IN THE SUPREME COURT OF OHIO

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

AMICUS CURIAE FIRST PRIORITY TITLE AGENCY'S
MERITS BRIEF, FILED ON BEHALF OF APPELLEE REBEKAH RADATZ

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Amicus Curiae First Priority Title Agency

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STATEMENT OF INTEREST OF AMICUS CURIAE

First Priority Title Agency is a real estate title agency operating in the State of Ohio and handling real estate transactions involving residential properties that are covered by R.C. § 5301.36. One of the most important parts of a real estate transaction is identifying the exact, correct status of the title of the property being sold or refinanced. This can only happen if liens including mortgages are timely cleared. Failure to timely remove a paid-off lien creates extra follow-up work for title insurers and others, delays issuance of title insurance policies, clouds the title, and prevents the owner from pledging the property for later loans; prevents the timely approval of purchase loans; and could injure the credit rating of the owner due to loan balances appearing to be unpaid beyond their maturity date. Also, if there is a long delay in releasing a lien, and the mortgagee goes out of business, merges, changes its name, or otherwise needs a research process to try to identify and track down later, this creates extra work that would not be needed if the mortgage satisfaction was timely recorded after payoff. There have even been instances of great difficulty getting mortgages released long after payoff.

The Ohio General Assembly sought to remedy this problem through R.C. § 5301.36 which requires prompt and easily-done recording of satisfactions (within 90 days).

Your amicus relies heavily on compliance with R.C. § 5301.36 in the daily operations of its business. Before the statute was enacted, lenders on a wholesale basis did not release liens on Ohio loans, at all, and this created much difficulty in clearing titles. It was claimed that such releases were expensive and time-consuming. But since the enactment of R.C. § 5301.36, and especially after the filing of class actions seeking damages under R.C. § 5301.36(C), there has been a dramatic improvement in the prompt recording of satisfactions. In fact, there have been no new lawsuits filed in the last few years, and only this one and one against CitiFinancial and related entities are still pending. Fannie Mae is not exempt from Ohio law on this subject. Nothing justifies giving it special treatment, especially since both the state and federal courts have uniformly ruled that payments under R.C. § 5301.36 and statutes like it are damages and not penalties.

STATEMENT OF FACTS

THE HISTORY OF FANNIE MAE, THE FINANCIAL CRISIS OF 2008, THE FHFA AND THE PENALTY BAR.

Fannie Mae was created by President Franklin D. Roosevelt and Congress in 1938 as part of the "New Deal" legislation. Avni P. Patel, *Developments in Banking and Financial Law: 2008-2009: The Credit Crisis of 2008*, 28 Rev. Banking & Fin. L. 21, 22 (2009). Fannie Mae was established to "increase affordability and availability of homeownership for low and moderate income families." Elyse Boyle, *Note: Eliminating the Risk to Taxpayers: Privatizing Fannie Mae and Freddie Mac*, 43 Suffolk U. L. Rev. 163, 166 (2009). Congress reorganized Fannie Mae in 1954 and in 1968 turned Fannie Mae into a private corporation with the United States Department of Housing and Urban Development (HUD) retaining regulatory oversight. *Id*. at 67. Therefore, as of 1968, Fannie Mae became a company that was "entirely privately owned." *Kapla v. Fannie Mae (In re Kapla)*, 485 B.R. 136, 147 (E.D. Mich. 2012) *citing* Fannie Mae's own pleading.

During the early to mid 2000s, housing values appreciated at an unprecedented rate. Nicholas O. Kennedy, *Citizens or Shareholders?: Analyzing the Federal Government's Fiduciary Duties As A Controlling Shareholder In Corporations Receiving Funds From The Troubled Asset Relief Program*, 12 J. Bus & Sec. L. 21, 22 (2011). Due to the increasing values, lenders relaxed lending standards based on their belief that increasing prices would provide protection if the borrowers defaulted. *Id*. The relaxed lending standards meant that many subprime loans were provided to unqualified borrowers. In order to fund the need for increased capital to write more mortgages, mortgage originators bundled the loans and sold them to "investment banks, hedge funds and other institutional investors." *Id*. Feeding the need for capital not only increased the size and magnitude of the housing bubble but it also increased the number of parties that would be impacted by the ultimate bursting of the housing bubble. In 2006 – 2007 the value of home prices started to decrease. Many of the loans given to the unqualified borrowers were of variable rates and when the interest rates were set to increase, many of the borrowers were now unable to refinance the homes because they were underwater, meaning that more money was owed on the home than the home was worth. As the deflation process begins, it starts to feed on itself just like the inflation process. Only the deflation was much quicker and messier. Additionally, the mortgage backed securities were losing value and it was causing institutions far and wide around the world to face financial ruin. This, in a nutshell, is what caused the great housing bubble and the great recession of 2008.

As a result of the financial crisis facing the United States, Congress enacted multiple new laws to help stabilize the economy and take unprecedented ownership or regulatory interest in private companies. One of these laws was the Emergency Economic Stabilization Act of 2008 ("EEAS") which was passed "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." 12 U.S.C. §5201. The EEAS authorized the Troubled Asset Relief Program ("TARP"). (US Dept. of Treasury – About Tarp found at http://www.treasury.gov/initiatives/financial-stability/about-tarp/Pages/default.aspx). Through TARP, the United States government took an ownership interest in over 650 private companies. Nicholas O. Kennedy, *Citizens or*

Shareholders?: Analyzing the Federal Government's Fiduciary Duties As A Controlling Shareholder In Corporations Receiving Funds From The Troubled Asset Relief Program, 12 J. Bus & Sec. L. 21, 22 (2011). TARP created and authorized multiple investments in private companies and multiple other programs. For example, pursuant to TARP, the United States government provided over $182 billion of support to AIG, a private insurance company. (US Dept. of Treasury – Investment In AIG found at http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/aig/Pages/status.aspx). This support included the purchase of approximately $70 billion of common and preferred stock. *Id*. TARP also invested $245 billion in banks through five different programs, including the direct purchase of bank stocks. (US Dept. of Treasury – Bank Investment Program found at http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/Pages/default.aspx). Additionally, the United States government devoted billions of dollars to the auto industry by creating and funding the Automotive Industry Financing Program ("AFIP") and through direct investments in General Motors and Chrysler. (US Dept. of Treasury – Auto Industry found at http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/default.aspx. The Federal government through TARP also launched credit market programs such as the Public-Private Investment Program, SBA 7(A) Securities Purchase Program and the Term Asset Backed Loan Facility to help provide credit to consumers and small businesses. (US Dept of Treasury – Credit Market Programs found at http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/credit-market-programs/Pages/default.aspx). The United States government reach was so broad during the financial crisis that it actually set executive compensation limits on all TARP recipients while any obligations were outstanding (US Dept. of Treasury – Executive Compensation found at http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/executive-comp/Pages/default.aspx).

