void and unenforceable." *Gunter v. Merchants Warren Natl. Bank*, 360 F.Supp. 1085, 1091 (D. Maine 1973) (rules that "permit the prejudgment attachment of real estate without prior notice and hearing violate the Due Process Clause. . . and are hence void and unenforceable"); *County of San Diego v. Gorham*, 186 Cal. App. 4th 1215, 1226 (2010) (a judgment is void on its face if violates constitutional due process); *State v. Hart*, No. 23977, 2004 Haw. LEXIS 573 (Sup. Ct. Hawaii, Aug. 32, 2004) (provision that violates procedural due process is unenforceable). Therefore, if Fannie Mae is correct that the consent order prohibits Radatz from recovering her statutory damages regardless of whether the statutory damages in this case are in the nature of a penalty, the order violates her due process rights, and is void and unenforceable.

CONCLUSION

Under state law, as determined by this Court in *Rosette*, there is no penalty or fine at issue in damages awarded under R.C. 5301.36. The outcome is no different under federal law which likewise "is informed by state law on the issue." Directing Fannie Mae against paying any judgment in violation of 12 U.S.C. 4617—which bars payment of fine or penalty—is not violated by a payment which is not.

A court properly reads a consent order to determine whether its proceedings conflict with the order. Fannie Mae's effort to close the court's eyes to the order's language—by repeatedly misquoting the order to omit "in violation of 4617"—was properly rejected by the court of appeals. Likewise properly rejected was Fannie Mae's spurious claim of lack of subject matter jurisdiction based on overriding federal law. Fannie Mae twice removed this matter to federal court, claiming the case was controlled by federal law, and twice the federal court told Fannie Mae that it was wrong. Most significantly, Fannie's removal in 2008 relied specifically on 12

U.S.C. 4617--the exact statute Fannie now claims strips this court of its authority—but the federal judge remanded to state court, finding no federal question.

More interesting is the fact that the statute Fannie Mae cites (§ 4617) by its express terms only applies to the Agency, FHFA, not Fannie. Fannie Mae was able to convince the agency to sign a consent order applying the penalty bar to Fannie Mae, but could not convince the agency to issue a finding that payment of late release damages in Ohio are a penalty. Having signed the consent documents with no complaint, no notice, and no hearing as all are required by federal law, the agency was not in a position to make any findings for Fannie, and went out of its way to say so. So when Fannie Mae insists that state and federal law are inapposite because 'the consent order tells us everything we need to know about this issue and FHFA already found this to be a penalty', FHFA took pains to note that it made no findings in issuing the consent order.

In conclusion, the court of appeals saw Fannie obtaining the 'consent order' for exactly what it was: a last ditch attempt to avoid R.C. 5301.36. The consent order focused on the penalty bar under 4617, but that was enacted five years ago in 2008 under HERA. If federal law prohibited a judgment against Fannie in this case, the able lawyers representing Fannie would have raised the issue in 2008.

It is troubling that a four-paragraph complaint alleging undisputed facts has been dragged out for over 10 years. The longer Fannie Mae can do so, the more likely it is that many homeowners in this class will not live to see their recovery.

This case presents a very insular, discrete situation which will never again be seen in this state. The court of appeals did exactly what it should have done, and should be affirmed. Further, the briefing here suggests there is no issue of great public or general interest, which would allow disposition of this matter, alternatively, with a finding that review was improvidently allowed.

Respectfully submitted,

/s/ Patrick J. Perotti

Patrick J. Perotti, Esq. (#0005481)
James S. Timmerberg, Esq. (#0067499)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*
jtimmerberg@dworkenlaw.com

Brian Ruschel, Esq. (#0046631)
925 Euclid Avenue, Suite 660
Cleveland, Ohio 44115-1405
(216) 621-3370 (216) 621-3371 Fax
Email: *bruschel@aol.com*

Counsel for Plaintiff-Appellee, Rebekah R. Radatz

PROOF OF SERVICE

A copy of Plaintiff-Appellee's Merits Brief was served on March 4, 2015:

Richard S. Gurbst, Esq.
SQUIRE PATTON BOGGS (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114—1304
Email: *richard.gurbst@squirepb.com*

J. Philip Calabrese, Esq.
PORTER WRIGHT MORRIS & ARTHUR LLP
950 Main Avenue, Suite 500
Cleveland, OH 44113-7206
Email: *pcalabrese@porterwright.com*

Counsel for Defendant-Appellant,
Federal National Mortgage Association

Stephen E. Hart, Esq.
Deputy General Counsel
FEDERAL HOUSING FINANCE AGENCY
Constitution Center
400 Seventh Street, S.W.
Washington, D.C. 20024
Email: *stephen.hart@fhfa.gov*

Anne Marie Sferra, Esq.
Sommer L. Sheely, Esq.
BRICKER & ECKLER, LLP
100 South Third Street
Columbus, OH 43215
Email: *asferra@bricker.com*
ssheely@bricker.com

Counsel for Amicus Curiae Federal Housing Finance Agency

And as a courtesy to:

Brian Ruschel, Esq.
925 Euclid Avenue, Suite 660
Cleveland, Ohio 44115-1405
Email: *bruschel@aol.com*

Counsel for Plaintiff-Appellee,
Rebekah R. Radatz

And to:

Jeffrey M. McGaffick, Esq.
571 East 185th Street
Cleveland, Ohio 44119
Email: *jmcgaffick@hotmail.com*

Counsel for Amicus Curiae First Priority Title Agency

/s/ Patrick J. Perotti

Patrick J. Perotti, Esq. (#0005481)
James S. Timmerberg, Esq. (#0067499)
DWORKEN & BERNSTEIN CO., L.P.A.

One of the Attorneys for Plaintiff-Appellee
Rebekah R. Radatz

FILED
2003 SEP 15 PM 12:52
CLEVELAND OHIO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

REBEKAH R. RADATZ, individually and on behalf of all others similarly situated,	)	Case No. 1:03CV1945
Plaintiff,	)	Judge JUDGE OLIVER
v.	)	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	**NOTICE OF REMOVAL**
Defendant.	)	

MAG. JUDGE HEMANN

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1442, defendant Federal National Mortgage Association ("Fannie Mae") hereby removes to this Court the action entitled Radatz v. Federal National Mortgage Association, Case No. CV-03-507616, filed on August 7, 2003 in the Common Pleas Court for Cuyahoga County and served upon Fannie Mae on August 14, 2003 (the "Action"). Removal is based on the grounds that: (1) federal subject matter jurisdiction is conferred upon claims against Fannie Mae pursuant to Title III of the National Housing Act, 12 U.S.C. § 1716, et seq. ("Fannie Mae Charter Act"), and (2) federal jurisdiction exists because this case involves an Action against "an[] officer (***or any person acting under that officer***) of the United States or an[] agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). This Notice of Removal is timely because it has been filed within the thirty-day period prescribed by 28 U.S.C. § 1446(b). Copies of the plaintiff's complaint (the "Complaint") and other documents, constituting the entire Cuyahoga County Court file in the Action, are attached as Exhibit A.

COMPLAINT

1. On August 7, 2003, plaintiff Rebekah H. Radatz filed the Complaint against Fannie Mae in the Court of Common Pleas for Cuyahoga County, Ohio. (A true and correct copy of the Complaint is attached as part of Exhibit A.)

2. Plaintiff's complaint alleges one claim, purportedly on behalf of a class of persons similarly situated, relating to the timing for recordation of mortgages that have been satisfied in full. (Compl. ¶ 1.)

SERVICE OF THE COMPLAINT

3. Fannie Mae was first served with a copy of the Complaint and Summons on August 14, 2003. This Notice of Removal is timely because it has been filed within the thirty-day period prescribed by 28 U.S.C. § 1446(b).

JURISDICTION

4. Removal is proper and federal jurisdiction exists over this Action pursuant to 28 U.S.C. §§ 1441 and 1442 for two independent reasons. First, federal jurisdiction is proper under 28 U.S.C. § 1441, because the Fannie Mae Charter Act confers federal subject matter jurisdiction upon claims against Fannie Mae. See 12 U.S.C. § 1723a(a). Second, this claim involves an action against Fannie Mae, which is a federal instrumentality and is therefore entitled to removal under 28 U.S.C. § 1442.