The United States Congress also passed legislation during this period that was directed at maintaining Fannie Mae's, and others', financial soundness. On July 30, 2008 President Bush signed the Housing and Economic Recovery Act of 2008 ("HERA"). Pub. L. 110-289. HERA changed many laws that affected housing and mortgage markets. HERA had three main subparts, the Federal Housing Finance Regulatory Reform Act of 2008, the Foreclosure Prevention Act of 2008, and the Housing Assistance Tax Act of 2008. HERA created the Federal Housing Financing Agency ("FHFA") in 2008. 12 U.S.C. §4511. FHFA was a consolidation of three former federal regulatory entities since HERA abolished the Office of Federal Housing Enterprise Oversight ("OFHEO") and the Federal Housing Finance Board ("FHFB") and transferred Fannie Mae supervisory authority from HUD to FHFA. (FHFA Timeline found at http://www.fhfa.gov/AboutUs/Timeline). FHFA was given regulatory and supervisory authority over Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance. 12 U.S.C. §4511.

Due to the deteriorating financial conditions in the United States, on September 6, 2008, Fannie Mae and Freddie Mac were placed into temporary FHFA conservatorship. (Statement of FHFA Director James B. Lochard at News Conference Announcing Conservatorship of Fannie Mae and Freddie Mac found at http://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-of-FHFA-Director-James-B--Lockhart-at-News-Conference-Annnouncing-Conservatorship-of-Fannie-Mae-and-Freddie-Mac.aspx). The FHFA conservatorship was a discretionary appointment and "[t]he Agency ["FHFA"] … [was] appointed conservator for the purpose of reorganizing, rehabilitating, or winding up the affairs" of Fannie Mae. 12 U.S.C. § 4617(a)(2).

The 2008 law (HERA) also provided that when FHFA was acting as the Conservator, it "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."[1] This language is what has been referred to as the "Penalty Bar." The 2013 Consent Order in this matter was a reiteration of the "preexisting statutory obligation" that existed under the 2008 Penalty Bar.

LAW AND ARGUMENT

__Appellant'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.

Appellant's first proposition of law fails because FHFA made no determination that the statutory damages provision in R.C. § 5301.36 violated the Penalty Bar, the Penalty Bar does not apply to Fannie Mae, and the Eighth District was not prohibited from reading the Consent Order to see if it applied or required the case be dismissed. It is important to note and for this Court to remember that for Fannie Mae to prevail in this first Proposition of Law, it must win every issue below. If this Court finds one of Radatz' arguments to be well taken, then Fannie Mae would lose this first Proposition of Law. As shown below, Fannie Mae's appeal lacks merit.

A. In Issuing The Order, The Federal Housing Finance Agency (FHFA) Did Not Make Any Determination that Making A Payment In This Matter Pursuant to R.C. § 5301.36 Would Violate Any Law

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[1] *See* 12 U.S.C. § 4617(j)(1),(4):
(j) Other Agency exemptions.

(1) Applicability. The provisions of this subsection shall apply with respect to the Agency in any case in which the Agency is acting as a conservator…

***

(4) Penalties and fines. The Agency shall not be liable for any amounts in the nature of penalties or fines, including those arising from the failure of an person to pay any real property, personal property, probate, or recording tax or any recording or filing fees when due.

In arguing Proposition of Law I, Appellant ignores the actual words in the "Stipulation and Consent To The Issuance of A Consent Order" which specifically states that the March 6, 2013 Consent Order was being issued "before the finding of any issues of fact or law." Fannie Mae's Appendix A-035 at bottom. Instead of addressing the fatal flaw in its argument, Appellant resorts to continually stating that FHFA made a "determination" that recovery under R.C. § 5301.36 is a penalty. Some excerpts highlighting this from Fannie's brief are as follows:

- "Further, to assure that the Order reflected and enforced ***its specific determination*** that the relief sought by plaintiffs in this case is 'in the nature of penalties,' FHFA expressly prohibited ….." (Appellant Brief, p. 1);
- "Yet that is exactly what the Eighth District did here – it not only rejected FHFA's ***determination*** that a judgment in this case would amount to a penalty…" (Appellant Brief, p. 2);
- "Based on the FHFA's ***determination*** that the statutory sums sought by Ms. Radatz and the class pursuant to R.C. 5301.36 are 'in the nature of penalties' within the meaning of the Penalty Bar, the Order explicitly prohibits Fannie Mae from violating 12 U.S.C. 4617(j)(4) ….." (Appellant Brief, p. 6);
- "While FHFA ***determined*** in the Order that any judgment in this lawsuit would amount to a penalty in violation of the Penalty Bar …." (Appellant Brief, p. 7);
- " "Here, FHFA exercised it enforcement authority under 12 U.S.C. 4631(a) to issue an order effectuating ***its determination*** that payment by Fannie Mae, while under FHFA's conservatorship, of any amount pursuant to R.C. 5301.34 in this case would constitute a penalty in 'violation' of 'a law,' 12 U.S.C.

4631(a) – specifically, the Penalty Bar in 12 U.S.C. 4617(j)(4)." (Appellant Brief, p. 8);

- "… neither court was permitted to 'review' the merits of ***the Regulator's factual and legal determinations*** underlying the Order." (Appellant Brief, p. 13);
- "…FHFA as Regulator correctly ***determined***, in an order issued under Section 4631(a), that paying a judgment in this case would violate the Penalty Bar." (Appellant Brief, p. 14);
- "Once the Regulator [FHFA] issued its Order under Section 4631 enforcing ***its determination*** that Fannie Mae would violate federal law by paying any amount pursuant to R.C. 5301.36 …" (Appellant Brief, p. 15);
- "Because the relief Plaintiff seeks necessarily would require 'review' of and would 'affect' the Order, the court below lacked jurisdiction to review the Order – or to address, much less adjudicate, the array of collateral issues raised by Ms. Radatz, such as whether the Regulator [FHFA] correctly ***determined*** that statutory sums levied under R.C. 5301.36 would be 'in the nature of penalties' under federal law." (Appellant Brief, p. 17);
- "…[T]he Regulator [FHFA] correctly ***determined*** that a judgment under R.C. 5301.36 would require payment of amounts 'in the nature of penalties' under federal law." (Appellant Brief, p. 21).

The lynchpin of Fannie Mae's argument is that FHFA made a finding that relief under R.C. § 5301.36 is a penalty. But Fannie Mae's repeated refrain that FHFA made such determination, as well as FHFA's late entrée in the form of the *amicus* is belied by the actual wording of the

Stipulation And Consent To the Issuance of [the] Consent Order which could not state more clearly that the Consent Order was issued **"before the finding of any issues of fact or law."** Fannie Mae Appx. A-035. It is impossible for Fannie to argue that FHFA made a finding when the agency went out of its way to state that it made no "finding of any issues of fact or law." Words do not mean what they say in a self-serving interpretation but rather "[t]hey mean what they mean in common parlance" (*In re Powers*, 140 B.R. 476 (N.D. Ill. 1992)) and the signing of a Stipulation that indicates the Consent Order was issued "before the finding of any issues of fact or law" sinks Fannie's claim that any factual and/or legal determination was made.

The Eighth District's reading of the plain language of the Stipulation and Consent Order to see if it applied to this matter is not barred by 12 U.S.C. § 4635(b) because if a court determines from reading the language used that the Consent Order does not apply, then by definition any ruling it issues will not "review, modify, suspend, terminate, or set aside such notice or order." 12 U.S.C. § 4635(b). Contrary to Fannie Mae's arguments, courts regularly read the terms of consent orders to see if any order issued by the court would modify or alter the terms of the consent order. Curiously, Appellant cites *American Fair Credit Ass'n v. United Credit Nat'l Bank*, 132 F.Supp.2d 1304 (D.C. Colo. 2001) but the court in *American Fair* reviewed whether a consent order coupled with 12 U.S.C. § 1818(i)[2] applied to divest the court of jurisdiction, or the ability to read the terms of the consent order. The court held that the consent order did not divest the court of jurisdiction of one claim and divested the court of jurisdiction of other claims. The court's actual finding is not relevant but what is highly relevant is that the court had to read the terms and language of order and the relief sought to determine if

[2] 12 U.S.C. § 4635 (b), the jurisdictional bar statute that is relevant to this matter is virtually identical to 12 U.S.C. § 1818(i)(1) which applies to organizations such as Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC).

the order divested the court of jurisdiction. For example, in finding that order did not divest the court of jurisdiction over one of the claims the court wrote:

> As to Plaintiff's claims against Defendant UICI, the June 29, 2000 UICI Consent Order specifically ordered Defendant UICI to assume all of [UCNB's] remaining contingent liabilities, and thereafter UICI shall pay-off, compromise, settle or resolve these contingent liabilities at no loss or cost to [UCNB] or the Federal Deposit Insurance Corporation Bank Insurance Fund. . . .. The June 29, 2000 UICI Consent Order does not prohibit Defendant UICI from making payments to Plaintiff, as Defendants maintain. The provision of the June 29, 2000 UCNB Consent Order requiring Defendant UCNB to use funds provided by Defendant UICI only for the retirement of [UCNB's] maturing deposit liabilities and payment of certain other liabilities . . . not otherwise prohibited by the terms of the February 25, 2000 UCNB Consent Order applies only to the $ 92,100,000 the June 29, 2000 UICI Consent Order required Defendant UICI to provide to Defendant UCNB. . . . It does not apply to Defendant UICI's assumption of Defendant UCNB's remaining contingent liabilities. Accordingly, subject matter jurisdiction exists with respect to Plaintiff's claims against Defendants UICI and XYZ.

Id. at 1311. It is beyond dispute that the court read the terms of the order when deciding the court was not divested of jurisdiction. Similarly, in holding that the order divested the court of jurisdiction over other claims, it held that the "unambiguous language" of the order stripped the court of authority. *Id*. at 1312. As in *American Fair*, the Eighth District here appropriately read the entire paperwork of the Stipulation and Order to determine if the language stripped the court of authority. Fannie claimed the Order made a finding that payment would be a penalty; just the opposite, the Order warned that it made no findings. Reading the documents confirms Fannie Mae is prohibited from paying any penalty or fine while in conservatorship, in this litigation, without any finding of fact or law about whether a payment pursuant to R.C. § 5301.36 would constitute a penalty or fine.