FANNIE MAE'S CHARTER ACT CONFERS FEDERAL JURISDICTION

5. Fannie Mae is a shareholder-owned, congressionally chartered federal instrumentality that was established to carry out vital public policies prescribed by the statute: to create a secondary market for residential mortgage financing, stimulate the flow of private capital into housing, and improve the affordability of homeownership. See 12 U.S.C. § 1716.

6. Federal subject matter jurisdiction exists in this action by virtue of 12 U.S.C. § 1723a(a), a provision of the Fannie Mae Charter Act that grants Fannie Mae authority "to sue and be sued, and to complain and to defend," in federal court. Cf. American National Red Cross v. S.G. & A.E., 505 U.S. 247, 256 (1992) (holding "sue and be sued" provision in charter act of federal chartered corporation that expressly mentions federal courts confers original federal jurisdiction over all cases to which the federally chartered corporation is a party "with the consequence that the organization is thereby authorized to removal from state to federal court of any state-law action it is defending."); Grun v. Countrywide Home Loans, Inc., No. SA-03-CA-141-EP (W.D. Tex. Apr. 9, 2003) (denying motion to remand based on Fannie Mae Charter Act).

FEDERAL OVERSIGHT OF FANNIE MAE PROVIDES AN ADDITIONAL BASIS FOR FEDERAL JURISDICTION

7. Separate and apart from the Fannie Mae Charter Act, federal jurisdiction over this Action exists because it involves claims against Fannie Mae "acting under" one or more officers the United States. See 28 U.S.C. § 1442(a)(1). The federal office removal statute is to be interpreted broadly to further the statute's purpose. Peterson v. Blue Cross/Blue Shield of Texas, 508 F.2d 55, 58 (5th Cir. 1975) ("The federal officer removal statute is not 'narrow' or 'limited,'" and its policy "should not be frustrated by a narrow, grudging interpretation of 1442(a)(1)."). Federal officer removal is proper where a defendant can (1) establish a causal connection between the claims asserted and actions taken pursuant to official authority; and (2) articulate a colorable federal defense. See Jefferson County, Ala. v. Acker, 527 U.S. 423, 431 (1999); see also Mesa v. California, 489 U.S. 121, 139 (1989). In an opinion that the court in Dixon v. Georgia Indigent Legal Services, Inc., 388 F. Supp. 1156, 1162-63 (S.D. Ga. 1975), aff'd 532 F.2d 1373 (5th Cir. 1976), praised as "buttressed by ample authority" and "reach[ing]

the proper result," the district court in Gurda Farms, Inc. v. Monroe County Legal Assistance Corp., 358 F. Supp. 841, 844 (S.D.N.Y. 1973), found federal officer removal to be particularly appropriate where the removing party is subject to "exceedingly complex regulations, guidelines and evaluation schemes."

8. Fannie Mae clearly meets the first prong of removal under 28 U.S.C. § 1442 because of the extensive oversight scheme under which it operates, and because of its public charter and mission. Although Fannie Mae is owned by private shareholders, Fannie Mae is (1) a federally chartered enterprise under the Fannie Mae Charter Act, that (2) operates under the direct and detailed control of Presidentially-appointed members of its Board of Directors, as well as the United States Department of Housing and Urban Development ("HUD"), the Office of Federal Housing Enterprise Oversight ("OFHEO"), and Congress. Five of Fannie Mae's board members are appointed annually by the President of the United States. See 12 U.S.C. § 1723(b). HUD and OFHEO have extensive regulatory control over Fannie Mae, extending from assessing Fannie Mae's financial condition and operations, to setting and analyzing Fannie Mae's progress towards particular housing goals. See 12 U.S.C. § 1723a(k) and (m). And not only is Fannie Mae required to submit a detailed annual report to Congress on all aspects of its business practices, but Congress sets up the very business structure in which Fannie Mae operates through the Fannie Mae Charter Act, through which Congress dictates, for example, the types of mortgages Fannie Mae can purchase, the amount of capital distributions the corporation can make, and, more broadly speaking, the market in which Fannie Mae operates. See 12 U.S.C. § 1716, et seq. Indeed, Fannie Mae's mission is a federal one – to tear down barriers, lower costs, and increase the opportunities for homeownership and affordable rental housing for all

Americans. See 12 U.S.C. § 1716. Therefore, Fannie Mae operates under the control of federal officers for purposes of removal under 28 U.S.C. § 1442.

9. The second prong of removal under 28 U.S.C. § 1442 is easily satisfied by virtue of the numerous federal defenses that are evident from the face of plaintiff's complaint. Although removal jurisdiction does not depend on an evaluation of the merits of these defenses, see, e.g., Magnin v. Teledyne Continental Motors, 91 F.3d 1424, 1427 (11th Cir. 1996), the plaintiff's claims are untenable under federal law, because Fannie Mae is unable to originate loans. Specifically, the Fannie Mae Charter Act dictates that Fannie Mae's business operate in the secondary mortgage market, and only permits Fannie Mae to "purchase, service, sell, [or] lend" mortgages. See 12 U.S.C. § 1716, 1717(b). The statute under which plaintiff has filed her claim distinguishes between originators (mortgagees) and purchasers (assignees) of mortgages: while Ohio Rev. Code § 5301.34 allows for the release of a mortgage after a deed of release is received from a "mortgagee or the mortgagee's assigns," the provision on which plaintiff's claims are based – Ohio Rev. Code § 5301.36 – imposes a recordation burden only on mortgagees, but not on assignees like Fannie Mae. Because Fannie Mae is prohibited by federal law from acting as a mortgagee (and for this reason did not act as a mortgagee with respect to the loan at issue in this case) Fannie Mae has a federal defense based on the limitations on its activities imposed by the Fannie Mae Charter Act. This clearly applicable federal defense satisfies the second requirement for federal-officer removal.

VENUE

10. Venue for removal is proper in this district and division under 28 U.S.C. § 1441(a) because this district and division embrace the Common Pleas Court for Cuyahoga County, the forum in which the removed action was pending. See N.D. Ohio Local Rule 3.8(a).

NOTICE

11. Pursuant to 28 U.S.C. § 1446(a), Fannie Mae has attached true and correct copies of all process, pleadings, and orders served upon Fannie Mae as of the date of this Notice.

12. As required by 28 U.S.C. § 1446(d), Fannie Mae will promptly serve upon plaintiff's counsel and file with the Court of Common Pleas for Cuyahoga County a true and correct copy of this Notice.

13. By removing this action to this Court, Fannie Mae does not waive any defenses available to it.

WHEREFORE, Fannie Mae respectfully removes this action from the Court of Common Pleas for Cuyahoga County to this Court pursuant to 28 U.S.C. §§ 1441 and 1442.

Dated: September 15, 2003

Respectfully submitted,

Richard S. Gurbst (0017672)
rgurbst@ssd.com
J. Philip Calabrese (0072709)
pcalabrese@ssd.com
Squire, Sanders & Dempsey L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1304
(216) 479-8500
(216) 479-8780 – Facsimile

Attorneys for Defendant
Federal National Mortgage Association

CERTIFICATE OF SERVICE

True and correct copies of the foregoing Notice of Removal were served this 15th day of September 2003 via U.S. First Class Mail, postage prepaid, on:

Brian Ruschel
925 Euclid Avenue, Suite 660
Cleveland, OH 44115-1405

Patrick J. Perotti
Dworkin & Bernstein Co., L.P.A.
60 South Park Place
Painesville, OH 44077

One of the attorneys for Defendant
Federal National Mortgage Association

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBEKAH R. RADATZ, *et al.*,	)	Case No.: 1:03 CV 1945
	)	
Plaintiff	)	JUDGE SOLOMON OLIVER, JR.
	)	
v.	)	
	)	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	
	)	
	)	
Defendant	)	ORDER OF REMAND

Pending before the court is Plaintiff Rebekah Radatz's ("Plaintiff" or "Radatz") Motion to Remand (ECF No. 6). Because the Complaint in the above-captioned matter does not fall within the original jurisdiction of this court, the Motion is granted, and this case is hereby remanded to the Cuyahoga County Court of Common Pleas, where the action was originally filed.

I. FACTS

On August 7, 2003, Radatz filed this action on behalf of herself and all others similarly situated in the Cuyahoga County Court of Common Pleas against the Federal National Mortgage Association ("Fannie Mae" or "Defendant"). Fannie Mae is a federal government-sponsored private corporation created by Congress to establish secondary market facilities for home mortgages and, among other things, to provide stability in the secondary market for home mortgages. 12 U.S.C. §§ 1716, 1716b. The sole claim raised in the Complaint alleges violation of Ohio Revised Code § 5301.36, which imposes requirements regarding the recording of mortgage satisfactions. Plaintiff maintains she paid off a mortgage where Fannie Mae was the mortgagee, and that Fannie Mae did not record the satisfaction of the mortgage within the time required by law. As a result, Plaintiff seeks damages under the statute.