Similarly, the court in *In re JPMorgan Chase Mort*. *Modification Litig*, 880 F.Supp.2d 220 (D.C. Mass. 2012) carefully read an order issued by the Office of the Comptroller of the Currency (OCC) to determine if the jurisdictional bar of 12 U.S.C. § 1818(i) could affect the

OCC consent order. In 2008 JPMorgan Chase ("Chase") received $25 billion in TARP money and in 2009 it agreed to participate in the Treasury run program called Home Affordable Modification Program (HAMP). *Id*. at 226. HAMP was authorized by the Emergency Economic Stabilization Act of 2008 (*supra*.). In order to participate in HAMP, banks had to agree to follow HAMP guidelines. *Id*. In 2011, Chase entered into a consent order with the OCC which required Chase to take certain steps to reduce and mitigate foreclosures and take other steps to change the mortgage servicing and foreclosure process. Thereafter, Chase moved to dismiss certain claims of a consolidated complaint pending against it by arguing that "a review by this court of plaintiffs' claims may well yield a result inconsistent with the Consent Order and its purpose of providing a uniform remediation process …." *Id*. at 231. The court denied the argument, read the order, and then held that the consent order did not bar the claims because: 1) "[t]he jurisdictional bar of §1818(i)(1) must, however, be read in the context of the entire statute, the primary purpose of which is to prevent federal courts from usurping the OCC's power to enforce its own consent order *against parties to the orders*. Congress did not intend to also prohibit non-parties from exercising their separate remedies at law." *Id*. (Emphasis in original); and 2) after reading the language of the order it found that the order's "enforcement is not affected by compliance with state laws …." *Id*. at 232. Again, in order to reach the conclusion as to whether the order terminated the court's jurisdiction, the court had to carefully read the language of the order. This is the exact same situation that exists in the present matter. *See also Rex v. Chase Home Fin. LLC*. 905 F.Supp.2d 1111, 1129 (CD Cal. 2012) holding that "Section 1818(i)(1) does not divest this court of jurisdiction because Defendants have not provided the legal authority or evidence to show that the relief in the [complaint] 'affects by injunction or otherwise' or 'modifies] the 2011 Consent Order."

Appellant maintains that "allowing Plaintiff to maintain her lawsuit, which seeks issuance of a judicial order compelling Fannie Mae to make monetary payments pursuant to R.C. § 5301.36, is in direct violation of the Order explicitly forbidding Fannie Mae from making any such payments." (Appellant Brief, p. 11). That is wrong. The Order says no such thing. The Order prohibits any payments in violation of 12 U.S.C. § 4617(j)(4), the Penalty Bar. Both paragraphs of the Order reference and prohibit any payments that would violate the Penalty Bar. Throughout its Brief, Fannie Mae misstates what the Order actually states by repeatedly leaving out that all of the language that forbids payments refers only to any payment violating 12 U.S.C. § 4617(j)(4) – the Penalty Bar.

It is also important to understand why FHFA would issue an order that only restates the Penalty Bar and says it not be violated as it relates to payments by Fannie Mae. The answer to that is simple. On its face, the Penalty Bar found in 12 U.S.C. § 4617(j)(4) only applies to FHFA, not Fannie Mae. FHFA issued the Order to inform Fannie Mae, Radatz, and presumably all other parties to cases pending elsewhere that it believed that the Penalty Bar should apply to Fannie Mae as well as FHFA. As is discussed immediately below, good reason exists for FHFA's concern that the Penalty Bar only applied to FHFA and not Fannie Mae.

B. The Penalty Bar Only Applies To FHFA And Not Fannie Mae

The Penalty Bar in HERA, 12 U.S.C. § 4617(j)(4), reads as follows:

> Penalties and fines. The **Agency** 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.

The "Agency" in the HERA is defined as "the Federal Housing Finance Agency [FHFA]." 12 U.S.C. § 4502(2). Fannie Mae is not included in the definition of the Agency, and rather is separately defined as the "regulated entity." 12 U.S.C. § 4502(20).

Due to the unambiguous language and use of the word "Agency" which means FHFA, and only FHFA, any court that has interpreted the Penalty Bar as applying to Fannie Mae is in error. The "first rule of statutory construction is that there is no more persuasive evidence of the purpose of a statute that the words by which the legislature undertook to express its wishes." *Smith v. Allstate Ins. Co.*, 403 F.3d 401, 408 (6th Cir. 2005). Or, as stated by Fannie Mae in a recent pleading in another action "… this Court need only heed Professor Frankfurter's timeless advice: (1) Read the statute; (2) read the statute; (3) read the statute!" *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigation*, Motion To Dismiss, United States District Court for the District of Columbia, 1:13-mc-01288 Docket No. 20 (filed 1/7/14). (Internal citations omitted). This Court should heed Fannie Mae's advice to read the statute. "[W]hen the statutory language is plain, [the court] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 188 (2009).

The Penalty Bar does not immunize private actors from payments of fines, penalties, or other obligations. Fannie Mae is not covered by the Penalty Bar because it has not become part of FHFA. In fact, FHFA has confirmed in other litigation that Fannie Mae cannot assert the Penalty Bar defense. *See Oakland County v. Fed. Natl. Mtge. Assn. and FHFA*, 276 F.R.D. 491, 498-499 (E.D. Mich. 2011). In *Oakland County*, the county brought suit against Fannie Mae for its failure to pay the transfer tax when recording real estate transactions. *Id*. at 493. FHFA moved to intervene and in their papers arguing why FHFA must be allowed to intervene, it stated: "…Plaintiffs' assertion that the Enterprises' [Fannie Mae] interests are completely aligned with those of the Conservator [FHFA] is inapposite. **The Conservator, and only the Conservator, can here assert unique statutory authorities and defenses, such as its exemption from penalties and fines** and its immunity from injunctive relief. 12. U.S.C. §

4617(j)(2), (j)(4), (f)" *Oakland County v. Federal National Mortgage Assoc.*, United States District Court, Eastern District of Michigan, Case No. 2:11-cv-12666, "Reply Brief In support of Federal Housing Finance Agency's Motion To Intervene" in that case, at p. 3 (emphasis added) (attached as Exhibit A to Reply Brief of Plaintiff-Appellant filed below in the Eighth District appeal). The District Court adopted that argument—noting "Fannie Mae['s] inability to assert certain statutory defenses unique to the Agency." *Oakland*, 276 F.R.D. at 498. Since the Statutory Penalty Bar is "unique to the Agency," Fannie Mae cannot "violate" § 4617(j)(4). FHFA was right, it, and only it, can assert the Penalty Bar defense. Fannie Mae remains a private corporation, and is not part of the federal government. *Herron v. Fannie Mae*, 857 F.Supp.2d 87, 95-96 (D.D.C. 2012) ("the government has not acceded to permanent control over the entity and Fannie Mae remains a private corporation"; "Fannie Mae was not converted into a government entity when it was placed into conservatorship"); *Judicial Watch, Inc. v. Federal Housing Finance Agency*, 646 F.3d 924, 925-26 (D.C. Cir. 2011) (Fannie Mae is structured as a private corporation); *City of Providence v. Fannie Mae*, C.A. no. 12-481L, C.A. No. 12-668L, 2013 U.S. Dist. LEXIS 104221, *4 (D.R.I. July 25, 2013) (Fannie Mae is a publicly-traded private corporation).

Fannie Mae is not FHFA. *In Samuels v. Federal Housing Finance Agency and Edward DeMarco, Director of FHFA*, United States District Court for the Southern District of Florida, Case No: 1:13-cv-22399 a group of Plaintiffs sued FHFA for FHFA's directive that it issued to Fannie Mae to suspend all payments to the Housing Trust Fund.[3] (Complaint, para. 53). FHFA claimed that it acted appropriately because the Director "performed his mandatory statutory obligation to suspend [Fannie Mae's] payments to a statutorily created Housing Trust fund

[3] The Housing Trust Fund was, like FHFA, created as part of HERA.

immediately upon making the unreviewable finding that such payments would contribute to [Fannie Mae's] financial instability." (FHFA Motion To Dismiss, Docket No. 24). Interestingly, although the *Samuels* litigation was against FHFA due to a directive issued by FHFA to Fannie Mae, Fannie Mae in that case told the Securities and Exchange Commission in its 2013 Form 10-K that is was not a party to the litigation. Fannie Mae could not have been more clear when it told the SEC and the investing public "[w]e are not a party to this lawsuit." (Federal National Mortgage Association, 2013 Form 10-K, p. F-114).

Fannie Mae is not the agency referred to in the statute, but instead "remains a private corporation" and it "is not a government actor[.]" *Herron*, 857 F.Supp.2d at 96. All payments in this matter would be paid out of Fannie Mae's private funds, not from "tax money." Fannie Mae is no longer in insolvency. Indeed, it has never been more profitable than now. In 2013 Fannie Mae had a net income of $84 billion. (Federal National Mortgage Association, 2013 Form 10-K filed with the SEC, p. 3). In 2014, Fannie Mae had a net income of $14.2 billion and "expect[s] to remain profitable on an annual basis for the foreseeable future." (Federal National Mortgage Association, 2014 Form 10-K, p. 2).

The conservatorship of FHFA is temporary. Like many of the TARP investments that the United States made in private companies during the financial calamity of 2008, the conservatorship will have to end, and judging by recent performance, one would expect it to end relatively shortly. In a hearing before the Senate Banking Committee on November 19, 2014, then Chairman Senator Tim Johnson urged FHFA Director Mel Watt to engage Treasury in discussions to end FHFA's Conservatorship of Fannie Mae and he stated that the Conservatorship was untenable. (Senate Banking Committee hearing of November 19, 2014, transcript is not currently available but the video may be viewed at http://www.banking.senate.gov/public/index.cfm?FuseAction=Hearings.LiveStream&Hearing_id=6d6117b6-1099-4790-b7e9-3c018fcc64f5). Additionally, the FHFA conservatorship has been quite profitable for the United States. In a November 6, 2014 release, Fannie Mae outlined that it expected to pay a dividend of $4.0 billion to Treasury in December, 2014 bringing the total dividend payment by Fannie Mae to $134.5 billion which was close to $20 billion more than Treasury provided to Fannie Mae in loans due to the 2008 economic crisis. (Fannie Mae November 6, 2014 Press Release found at http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2014/q32014_release.pdf).

Based upon the clear language used in the statute, Congress limited the Penalty Bar found in 12 U.S.C. § 4617(j)(4) to the Agency, and defined the Agency to be FHFA, and only FHFA. It is therefore clear that FHFA was correct in its pleadings in the *Oakland County* when it stated: "The Conservator [FHFA], and only the Conservator, can here assert unique statutory authorities and defenses, such as its exemption from penalties and fines…" As such, Fannie Mae is not entitled to the Penalty Bar protection found in 12 U.S.C. § 4617(j)(4).

C. The Eighth District Did Not Conflate The Penalty Bar With The Regulator's Statutory Enforcement Authority

The Appellant claims that it is "the jurisdictional bar arising under Section 4635(b) by virtue of the Order **–** *not* the Penalty Bar of Section 4617(j)(4) applicable to FHFA conservatorships **–** that requires dismissal of the case." (Appellant Brief, p. 15). Notwithstanding the fact that the Order only requires dismissal if this Court finds that damages awarded for a violation of R.C. § 5301.36 constitutes a "penalty" or "fine", *supra*, Fannie's argument ignores what it stated clearly below. Fannie admitted that the Consent Order was nothing more than a reiteration of the Penalty Bar found in 12 U.S.C. § 4617(j)(4):

> Plaintiff's focus on FHFA and the Order as the source of her alleged constitutional injury is misplaced. Any alleged deprivation of a property interest occurred not upon the issuance of the Order, but in September 2008, after Congress enacted the Statutory Penalty Bar and FHFA appointed itself as Conservator of Fannie Mae. Under HERA, the effect of that appointment was to bar the Conservator and Fannie Mae from paying fines or penalties. **The Order simply compels Fannie Mae to comply with its preexisting statutory obligation not to pay penalty assessments.** Therefore, any constitutional due process analysis must focus not on the date of the Order, but on September 6, 2008, the date the Statutory Penalty Bar was triggered.

Brief of Defendant-Appellee Federal National Mortgage Association in the Eighth District Court of Appeals, p. 23. (Emphasis added). It bears repeating that, contrary to Fannie's arguments, the Eighth District was correct when it held that it had the obligation to read the Stipulation and Order to determine if it applied to this matter and when it determined that damages paid pursuant to R.C. § 5301.36(C) are not penalties or fines.