On September 15, 2003, Fannie Mae filed its notice of removal based on 28 U.S.C. §§ 1441 and 1442. First, Fannie Mae argues that its charter language grants federal question jurisdiction over all suits brought against it. Second, Fannie Mae contends that it may remove this action to federal court under the federal officer removal statute. As part of its argument, Fannie Mae contends that it has a federal defense because its charter requires it to operate only in the secondary mortgage market. Thus, it is only allowed to "purchase, service, sell, or lend" mortgages. 12 U.S.C. § 1716, 1717(b). Defendant maintains that unlike Ohio Revised Code § 5301.34, which provides for the release of a mortgage after a deed of release is received from a "mortgagee or the mortgagee's assigns," Ohio Revised Code § 5301.36, which provides for the recording of the satisfaction of the mortgage, "distinguishes between originators (mortgagees) and purchasers (assignees)" of a mortgage and applies to only originators. Consequently, Fannie Mae maintains that the statute imposes no obligation on assignees like itself.

II. LAW AND ANALYSIS

Removal of an action from state to federal court is allowed when the federal court has original jurisdiction over the action. 28 U.S.C. § 1441(a). A removed case must be remanded "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). The party seeking to remove a case to federal court carries the burden of establishing that jurisdiction exists. *See Gafford v. General Electric Co.*, 997 F.2d 150, 155 (6th Cir. 1993). All disputed questions of fact, all ambiguities in controlling law, and all doubts as to the propriety of removal must be resolved in favor of remand. *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999).

In its notice of removal, Fannie Mae states that the court has subject matter jurisdiction over the claims in this action pursuant to its charter, 12 U.S.C. § 1716 *et seq*. (the "Fannie Mae Charter Act"). Alternatively, it claims that under 28 U.S.C. § 1442(a)(1), jurisdiction exists because this action involves a person acting under an officer of the United States. In its Motion to Remand, Radatz contends that neither Fannie Mae's charter nor § 1442(a) confer subject matter jurisdiction on this court. For the reasons discussed herein, the court agrees.

A. Removal under Fannie Mae's Charter

Fannie Mae first contends that the language contained in its charter confers federal courts with original jurisdiction over claims asserted against it. Specifically, it points out that its charter provides that Fannie Mae "shall have the power . . . in its corporate name, to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal . . . ." 12 U.S.C. § 1723a(a). In support, Fannie Mae cites to *American Natl Red Cross v. S.G.*, 505 U.S. 247 (1992), where the United States Supreme Court considered whether the language in the American Red Cross' charter conferred jurisdiction on federal courts. The Red Cross charter provides: "The American National Red Cross'... shall have ... the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States . . . ." 36 U.S.C. § 2. The court held that this "sue and be sued" provision conferred original jurisdiction on federal courts in litigation involving the Red Cross so as to authorize the Red Cross to remove cases from state court for federal adjudication. *Id.* at 257. The Court explained that federal court jurisdiction is provided by such a statute "if, but only if, it specifically mentions the federal courts." *Id.* at 255. Thus, contends Fannie Mae, federal courts have jurisdiction over claims asserted against it based on Fannie Mae's charter language.

In response, Radatz argues that the language in Fannie Mae's charter is sufficiently different from the language in the American Red Cross charter, such that federal courts do not have subject matter jurisdiction over claims brought against Fannie Mae. Specifically, Radatz notes that Fannie Mae's charter includes the limitation that suits may only be maintained in federal or state courts "of competent jurisdiction," whereas Red Cross' charter contains no such limitation. In support, Radatz cites to *Saraco v. Hallett*, 831 F. Supp. 1154 (E.D. Pa. 1993), where the court recognized this distinction as significant. In *Saraco*, the court reviewed language contained in the Fair Labor Standards Act ("FLSA"), which provided that a suit may be maintained in federal or state courts of competent jurisdiction. The court concluded that the *American Red Cross* holding was not applicable to the facts of the case before it because the "'competent jurisdiction' language illustrates that the FLSA itself does not confer jurisdiction, but rather relies upon other jurisdictional statutes to define which courts are competent to entertain FLSA claims." *Id.* at 1162. Thus, this language did not extend general federal question jurisdiction to suits under the FLSA against federal agencies; jurisdiction over such lawsuits for more than $10,000 was limited to the Court of Claims under the Tucker Act.

Several other courts have adopted the conclusion that the "courts of competent jurisdiction" language is a limitation on jurisdiction. In *Poindexter v. National Mortg. Co.*, 1995 WL 242287 (N.D.

Ill. Apr. 24, 1995), the court considered whether the Government National Mortgage Association ("GNMA") was amenable to suit in federal court based on § 1723a(a), the same charter language at issue in this case. *Id.* at *10. The court noted that the holding in *American Red Cross* was not controlling because GNMA's charter "is distinguished by the phrase 'in any court of competent jurisdiction, State or Federal' implying that one must look elsewhere to determine competence." *Id.* Likewise, in *Western Securities Co. v. Derwinski*, 937 F.2d 1276 (7th Cir. 1991), the United States Court of Appeals for the Seventh Circuit concluded that a provision similar to Fannie Mae's, permitting the Veteran's Administrator to sue or be sued in a state or federal court of competent jurisdiction, was "better read as a waiver of sovereign immunity than as a grant of jurisdiction." *Id.* at 1279.

Based on these holdings, the court concludes that Fannie Mae's charter does not confer federal courts with subject matter jurisdiction such that Fannie Mae may remove cases from state to federal court. As was the case in *Saraco* and *Poindexter*, the "court of competent jurisdiction" language does not itself confer jurisdiction, but rather relies on other jurisdictional statutes to define which courts are competent. The court does not find the two recent cases Fannie Mae cites in support of its position to be persuasive. *Connelly v. Fed. Nat. Mortg. Ass'n*, 251 F. Supp.2d 1071 (D. Conn. 2003), was removed to the district court. Thereafter, the court dismissed the only claim against Fannie Mae for failure to state a claim upon which relief could be granted and remanded the supplemental claims against the remaining parties to the state court. The court noted in its decision to remand that since the claim against Fannie Mae which provided subject matter jurisdiction over the action under § 1723a, on authority of *American Red Cross*, had been dismissed, there were no other federal claims before the court. *Id.* at 1072-73. Because removal jurisdiction was not contested in *Connelly*, there was no discussion or analysis by the court of the Fannie Mae charter language in comparison to that in the American Red Cross charter. Similarly, the court in *Grun v. Countywide Home Loans, Inc.*, slip op., case no.5A-03-CA-141-EP (W.D. Tex. Apr. 9, 2003) (Prado, J.) did not conduct any detailed comparison between the charter language involved in that case and the language in the charter of the American Red Cross. The court concluded there was jurisdiction merely because the words "federal courts" were mentioned. It did not analyze what effect, if any, the words "court of competent jurisdiction" have on a determination of whether or not jurisdiction existed in the case. For the reasons discussed above, this court finds that the Court in *American Red Cross* did not hold that the mere mention of federal courts in a charter was sufficient to confer jurisdiction. While those words were a necessary condition in *American Red Cross* to a finding of jurisdiction, there was no indication by the court that the words alone were a sufficient condition. In comparing the charter language involved in this case to the charter language in those cases where the court has found jurisdiction as well as to those cases where the court has found no jurisdiction, the court concludes that the Fannie Mae charter does not confer jurisdiction for the reasons discussed above.

Because the court concludes that Fannie Mae's charter itself does not confer jurisdiction on federal courts, Fannie Mae's removal on this basis was improper.

B. Removal under § 1442(a)

Alternatively, Fannie Mae argues that jurisdiction exists because this action involves a person acting under an officer of the United States as required by 28 U.S.C. § 1442(a)(1).