If one were to assume that Fannie Mae is correct that courts are barred from even reading an order to see if applied to the matter at hand, then the breadth and reach of that argument is astounding. Fannie Mae admits in earlier pleadings that the Order was nothing more than a reiteration of the Penalty Bar that Congress enacted in the 2008 law (HERA) because the Order "simply compels [it] to comply with its preexisting statutory obligation.…" Yet when it comes before this Court, that admission goes completely off the tracks and the corresponding results could be so invasive of state courts' authority it is hard to adequately describe. According to Fannie Mae, FHFA can issue an order and Fannie Mae is then allowed to argue that the court is barred from even reading the order to see if it applies to the litigation. The case of *Nicolai v. Federal Housing Financial Agency*, 928 F.Supp.2d 1331 (M.D. Fla. 2013) illustrates how a matter raising the Penalty Bar is properly handled. In *Nicolai*, a lawsuit was brought against FHFA, Fannie Mae, and Freddie Mac for their failure to pay "the Transfer Tax pursuant to Florida statute and law." *Id*. at 1333. FHFA, Fannie Mae and Freddie Mac moved to dismiss the claim by arguing that the Transfer Tax was prohibited by 12 U.S.C. § 4617(j)(2) and (j)(4) because "Plaintiff cannot impose the Transfer Tax on transfers to or from the Enterprises [Fannie Mae and Freddie Mac] – or impose any penalties for non-payment – because the Transfer Tax falls squarely within the expansive clearly worded statute." *Nicolai*, Case No: 8:12-cv-01335, Defendants' Motion To Dismiss the Plaintiff's Complaint and Memorandum of Law, p. 3. In making this argument, Fannie Mae looked to precedent interpreting whether or not the tax authorized by the Florida statute was covered by 12 U.S.C. § 4617(j)(2). The critical inquiry was whether the tax exemption found in the 12 U.S.C. § 4617(j)(2) applies to excise taxes. *Id*. at 1334. The court therefore read the Transfer Tax statute in relation to 12 U.S.C. § 4617(j)(4) to see if 12 U.S.C. § 4617(j) was implicated. That is the same thing that the Eighth District did in this case when it read R.C. § 5301.36 in relation to 12 U.S.C. § 4617(j)(4).

In sum, as Fannie Mae correctly admits, "[t]he Order simply compels Fannie Mae to comply with its preexisting statutory obligation not to pay penalty assessments." As such, the Eighth District did not "conflate" the jurisdictional bar of 12 U.S.C. §4635(b) with the Penalty Bar of § 4617(j)(4), since the two deal identically with whether a payment is a fine or penalty. The Eighth District rightfully read the materials to determine if the damages were in the nature of penalties or fines.

D. The Consent Order, As Interpreted By Fannie Mae, Violates Due Process

If Fannie Mae's interpretation of the language of the Consent Order and arguments are correct that any court is barred from reading the Stipulation and Consent Order to determine if continuing the litigation would affect the Order, then that would constitute a due process violation. "[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.

Here, FHFA is purportedly acting against Fannie Mae by ordering it to cease and desist from violating 12 U.S.C. § 4617(j)(4). That raises no due process problem. But Fannie tries to take the process one step further, claiming the Order is a determination that Radatz and her class are barred from their claim. Accepting Fannie's approach, the target of the Order is Radatz and the class she represents. Although Fannie Mae has argued in the past that this Order automatically shuts down claims under all mortgage satisfaction statutes, its actions in *Higgins v. BAC Home Loans Servicing*, *LP*, 2014 US Dist Lexis 43278 (ED Ky. 2014) prove otherwise. *Higgins* was a case against Fannie Mae, as well as other defendants, for its violation of Kentucky statutory law by failing to properly record mortgage assignments. Fannie Mae moved to dismiss the complaint by arguing that 12 U.S.C. § 4617(j)(4) barred the action because "[t]he Kentucky Statutes impose penalties under State and Federal law." *Higgins*, United States District Court, Eastern District of Kentucky Case No: 5:12-cv-00183, "Enterprise Defendants' (FHFA) Memorandum In Support of Their Motion To Dismiss Plaintiffs' First Amended Class Action Complaint," p. 6. Docket No. 52-1. Notably, Fannie Mae did not argue to the federal court in *Higgins* that the Consent Order in the instant case contained a FHFA determination that the statutory damages provided for in the Kentucky statutes were penalties and fines and thus, the federal court was barred from making a legal determination as to whether damages were in the nature of penalties and fines. The private citizens in *Higgins* had their rights determined by the court upon briefing and argument. Here, Fannie demands the courts stand down and do nothing?

Fannie seeks to direct the Order to Radatz and her class alone, which conflicts with the Order language and would violate due process. Paragraph 1 of the Consent Order provides that Fannie Mae is "ORDERED to CEASE and DESIST from violating 12 U.S.C. § 4617(j)(4) by paying, for any reason, directly or indirectly, any fines or penalties imposed by <u>any</u> state mortgage satisfaction law on the Enterprises for noncompliance." Fannie Mae has stated that this applies "*all* mortgage satisfaction statutes" and yet it did not move to apply this Consent Order in *Higgins*, or, to Appellee's knowledge, any other individual. The result is inescapable, by following Fannie's argument this Consent Order would be used only for Radatz. Further, the fact that this Order was issued in 2013, a year in which Fannie Mae had a net income of over $84 billion, shows that this Order was not entered for the rational purpose of protecting the financial soundness and solvency of Fannie Mae but simply to deny Radatz and this class their right to a remedy under the Ohio constitution, Article 1, Section 16. By way of comparison, General Electric and Walmart each had a net income of $17 billion or less in 2013.

If the Consent Order is read to stop any reading of the Order and R.C. § 5301.36 where there is not even any language in the Order demanding that because the Order made no determinations, then the Order directly punishes Radatz and rewards Fannie Mae. In that case, Radatz had a due process right to a hearing that she did not receive.