Section 1442(a)(1) provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Under this provision, a non-officer defendant may remove an action from state court by establishing the following elements: (1) that it is a "person" within the meaning of the statute; (2) that it acted pursuant to a federal officer's directions, and that a causal nexus exists between the defendant's actions under color of federal office and the plaintiff's claims; and (3) that it has a colorable defense to the plaintiff's claims. *Mesa v. California*, 489 U.S. 121(1989); *Willingham v. Morgan*, 395 U.S. 402 (1969). A defendant satisfying these requirements possesses an absolute right to remove an action to federal court, regardless of whether the lawsuit originally could have been brought in federal court. *Willingham*, 395 U.S. at 406. In clarifying the scope of the statute, the Supreme Court instructed that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation." *Id.* at 406-07.

As to the first element, Fannie Mae qualifies as a "person" under the federal officer removal statute. While courts at one time expressed serious doubt about whether a corporation qualified as a "person" under the federal officer statute, *see e.g Intl Primate Protection League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991); *Arnold v. Blue Cross and Blue Shield of Texas, Inc.*, 973 F. Supp. 726, 739 (S.D. Tex. 1997), Congress amended the federal officer statute to its present form in 1996 and plainly authorized removal by agencies, individual officers, and corporations. *See State of Nebraska, ex rel., Depart. of Social Services v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998). Based on this authority, corporations such as Fannie Mae qualify as a "persons" under § 1442(a)(1).

Under the second element, the court must first determine whether Fannie Mae acted under the direction of a federal officer, and then whether a causal nexus exists between Fannie Mae's actions, under the color of federal office, and Radatz's claim. These two inquiries are intertwined; the real question may be reframed as whether Fannie Mae acted, under the direction of a federal officer, to bring about the harm Radatz complains of.

A central issue in evaluating this element is determining how detailed federal control must be to establish a causal nexus. Several courts have held that the federal officer must have "'direct and detailed control' over the defendant." *Fung v. Abex Corp.*, 816 F.Supp. 569, 572 (N.D. Cal.1992); *see also Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 947 (E.D.N.Y.1992). However, the 1996 amendments to § 1442(a)(1) were intended to legislatively overturn a number of judicial decisions that had narrowed the scope of officer removal jurisdiction. H.R. Rep. No. 104-798 (1996). Consequently, the post-amendment cases favor a less restrictive interpretation of the level of federal agency direction required over a defendant to invoke federal jurisdiction. *See AIG Europe, Ltd. v. McDonnell Douglas Corp.*, 2003 U.S. Dist. LEXIS 2770 (C.D.Cal Jan. 27, 2003); *Thompson v. Cmty. Ins. Co.*, 1999 U.S. Dist. LEXIS

21725 at *20 (W.D.Ohio Mar. 3, 1999) ("[t]he Defendant need not have acted pursuant to a direct order . . .[i]t is sufficient for purposes of federal officer removal jurisdiction if the acts underlying the Plaintiff's lawsuit were performed pursuant to comprehensive and detailed regulations.")

In *Thompson*, the court found that an HMO that provided and then terminated plaintiffs' Medicare coverage was operating under the direction of the federal Health Care Financing Agency for purposes of the federal office removal statute. 1999 U.S. Dist. LEXIS 21725. In reaching this conclusion, the court highlighted a number of factors that are instructive in analyzing the instant case: (1) the Medicare programs offered by the HMO were a creature of a federal statute permitting delegation of administrative authority; (2) the federal statute provided that the Secretary of Health and Human Services ("HHS Sec'y") should administer Medicare programs directly or by contract; (3) the HMO provided services to Plaintiffs in return for monthly flat payments from the HHS Sec'y; (4) the federal government regulates the conduct of HMOs in providing Medicare services and imposes sanctions if necessary; (5) all aspects of the HMO's relationship with the Plaintiffs were governed by "a multitude of contractual, administrative, and statutory regulations" imposed by the government, including the precise contractual language that was the root of the lawsuit; and (6) while the government did not order the HMO to cancel plaintiffs' contracts, the government did authorize the HMO to undertake "service area reductions." *Id.* at *12-*16.

In the instant case, Fannie Mae argues that it is a federally-chartered enterprise organized under the Fannie Mae Charter Act and that it operates under the "direct and detailed" control of its Board of Directors, five members of which are appointed by the President of the United States. It also asserts that with respect to its financial condition and its operations, it is regulated significantly by the United States

Department of Housing and Urban Development and the Office of Federal Housing Enterprise Oversight, as well as by Congress. Further, Congress dictates "the types of mortgages Fannie Mae can purchase, the amount of capital distributions the corporation can make, and, more broadly speaking, the market in which Fannie Mae operates." (Opp. Br. at 6).

Despite these arguments, the *Thompson* factors counsel against a finding that Fannie Mae's failure to record Plaintiff's mortgage satisfactions was an action taken under the control of a federal officer. While Fannie Mae is a creature of federal statute, there is no federal officer responsible for directing or overseeing its programs in the way the HHS Sec'y did in *Thompson*. While the government does regulate Fannie Mae, there is no evidence that federal regulations or orders specifically affected Fannie Mae's relationship with Plaintiff or Fannie Mae's decision to not record Plaintiff's mortgage satisfactions in the statutory time period, which is the root of this dispute. There is no evidence that there is any federal officer responsible for directing it to file or not file a mortgage satisfaction in this case. Fannie Mae's argument, pure and simple, is that, by virtue of the restrictions placed on it by its charter and other governmental regulations, it only operates in the secondary mortgage market. If Fannie Mae is correct in its interpretation of Ohio Revised Code § 5301.36, this has implications for the case. If that section does not apply to assignees of mortgages and only to originators of mortgages as argued by Fannie Mae, then it was not required by state law to record the satisfaction of Plaintiff's mortgage. But, to reiterate, there is nothing to suggest that these actions are dictated by, controlled, or required by a federal officer. The relationship between the government and Fannie Mae is unlike the subcontractor relationship between the HMO and HHS Sec'y in *Thompson*. Fannie Mae is not a service provider that is paid by the federal government, but a government-chartered corporation that has its broad goals and purpose set by the federal government, but conducts business on its own. There is insufficient evidence of a causal nexus between Fannie Mae's actions, under the color of federal office, and Radatz's claim.

This conclusion is supported by *Arness v. Boeing North American, Inc.*, 997 F. Supp. 1268 (C.D. Cal. 1998). In *Arness*, the plaintiffs sued a government contractor for injuries sustained from negligent disposal and storage of a toxic chemical. *Id.* The defendant-corporation removed the action, claiming that the chemical was used in the testing and manufacturing of rocket engines, actions performed pursuant to a federal contract. *Id.* at 1270. The court remanded the case, reasoning that the plaintiffs' complaint alleged improper disposal and storage of the toxic chemical, actions that were not performed under the direct and detailed control of a government officer. *Id.* In the instant case, while Fannie Mae indisputably has a relationship with the federal government, the actions challenged by Plaintiffs were not performed under the direct and detailed control of a federal officer. Thus, the court finds that Fannie Mae has not established federal jurisdiction under § 1442(a)(1), and removal to federal court was improper.

III. CONCLUSION

For the foregoing reasons, this court is without original jurisdiction to hear the instant case. Because the case was improperly removed from state court, the court must remand it back to the court in which it was originally brought. Accordingly, Plaintiffs' Motion to Remand (ECF No. 6) is granted, and this case is remanded to the Cuyahoga County Court of Common Pleas.

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

September 23, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

REBEKAH R. RADATZ, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	Civ. Action No. __________________
v.	)	
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	
Defendant.	)	

DEFENDANT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S NOTICE OF REMOVAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1349 and 1441, defendant Federal National Mortgage Association ("Fannie Mae"), under authority delegated by its Conservator, the Federal Housing Finance Agency ("FHFA") (*see* Order Regarding Functions and Authorities of Officers, dated September 6, 2008, attached at Exh. 1), hereby removes to this Court the action entitled *Radatz v. Federal National Mortgage Association*, Case No. CV-03-507616, filed on August 7, 2003 in the Common Pleas Court for Cuyahoga County and served upon Fannie Mae on August 14, 2003 (the "Action"). The grounds for removal are as follows:

1. On September 6, 2008, the Director of the FHFA placed Fannie Mae into conservatorship in accordance with the Federal Housing Finance Regulatory Reform Act of 2008 (Public Law 110-289) ("Housing and Economic Recovery Act") and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. § 4501, *et seq*.). (*See* Order

Regarding Functions and Authorities of Officers, attached at Exh. 1, and Questions and Answers on Conservatorship, at 1, attached at Exh. 2.)

2. Removal is proper for two independent reasons that first came into existence on September 6, 2008, within the statutory removal period. ***First***, federal jurisdiction exists pursuant to 28 U.S.C. § 1349 because, based on warrants given to the U.S. Department of the Treasury in connection with Fannie Mae's conservatorship that are convertible at the option of the Treasury Department, the federal government now controls 79.9 percent of Fannie Mae's common stock and is the owner, as a matter of law, of the majority of Fannie Mae's capital stock. ***Second***, as a consequence of Fannie Mae's conservatorship, removal is statutorily authorized pursuant to Section 1145 of the Housing and Economic Recovery Act.

3. This Notice of Removal is timely under 28 U.S.C. § 1446(b) because it has been filed within 30 days of the date on which Fannie Mae was placed in conservatorship. *Cf. Resolution Trust Corp v. Bayside Developers*, 43 F.3d 1230, 1236-37 (9th Cir. 1994) (holding that Resolution Trust Corporation conservatorship permits removal of previously unremovable action to federal court and holding that time period for removal runs from date of "filing of . . . pleading informing the court that the [RTC] has been appointed conservator or receiver"). A copy of the process, pleadings, and substantive orders served on Fannie Mae in this Action is attached as Exhibit 3.

4. In 2003, Fannie Mae removed this action to this Court (Oliver, J.) on the grounds that (1) federal subject matter jurisdiction is conferred upon claims against Fannie Mae pursuant to Title III of the National Housing Act, 12 U.S.C. § 1716, *et seq*. ("Fannie Mae Charter Act"), and (2) federal jurisdiction exists because this case involves an Action against "an[] officer (or any person acting under that officer) of the United States or an[] agency thereof" based on the

membership of five Presidentially appointed members on Fannie Mae's board of directors and on Fannie Mae's Congressionally defined federal housing mission. *See* 28 U.S.C. § 1442(a)(1). In an order entered September 24, 2004, this Court remanded the action to state court based on its conclusion that (1) "Fannie Mae's charter does not confer federal courts with subject matter jurisdiction such that Fannie Mae may remove cases from state to federal court" (Order of Remand entered September 24, 2004, at 5, attached at Exh. 3), and (2) "[w]hile Fannie Mae is a creature of federal statute, there is no federal officer responsible for directing or overseeing its programs." (Order of Remand at 10).[1]

5. This removal is proper despite a previous remand of the Action because the present removal is based on new developments within the past 30 days that provide grounds for removal that did not exist at the time this action was commenced or at the time it previously was removed to federal court. The law permits a defendant to re-remove an action that was previously remanded to state court where the new removal is based on grounds that did not exist at the time of the first removal. *See, e.g.*, *Benson v. S.I. Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999) (reversing district court's remand of re-removed action); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492-93 (5th Cir. 1996) (affirming district court's denial of motion to remand re-removed action); *Doe v. American Red Cross*, 14 F.3d 196, 198 (3d Cir. 1993) (to

[1] Since the date of this Court's remand order, the U.S. Court of Appeals for the District of Columbia Circuit, the highest federal appeals court for Fannie Mae's home jurisdiction, has held that Fannie Mae's Charter Act does confer federal subject matter jurisdiction over actions in which Fannie Mae is named as a defendant. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 785 (D.C. Cir. 2008) (citing cases from multiple jurisdictions and holding that "Section 1723a(a) provides federal subject-matter jurisdiction in Fannie Mae cases.")

similar effect); *Young v. Chubb Group of Ins. Cos.*, 295 F. Supp. 2d. 806, 808 (N.D. Ohio 2003) (denying motion to remand re-removed action).

FEDERAL JURISDICTION EXISTS UNDER 28 U.S.C. § 1349

6. Federal jurisdiction over this Action exists under 28 U.S.C. § 1349 because the United States has taken control of more than one-half of Fannie Mae's capital stock.

7. At the time of the previous removal in 2003, Fannie Mae was owned by private shareholders and controlled by a board of directors the majority of whose members were elected by the shareholders. Under the terms of the federal takeover of Fannie Mae, the federal government is now deemed to be the majority owner of Fannie Mae. The United States Department of the Treasury holds warrants to acquire, at its option, 79.9 percent of Fannie Mae's common stock. Federal financial institution regulations provide that a person "that owns, controls, or holds securities that are immediately convertible, at the option of the holder or owner, into voting securities of a bank or other company, controls the voting securities." 12 C.F.R. § 225.31(d)(1). By virtue of its control of 79.9 percent of Fannie Mae's common stock, the federal government now owns more than one-half of Fannie Mae's capital stock as a matter of law.

8. In similar circumstances, courts have approved the removal of federally chartered corporations the majority of whose stock is owned by the federal government. *See, e.g.*, *Fifth Third Bank v. CSX Corp.*, 415 F.3d 741, 743 (7th Cir. 2005) (approving removal under 28 U.S.C. § 1349 by Amtrak); *Amtrak v. Rountree Transp. & Rigging*, 286 F.3d 1233, 1259 (11th Cir. 2002) (same).

THE HOUSING AND ECONOMIC RECOVERY ACT CONFERS FEDERAL JURISDICTION

9. On September 6, 2008, the FHFA placed Fannie Mae into conservatorship. (*See* Order Regarding Functions and Authorities of Officers, attached at Exh. 1, and Questions and Answers on Conservatorship, at 1, attached at Exh. 2.)

10. The Housing and Economic Recovery Act provides that

> (11) ADDITIONAL RIGHTS AND DUTIES. –
>
> (A) PRIOR FINAL ADJUDICATION. – The Agency shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Agency as conservator or receiver.
>
> (B) RIGHTS AND REMEDIES OF CONSERVATOR OR RECEIVER. – In the event of any appealable judgment, the Agency as conservator or receiver –
>
> (i) shall have all the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to federal court and all appellate rights . . . .
>
> 12 U.S.C. § 4617(b)(11), *as amended by* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1145(a)

11. Upon commencement of its conservatorship of Fannie Mae, FHFA was deemed a party with respect to this action as a matter of law. *See, e.g.*, *In re Savers Fed. Sav. & Loan Ass'n*, 872 F.2d 963, 965 (11th Cir. 1989) (Federal Savings and Loan Insurance Corporation "becomes a party within the meaning of [12 U.S.C. §] 1730(k)(1) on the day conservatorship is imposed"); *Crawford Country Homeowners Ass'n v. Delta Sav. & Loan*, 77 F.3d 1163, 1166 (9th Cir. 1996) (Resolution Trust Corporation "may remove any case against an institution for which it is conservator or receiver."); *cf. Rosciti Constr., Inc. v. Lot 10 of the East Greenwich Town

Assessor's Plat 14, 754 F. Supp. 14, 16 (D.R.I. 1991) (National Credit Union Administration, "as conservator, stands in the shoes of the mortgagee, Fairlawn Credit Union")

12. At the time of removal, there was an "appealable judgment" in this action within the meaning of the Housing and Economic Recovery Act, namely, an appeal pending before the Ohio 8th District Court of Appeals and the Ohio Supreme Court from lower court decisions approving class certification. In any event, courts interpreting identical removal language contained in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") have held that removal based on a conservatorship is proper at any point in the litigation prior to entry of a final non-appealable judgment, including before any appealable judgment has been entered in the action. *See, e.g.*, *Resolution Trust Corp. v. Plumlee*, 745 F. Supp. 1462, 1463 (E.D. Ark. 1990) (noting removal after institution of RTC conservatorship but seven months before entry of summary judgment).

13. Fannie Mae has been authorized by FHFA, as conservator, to effectuate this removal.

14. Fannie Mae thus is authorized to exercise FHFA's statutory power to remove this action to federal court pursuant to the Housing and Economic Recovery Act.

VENUE

15. Venue for removal is proper in this district and division under 28 U.S.C. § 1441(a) because the removed action is pending before Common Pleas Court for Cuyahoga County currently on interlocutory appeal. This district and division embrace the forum in which the removed action was originally filed. *See* N.D. Ohio Local Rule 3.8(a).

MISCELLANEOUS

16. Pursuant to 28 U.S.C. § 1446(a), Fannie Mae has attached true and correct copies of all process, pleadings, and substantive orders served upon or by Fannie Mae as of the date of this Notice.

17. As required by 28 U.S.C. § 1446(d), Fannie Mae will promptly serve upon plaintiff's counsel and file with all relevant state courts a true and correct copy of this Notice.

18. By removing this action to this Court, Fannie Mae does not waive any defenses available to it.

WHEREFORE, Fannie Mae respectfully removes this action to this Court pursuant to 28 U.S.C. §§ 1349 and 1441 and the Housing and Economic Recovery Act of 2008.