As explained in *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035 (D.C. Cir. 1998), "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 should also be true. When the directly regulated party (Fannie Mae) has a dis-incentive to contest the enforcement decision, the party suffering an indirect adverse effect (Radatz) would have a constitutional right to participate in the enforcement proceedings. This is illustrated by the court’s statement that “[c]onceivably … if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing.” *Id*. at 1041 *citing O’Bannon v. Town Court Nursing Ctr*., 447 US 773, 789-790 (1980). Fannie Mae had a dis-incentive to contest the Consent Order that it asked FHFA to enter.

“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 a protectable, legal claim against Fannie Mae for statutory damages. They have a property interest that is protected by the Due Process Clause. If Fannie’s approach to the Order is accepted, then they were denied due process by FHFA, which failed to provide them any sort of hearing before it issued its Order which Fannie Mae claims to “find” them barred from any payment without regard to whether it is a penalty. “[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.” *Logan v. Zimmerman Brush Co.*, 455 U.S. at 433.

Because the Order violates Radatz's and the class members' due process rights, it is "void and unenforceable." *Gunter v. Merchants Warren Natl. Bank*, 360 F.Supp. 1085, 1091 (D. Me. 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) (judgment void on face if it 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).

Regardless of whether FHFA is acting in its capacity that Congress assigned as Fannie Mae's regulator, or a role as Fannie Mae's helper against Radatz and the class, FHFA has not been granted authority to violate the Constitution. If the Order was intended to operate as is now claimed—to wit, having made a finding that a payment to Radatz is a penalty (even though its language says the opposite), then FHFA has attempted to deny Radatz and the class a protected property interest, without granting them a hearing. Under what circumstance could an agency or court comport with due process by denying a certified class their availability of relief under law, without the opportunity to be heard?

Appellant'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.296, 2006-Ohio-1736, 825 N.E.2d 599

Contrary to Fannie Mae's assertion yet again, FHFA did not make a legal or factual determination that the damages provided by R.C. § 5301.36(C) are in the nature of a penalty. Looking at existing law, the Eighth District confirmed that "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)." Judgment, ¶19.

A. State Law Governs Whether Damages Awarded Pursuant To O.R.C. § 5301.36 Are In The Nature of Penalties

R.C. § 5301.36 was enacted by the Ohio legislature for the protection of Ohio mortgagors. "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 interpretation); *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"; *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)); *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* 3-29-10 Remand Order, at 10.

The issue of a federal court applying state law to determine if an amount is a penalty or fine for purposes of an exemption that was almost the same as the exemption argued by Fannie Mae herewas addressed in *Irving Indep. School Dist. v. Packard Properties*, 970 F.2d 58 (5th Cir. 1992), whose lower-court decision is cited by Fannie Mae in its Brief at 19. In that case, 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, the §1825(b)(3) in *Irving* 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 Appellant cites a handful of cases for the proposition that “federal law governs whether the financial exaction Plaintiff seeks is a penalty.” (Appellant Brief, p. 18). However, the cases Appellant cites instead say that "whether a charge constitutes a penalty for purposes of [federal law at issue] is a federal question informed by state law." *National Loan Investors L.P. v. Town of Orange*, 204 F.3d 407 (2nd Cir. 2000) *referencing Irving Indep. Sch. Dist. v. Packard Properties*, 741 F.Supp. 120, 123 (N.D. Tex. 1990). In *National Loan*, the court cited a Connecticut state court decision that had held that the assessments at issues were not penalties and stated: "Informed by state law, we are inclined to agree with the [Connecticut State] court's conclusion." *Id* at 412. The Appellant also cites *Irving Indep. School Dist v. Packard Properties*, 741 F.Supp. 120, 123 (N.D.Tex. 1990) to argue that whether funds sought from the FDIC was in the nature of penalties or interest within the meaning of §1825(b)(3) was an issue of federal law guided by reference to Texas state law. (Appellant Brief, p. 19). Notably, the *Irving* opinion that Appellant cites is the opinion from the lower court. The opinion was affirmed by the Fifth Circuit in *Irving*, 970 F.2d 58 cited above and, as stated above, the appeals court looked to state law.

B. Under the Ohio Law of *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296 (2005) The Statutory Damages In R.C. § 5301.36(C) Are Not A Penalty or Fine.

This Court earlier was called upon to decide whether R.C. § 5301.36(C) "creates a statutory liability or whether it is a statute for a penalty." *Rosette v. Countrywide Home Loans, Inc.*, 105 Ohio St.3d 296, 2005-Ohio-1736, (2005) (internal citations omitted). This Court could not have been clearer:

> 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.
> Clearly, the General Assembly could have used the term 'penalty' or 'forfeiture' if it had intended R.C. 5301.36(C) to create an action for a penalty or forfeiture.

> Indeed,the legislature has used such penalty/forfeiture language in other statutes. See R.C. 1321.56 ('[a]ny person who willfully violates section 1321.57 of the Revised Code *shall forfeit* to the borrower the amount of interest paid by the borrower'); see, also, R.C. 149.351(B)(2) (providing that any person aggrieved by the removal, destruction, transfer, or mutilation of a public record may bring a civil action to recover a '*forfeiture* in the amount of one thousand dollars for each violation'). (Emphasis added.) To presume that the legislature meant 'penalty' or 'forfeiture' when it used the term 'damages' is to presume imprecision on part of the General Assembly. We decline to make such a presumption in this case.

Id. at 298. Faced with this ruling addressing the same statute and same issue of whether the statutory damages are a penalty, Fannie resorts to arguing, without any case support, that *Rosette* was not decided while interpreting the statute relevant to the Penalty Bar. According to Appellant, this Court could honor *stare decisis* and yet somehow rule that the exact same statute can have two completely different meanings depending upon why the statute was being interpreted. That means judicial precedent from this Court is useless. Whether this statute addresses a penalty or damages is the question now, as it was then.