Dated: October 6, 2008

Respectfully submitted,

/s/ *Richard Gurbst*__________________

Richard Gurbst (0017672)
J. Philip Calabrese (0072709)
Donald W. Herbe (0076500)
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower, 127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 (telephone)
(216) 479-8780 (facsimile)

John H. Beisner
Brian P. Brooks
Sarah A. Goldfrank
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001
(202) 383-5300 (telephone)
(202) 383-5414 (facsimile)

Attorneys for Defendant-Appellant
Federal National Mortgage Association

CERTIFICATE OF SERVICE

The foregoing was filed electronically this 6th day of October, 2008. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or by other means. Parties may access this filing through the Court's system.

/s/ *Richard Gurbst*
One of the Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBEKAH R. RADATZ, *Individually and on behalf of all others similarly situated,*	)	Case No.: 1:08 CV 2369
Plaintiff	)	
v.	)	JUDGE SOLOMON OLIVER, JR.
FEDERAL NATIONAL MORTGAGE ASSOCIATION,	)	
Defendant	)	ORDER

On October 6, 2008, Federal National Mortgage Association ("Fannie Mae" or "Defendant") removed the above-captioned case to this court after Fannie Mae was placed into conservatorship under the control of the Federal Housing Finance Agency ("FHFA") in accordance with the Housing and Economic Recovery Act ("HERA"). Defendant previously sought removal in this case; the court, however, remanded the case to state court. Defendant contends that because the FHFA is now conservator for Fannie Mae, removal is proper pursuant to either 28 U.S.C. § 1349 or 12 U.S.C. § 4617(b)(11)(B). Plaintiff Rebekah R. Radatz ("Plaintiff" or "Radatz"), on the other hand, argues that removal is improper under these new bases as well.

Now pending before the court is Plaintiff 's Motion to Remand to State Court (ECF No. 8). For the reasons that follow, the court grants this Motion.

I. FACTS AND PROCEDURAL HISTORY

The following facts are reproduced from this court's previous Order of Remand (1:03-cv-1945, ECF No. 21, at pp. 1-2):

> On August 7, 2003, Radatz filed this action on behalf of herself and all others similarly situated in the Cuyahoga County Court of Common Pleas against the Federal National Mortgage Association ("Fannie Mae" or "Defendant"). Fannie Mae is a federal government-sponsored private corporation created by Congress to establish secondary market facilities for home mortgages and, among other things, to provide stability in the secondary market for home mortgages. 12 U.S.C. §§ 1716, 1716b. The sole claim raised in the Complaint alleges violation of Ohio Revised Code § 5301.36, which imposes requirements regarding the recording of mortgage satisfactions. Plaintiff maintains she paid off a mortgage where Fannie Mae was the mortgagee, and that Fannie Mae did not record the satisfaction of the mortgage within the time required by law. As a result, Plaintiff seeks damages under the statute. On September 15, 2003, Fannie Mae filed its notice of removal based on 28 U.S.C. §§ 1441 and 1442.

The court granted Plaintiff's Motion to Remand (Case No. 1:03-cv-1945, ECF No. 6), concluding that Fannie Mae's Charter did not confer jurisdiction on federal courts. The case resumed before the Cuyahoga County Court of Common Pleas, which certified a class in the case. The Ohio Eighth District Court of Appeals affirmed the class certification decision, and the Supreme Court of Ohio denied the appeal.

While the case was pending before the Cuyahoga County Court of Common Pleas, Congress enacted the Housing and Economic Recovery Act of 2008, Pub L. No. 110-289, 122 Stat. 2654, codified at 12 U.S.C. § 4617 on July 30, 2008. HERA created the Federal Housing Finance Agency. The FHFA "succeeded the Office of Federal Housing Enterprise Oversight as the regulator of Fannie Mae and Freddie Mac." *Kuriakose v. Federal Home Loan Mortg. Co.*, Sl. Cop., 2009 WL 4609591, at *9 (S.D.N.Y. Dec. 7, 2009). The Federal Housing Finance Agency ("FHFA") was appointed conservator of Fannie Mae on September 6, 2008. (ECF No. 1-1). On September 7, 2008, the U.S.

Government provided loans of cash to Fannie Mae of up to $100 billion. As consideration, Fannie Mae issued $1 billion worth of senior preferred stock to the U.S. and granted the U.S. a warrant giving the U.S. the option to purchase stock. (ECF No. 8-2; ECF No. 8-3.) If the Government were to exercise this warrant, it would purchase 79.9% of the total number of shares of Fannie Mae outstanding common stock.

On October 6, 2008, Defendant again removed this action to federal court, this time alleging jurisdiction pursuant to 28 U.S.C. §§ 1349 and 1441. (ECF No. 1.) Defendant stated that,

> Removal is proper for two independent reasons that first came into existence on September 6, 2008, within the statutory removal period. ***First***, federal jurisdiction exists pursuant to 28 U.S.C. § 1349 because, based on warrants given to the U.S. Department of the Treasury in connection with Fannie Mae's conservatorship that are convertible at the option of the Treasury Department, the federal government now controls 79.9 percent of Fannie Mae's common stock and is the owner, as a matter of law, of the majority of Fannie Mae's capital stock. ***Second***, as a consequence of Fannie Mae's conservatorship, removal is statutorily authorized pursuant to Section 1145 of the Housing and Economic Recovery Act.

(*Id*., at ¶ 2.) Plaintiff, thereafter, filed a Motion to Remand, requesting that the court remand the case back to state court. Radatz claims that neither basis permits removal in this case.

II. STANDARD OF REVIEW

As the Sixth Circuit recognized in *Gafford v. General Electric Company*, 997 F.2d 150, 155 (6th Cir. 1993), "[g]enerally, a civil case brought in state court may be removed by a defendant to federal court only if it could have been brought there originally." A defendant desiring to remove a case has the burden of establishing federal jurisdiction. *See Alexander v. Electronic Data Systems Corp*., 13 F.3d 940, 949 (6th Cir. 1994); *Rogers v. Wal-Mart Stores, Inc*., 230 F.3d 868, 871-72 (6th Cir. 2000); *Ahearn v. Charter Twp. of Bloomfield*, 100 F.3d 451, 453-54 (6th Cir. 1996). A district court must "look to the complaint as it existed at the time the petition for removal was filed to determine the matter of federal jurisdiction raised by the defendant's notice of removal." *Alexander*, 13 F.3d at 949. All doubts as to the propriety of removal are resolved in favor of remand. *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999); *see also Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989).

The language of the statute is the starting point for determining whether removal is proper. It is also the ending point if the plain meaning of that language is clear. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The court may also look to "the language and design of the statute as a whole" in interpreting the plain meaning of statutory language. *United States v. Meyers*, 952 F.2d 914, 918 (6th Cir. 1992), *cert. denied*, 503 U.S. 994 (1992). Lastly, the court may review the "legislative history of a statute if the statutory language is unclear." See *In re Comshare, Inc. Sec. Litig.*, 183 F.3d 542, 549 (6th Cir. 1999).

III. LAW AND ANALYSIS

The issue presented in the instant case is whether 28 U.S.C. § 1349 or 12 U.S.C. § 4617 provides federal jurisdiction in this case. For the reasons stated below, this court finds that neither statute provides for jurisdiction. Thus, Plaintiff's Motion to Remand (ECF No. 8), is well-taken.

A. Relevant Statutory Provisions

1. 28 U.S.C. § 1349

This statute provides that,

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

2. 12 U.S.C. § 4617

This statute states, in relevant part that,

> (B) Rights and remedies of conservator or receiver
> In the event of any appealable judgment, the Agency as conservator or receiver--
> (i) shall have all of the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to Federal court and all appellate rights; and
> (ii) shall not be required to post any bond in order to pursue such remedies.

This statute came into effect on July 30, 2008.

B. The Parties' Arguments

Defendant makes two arguments in support of removal from state court to federal court, namely that this court has jurisdiction over this case based on both 28 U.S.C. § 1349 and 12 U.S.C. § 4617. First, Defendant argues that the United States owns more than half of Fannie Mae's capital stock because the federal government holds a warrant for 79.9% of Fannie Mae's common stock. Defendant interprets the ownership requirement of 28 U.S.C. § 1349 to include holding a warrant for stock. Second, Defendant argues that 12 U.S.C. § 4617 confers federal court jurisdiction because "HERA amended Section 4617 to expressly authorize removal to federal court in the event of a FHFA conservatorship of Fannie Mae." (Def.'s Memo. in Opp. to Pl.'s Mot. to Remand, ECF No. 16, at p. 15.)

Plaintiff counters that neither statute confers federal court jurisdiction. Plaintiff argues that having a warrant to purchase common stock is not the same as owning stock. Consequently, 28 U.S.C. § 1349 does not confer federal jurisdiction. Plaintiff further argues that 12 U.S.C. § 4617 cannot confer federal jurisdiction because it only grants a conservator the same removal rights that the regulated entity has. Because no statute awards Fannie Mae federal jurisdiction, Plaintiff argues, the fact that a federal agency is a conservator does not create federal jurisdiction.

C. Analysis

1. Definition of "Owner" under 28 U.S.C. 1349

The statute states that federal district courts do not have jurisdiction over "any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." 28 U.S.C. § 1349. The federal government currently owns a warrant to purchase common stock of Fannie Mae. If the government were to exercise these warrants, it would own 79.9% of Fannie Mae. Defendant argues that owning warrants to buy stock is equivalent to owning stock in the company sufficient to confer jurisdiction under 28 U.S.C. § 1349. (Def.'s Memo. in Opp. to Pl.'s Mot. to Remand, ECF No. 16, at p. 14.) Plaintiff argues that owning stock warrants is not the same as owning stock, so the federal government does not own over 50% of Fannie Mae. (Pl.'s Br. in Supp. of Pl.'s Mot. to Remand, ECF No. 8-1, at p. 7.) Because the court finds that the issuance of warrants by the United States is not the same as owning stock in Fannie Mae, the court determines that § 1349 does not provide federal jurisdiction for this case.

A stock warrant is "an instrument granting the holder a long-term (usu[ally] a five-to ten-year) option to buy shares at a fixed price" and is "commonly attached to preferred stocks or bonds." Black's Law Dictionary (8th ed. 2004) ("warrant"). According to the Sixth Circuit, "a warrant is simply an 'option to purchase shares of corporate stock at a fixed price.'" *Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 514 (6th Cir. 2004) (citing *In re Daig Corp.*, 799 F.2d 1251, 1253 (8th Cir.1986); *Bradford v. Crown-Bremson Indus., Inc.*, 255 F.Supp. 1009, 1012 (M.D.Tenn.1964)).

The Tenth Circuit further clarified that, "[a] right to purchase is not the equivalent of ownership of the property subject to the right," and a warrant does "not give ownership until exercised or terminated." *Morales v. Mapco, Inc.*, 541 F.2d 233 (10th Cir. 1976). The Second Circuit explained that when a warrant has not been exercised, the warrant holder does not hold shares of a company. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 49 (2d. Cir. 1991). *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 590 (7th Cir. 2003), is in accord. The court determined therein that although the defendants had warrants for common stock, they "were not common shareholders at all." *Id*. Even a summary of the bailout prepared by the Congressional Research Service explains that the U.S. government is not a majority owner of Fannie Mae stock until it exercises the warrants. The specific language states, "[if] the warrants are exercised, Treasury would own 79.9% of each company." N. Eric Weiss, "Fannie Mae's and Freddie Mac's Financial Problems: Frequently Asked Questions," *Cong. Research Serv.*, *Report for Congress*, Sept. 12, 2008, http://fpc.state.gov/documents/organization/110096.pdf.

Plaintiff persuasively cites *First Chicago Corp. v. Commissioner*, 96 T.C. 421, 437 (T.C. 1991), which determined that, "when the income tax laws require a person to own a certain percentage of voting stock, they mean 'own' in the ordinary, common sense understanding of the term; that is, actual or outright ownership." Even the warrant itself states, in relevant part that, "this Warrant in and of itself shall not entitle the Holder to any voting rights or other right as a stockholder of the company." (Pl.'s Br. in Supp. of Pl.'s Mot. to Remand, ECF No. 8-1, at p. 13, citing Warrant, ¶ 6.) The court finds that owning a warrant for stock is not equivalent to owning capital stock.

2. Control under 28 U.S.C. § 1349

Defendant further argues that having control over a company is synonymous with having ownership for the purposes of § 1349. (Def.'s Memo. in Opp. to Pl.'s Mot. to Remand, ECF No. 16, at p. 7.) Defendant cites the Bank Holding Company Act ("BHCA")'s regulation, which provides that a person "that owns, controls, or hold securities that are immediately convertible, at the option of the holder or owner, into voting securities of a bank or other company, controls the voting securities," 12 C.F.R. 225.31(d)(1), to argue that the U.S. controls Fannie Mae. *See also* Opinion from Board of Governors of the Federal Reserve System, 2007 Fed. Res. Interp. Ltr. LEXIS 6 (Aug. 22, 2007). Plaintiff counters that 12 C.F.R. 225.31(d)(1) is a part of Regulation Y, which governs "the acquisition of control of banks by companies and individuals," not stock warrants issued by companies to the U.S. government. (Pl.'s Br. in Supp. of Pl.'s Mot. to Remand, ECF No. 8-1, at p. 13, citing 12 C.F.R. 225.31(b)(1).)

Defendant also cites SEC Rule 13-d-3(d)(1)(i), which defines "beneficial owner" to include any person who has the right to acquire voting power or a security through the exercise of a warrant. 17 C.F.R. § 240.13d-3(d)(1)(i). This argument is unavailing because § 1349 does not address beneficial or equitable ownership. Instead, it simply states that the U.S. government must be an "owner" of more than 50% of a company's capital stock in order for that company to have federal jurisdiction under § 1349.

Defendant further argues in its memorandum that *BHC Interim Funding, L.P. v. Finantra Capital, Inc.*, 283 F.Supp.2d 968, 977 (S.D.N.Y., 2003), stated that "the delivery of warrants 'is equivalent to the sale of stock for the purposes of federal securities laws.'" What the case really states is:

> The Loan Agreement between BHC and Finantra provided that BHC would receive warrants to purchase common stock of both Travelers

> and Finantra. (Am. Compl., Exh. A at 13.) Such a warrant is included in the definition of "security" in 15 U.S.C. § 78(c)(a)(10). In addition, Finantra pledged to BHC all of the capital stock of TAQ owned by Finantra, and TAQ pledged to BHC all of the capital stock of its subsidiaries (which included Travelers). (Am. Compl., Exh. A at 12.) The pledge of stock as a guarantee for a loan is equivalent to the sale of the stock for the purposes of the federal securities laws.

Thus, this case states that a pledge of stock is considered a sale under federal securities law, but this case does not state that a stock warrant is a sale of stock.

Defendants further rely on *Gov't Nat'l Mortgage Ass'n v. Terry*, 608 F.2d 614, 621, fn 10 (5th Cir. 1979). This case involved a federally-chartered corporation, Ginnie Mae. The U.S. Government did not own one-half of Ginnie Mae's capital stock because Ginnie Mae never issued stock. The court found jurisdiction not from § 1349 but from § 28 U.S.C. 1345 but opined in a footnote that, "[s]ince control of a corporation normally follows from the ownership of a majority of the corporation's capital stock, the congressional use of the words 'unless the United States is the owner of more than one-half of its capital stock' simply represents a short-hand expression for control." *Id*.

The court went on to state that, "[t]he fact that Congress in creating an entity like Ginnie Mae did not engage in the mechanical and formal process of issuing stock and then purchasing it does not detract from the conclusion that the Government controls Ginnie Mae." *Id*. In this case, however, Fannie Mae did "engage in the mechanical and formal process of issuing stock," and thus § 1349 requires the U.S. Government to own half of it for the chartered company to have federal jurisdiction. The "control" cases that Defendant relies on govern companies controlled by the U.S. Government that do not issue stock. In that situation, some federal courts have found that there is federal jurisdiction over the government-controlled company. The court cannot apply this reasoning to this case because Fannie Mae did issue stock, and the plain language and meaning of the words of § 1349 still control. *United States v. Choice*, 201 F.3d 837, 840 (6th Cir. 2000) ("The language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear.").

The court agrees with Defendant that § 1349 is not to be interpreted in an overly formalistic manner. (ECF No. 16, at p. 11.) The court in *Jackson v. Tennessee Val. Authority*, 462 F.Supp. 45, 51 (D.C. Tenn., 1978), held that, "Section 1349 was not intended to and does not limit a federal court's jurisdiction over a suit against a corporate agency of the United States that is entirely owned by the United States." The court went on to state that interpreting "section 1349 to give effect to its legislative purpose to preserve federal question jurisdiction in the case of corporations predominately owned by the United States would be proper even if the literal words of that section alone did not suggest such an interpretation." *Id*., at 53. However, *Jackson* is quite different from the present case because the TVA was wholly owned by the government, and in this case, the federal government currently owns less than 50% of Fannie Mae. As the *Jackson* court noted,

> [t]here is no ownership of TVA except that of the government. All real and personal property for TVA activities is acquired and held by the United States (16 U.S.C. ss 831w, 831x) and all the net proceeds of TVA over its expenses are payable into the Treasury of the United States (16 U.S.C. s 831y). It is exactly as if the United States owned all the capital stock and to make it significant for purposes of 28 U.S.C. s 1349 that TVA has no capital stock would seem to exalt form over substance.

Jackson, 462 F.Supp. at 51 (citing *Monsanto Co. v. Tennessee Valley Authority*, 448 F.Supp. at 652 (N.D.Ala.1978)). Again, this is a case in which § 1349 applies to a federally-owned company that does not issue stock. It does not stand for the principle that a company that issues stock but chooses to issue warrants for stock to the Government instead of selling the stock outright falls under the auspices of § 1349.

Therefore, Defendant's argument regarding the definitions of "own" and "capital stock" from § 1349 is not well-taken. Defendant defines "beneficial owner" and "control" for the court, but it is unable to demonstrate that "the owner ... of capital stock" means the same as the owner of a warrant for stock. The court determines that 28 U.S.C. § 1349 does not confer jurisdiction over this case.

3. Application of 12 U.S.C. § 4617

In the event of any appealable judgment, § 12 U.S.C. 4617 gives a conservator "all of the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to Federal court and all appellate rights." 12 U.S.C. § 4617(b)(11)(B). Defendant argues that this provision allows the FHFA, who is acting as conservator for Fannie Mae, to possess not only the rights of Fannie Mae prior to the conservatorship, but also continue to maintain the rights that it possesses as an agency. Defendant claims that because 28 U.S.C. §1442(a)(1) authorizes a federal agency to remove a state action to federal court and the FHFA is a federal agency, the FHFA can use this authority, even in its conservatorship capacity, to remove the instant action. Plaintiff, on the other hand, argues that this provision confers to the FHFA only the rights that Fannie Mae had prior to the conservatorship, which does not include the right of removal as previously held by this court.[1]

[1] Although Defendant does not expressly request that the court reconsider the prior Order of Remand, it points out the recent case of *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex rel. Federal Nat. Mortg. Ass'n v. Raines*, 534 F.3d 779 (D.C. Cir., 2008), which states that, "there is federal jurisdiction because the Fannie Mae 'sue and be sued' provision expressly refers to the federal courts in a manner similar to the Red Cross statute." The court concluded that Fannie Mae has the authority through its charter to remove cases to federal court. This ruling, however, is not binding on this court, and the court is not persuaded that it should reconsider the prior Order.

Section 4617 expressly states that the conservator, under this provision, has "all rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency." 12 U.S.C. § 4617(b)(11)(B)(i) (emphasis added). A plain reading of this statute dictates that the FHFA inherits the rights and remedies of the regulated entity while also maintaining its own rights. Claims asserted against the FHFA are removable to federal court pursuant to 28 U.S.C. § 1442(a)(1), which provides as follows:

> A civil action . . . commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof . . .

Therefore, the FHFA, as a federal agency, is permitted to use its own authority to remove a case.

The question, however, is whether its authority to remove a case under Section 4617 is limited by the preamble of the provision, which expressly states that all of these rights are available "in the event of any appealable judgment." A plain reading of this provision appears to dictate that this provision is only applicable where there is an "appealable judgment" rather than upon the appointment of the receiver. Defendant argues that the statutory text should not be read in this regard as such a reading would be "at odds with the bulk of decided case law." (Def.'s Br. in Opp. at 18.) While Defendant makes this assertion, it fails to point to any such case law. Indeed, because this statute was recently enacted, there are no cases construing the meaning of this phrase within this statute.

Although there are no cases construing this particular provision, the language therein is identical to 12 U.S.C. § 1821(d)(13)(B)(i), which is part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") that was enacted to reform the savings and loan industry. The pertinent provision reads as follows:

> (B) Rights and remedies of conservator or receiver. In the event of any appealable judgment, the Corporation as conservator or receiver shall --
>
>> (i) have all of the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights;

12 U.S.C. § 1821(d)(13)(B)(i). This provision has been construed in several cases, none of which find that the "appealable judgment" requirement can be excluded or that its inclusion is at odds with any other case law. *See Holmes Fin. Assocs, Inc. v. Resolution Trust Corp.*, 33 F.3d 561, 569 (6th Cir. 1994) (construing 12 U.S.C. § 1821(d)(13)(B) to apply where the receiver or conservator "seek[s] review of a state trial court judgment wherever the failed [entity] could have sought review."); *Fed. Deposit Ins. Co. v. Keating*, 812 F. Supp. 8, 9 (D. Mass. 1993) ("[T]he entry of judgment by a state trial court does not foreclose the possibility of removal by the FDIC. FIRREA provides that <u>in the event of any appealable judgment</u> the FDIC as conservator or receiver shall have [the right of removal].") (emphasis added); *In re Meyerland Co.*, 960 F.2d 512, 517 n. 7 (5th Cir. 1992) (noting that 12 U.S.C. § 1821(d)(13)(B) "makes clear that the FDIC may remove a suit after judgment."); *Alberti, Larochelle & Hodson Eng'g Corp., Inc. v. First Meridian Group*, 795 F. Supp. 42, 45 (D. Me. 1992) (stating that 12 U.S.C. § 1821(d)(13)(B) "vests the FDIC, *qua* receiver, with 'all the rights and remedies available' to the failed institution to pursue <u>appealable judgments</u>, and thus allows for continued appellate jurisdiction.") (emphasis added). This case law indicates that such a provision applies where a conservator or receiver seeks review of a judgment, not whenever a conservator or receiver is appointed.

While it is not the duty of the court to pass on the wisdom of Congressional policy, the court does note that the statute involved herein, and other similar statutes, are not a model of clarity. The court acknowledges that while it is possible that Congress might have intended to provide jurisdiction to the extent argued by Defendant, it is of the opinion that the language in the statute failed to achieve this objective. The court cannot be left to speculate on what Congress intended or to apply the statute which Congress might have drafted.

In the instant case, Defendant contends if the court finds that an "appealable judgment" is required, that the order regarding class certification is such a judgment. The court does not find this argument well-taken. The class certification decision has already been affirmed by the state appellate court, the Supreme Court of Ohio denied the appeal, and to this court's knowledge, no other action has been taken regarding this decision. The decision herein is a final adjudication of this matter, and it is no longer appealable. Consequently, the removal would not be "in the event of an appealable judgment."[2]

Lastly, the court notes that there is further evidence that Congress did not intend for the FHFA to have broad removal authority. Plaintiff directs the court to several statutes wherein Congress expressly grants removal authority to an entity. *See, e.g.*, 12 U.S.C. § 1819(b)(2)(B) (providing the FDIC the authority to remove any action); 12 U.S.C. § 1441b(h)(4)(B) (providing the Resolution Funding Corporation with the authority to remove any action). There is no such clear grant of authority with regard to the FHFA acting as conservator for Fannie Mae. Accordingly, the court

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[2] Furthermore, Section 4617 makes clear that a conservator is bound by a final unappealable judgment, which would include the class certification decision. *See* 12 U.S.C. § 4617(b)(11)(A) ("Prior final adjudication. The Agency shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Agency as conservator or receiver.")

finds that removal is not proper under Section 4617, and the court remands the case to the Cuyahoga County Court of Common Pleas.

IV. CONCLUSION

As set forth above, when ascertaining whether removal jurisdiction exists, this court must abide by the principle that all doubts as to the propriety of removal are resolved in favor of remand. *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999). Having reviewed the relevant statutory provisions and case law, the court concludes that Congress did not clearly confer jurisdiction over Fannie Mae upon this Court. Accordingly, Plaintiffs' Motion to Remand (ECF No. 8) is granted, and this case is remanded to the Cuyahoga County Court of Common Pleas, from which it was removed.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

March 29, 2010