C. Under Federal Law The Statutory Damages In R.C. § 5301.36 Are Not A Penalty or Fine.

As shown above, Ohio law governs this matter and the Ohio law could not be more clear that R.C. § 5301.36 is remedial and not penal. However, even if this Court chose to apply federal law to this question, the result would be the same. In *Murphy v. Household Fin. Corp*., 560 F.2d 206 (6th Cir. 1977), the court set out the three factors—already well-established under U.S. Supreme Court and other federal precedent—that courts should look at to determine if a statute was remedial or penal. The *Murphy* court was called upon to decide whether the Truth in Lending Act ("TILA") statute which provided for damages of actual damages plus twice the amount of any finance charge assessed was remedial or penal. Looking to the U.S. Supreme Court for guidance to determine whether the "twice the finance charge damages" were remedial or penal, the Sixth Circuit held:

> Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
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> ***
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> Three factors in particular deserve attention: 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, 560 F.2d at 209 (*citing Huntington v. Attrill*, 146 U.S. 657, 666-669 (1892); *Bowles v. Farmers Nat'l. Bank*, 147 F.2d 425, 428 (6th Cir. 1945); *Porter v. Household Fin. Corp.*, 385 Supp. 336 (S.D. Ohio 1974).

An analysis of R.C. § 5301.36 shows that the statute is remedial and not penal. First, the purpose of the statute was to redress individual wrongs to mortgagors for the mortgagee's failure to properly record mortgage satisfactions. In *Murphy*, the court found that a statute which serves a dual purpose of remedying individual harm while acting as a deterrent is properly characterized as remedial and not penal.

> The Truth in Lending Act ultimately serves the dual purpose of providing a remedy for harm to the monetary interests of individuals while serving to deter socially undesirable lending practices. Congress focused on the individual consumer of credit as the person primarily injured who should be encouraged to prosecute actions and should be allowed to recover directly and adequately for harms done. This is not the sort of statutory scheme properly characterized as penal.

Where, as here, "the damages recovered by a prevailing party … are for his own use and not for the benefit of the public at large," the "restitution provided by the statute is not penal." *Becker v. Computer Sciences Corp.*, 541 F.Supp. 695, 702 (S.D. Tex 1982), citing *Brady*, 175 U.S. at 154-157.

The second factor is beyond dispute. ("[W]hether recovery under the statute runs to the harmed individual or to the public…") The damages awarded under R.C. § 5301.36(C) go to the mortgagors, and not the government. Further, not only relevant to this factor but also the first factor, statutory language providing for this recovery to the mortgagors and not the government shows that the Ohio legislature desired and intended recovery of damages, not something in the nature of a government penalty or fine.

The third factor is whether the "recovery authorized by the statute is wholly disproportionate to the harm suffered." In the present matter, the damages provided for in R.C. § 5301.36(C) are liquidated, rather than a disproportionate punishment. The Appellant fails to offer any factual argument about why the damages are disproportionate, rather than liquidated in a modest sum. Appellant seems to rely upon the argument that since statutory damages of $250 are provided, the statute must be penal. ("R.C. 5301.36 sanctions a failure to record a mortgage satisfaction and provides a statutory award of $250 for each violation without regard to any actual damages suffered." Appellant Brief, p. 21). But just the opposite, the law is clear that a statutory minimum damages does not render a statute penal. *See Becker*, 541 Supp. at 702("That a portion of such damages is statutorily set rather than being subject to proof like most remedial statutes, or the fact that the statute imposes liability beyond the amount of damages actually suffered, however, does not necessarily make the statute penal."); *Brady v. Daly*, 175 U.S. 148, 15 (1899) ("The further provision in the statute, that those damages shall be at least a certain sum named in the statute itself, does not change the character of the statute and render it a penal instead of a remedial one.")

Fannie Mae quotes dicta from *Gabelli v. S.E.C.*, 568 U.S. ___, 133 S. Ct. 1216, 1223 (2013) and *Tull v. United States*, 481 U.S. 412, 422 (1987) but those cases are consistent with the

Murphy/Huntington test and do not help Fannie Mae. *Gabelli* was an enforcement action by the SEC for civil penalties under 15 U.S.C. § 80b-9. *Gabelli*, 133 S. Ct. at 1217. The penalties were "payable to the Treasury of the United States." 15 U.S.C. § 80b-9(e)(A). *Gabelli* partially quotes *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 423 (1915) which said a penalty or forfeiture is "something imposed in a punitive way for an infraction of a public law." But *Meeker*, 236 U.S. at 423 simply re-affirms what Radatz is saying, and cites, among other cases, *Huntington*, 146 U.S. at 666-669 and *Brady*:

> The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such. Here, the liability sought to be enforced was not punitive, but strictly remedial, as is shown by §§ 8, 9, 14, and 16 of the Act to Regulate Commerce. [citations omitted]

In *Gabelli*, the Supreme Court was never called on to decide whether the amounts sought were a penalty. The dicta cited by Fannie Mae arose when the Court was deciding whether to apply the discovery rule to toll the statute of limitation to a civil penalty action brought by the Government. The opinion highlights how the Government and an individual plaintiff were markedly different in their ability to ferret out fraud and wrongdoing. While the Government had huge staffs to investigate and determine if fraud was happening, individuals did not know of the fraud until it happened. That is the reason why the discovery rule would apply in one context and not another. "The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong. Rather, a central "mission" of the Commission is to "investigat[e] potential violations of the federal securities laws." *Gabelli*, 133 S. Ct. at 1222.

Gabelli has nothing to do with deciding whether a statute is penal or remedial but whether a tolling should apply for the Government to bring a civil penalty action. "[W]e have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement for civil penalties." *Id*. at 1221. Contrary to Fannie's mistatement, the case and the holding had nothing to say about what "[t]he defining characteristic of a penalty under federal law is…." (Appellant Brief, p. 19).

Tull, cited by Fannie Mae, was a classic "penalty" case: the Government sought civil penalties for itself under the Clean Water Act. *Id*. at 414. The payments to the Treasury were in the nature of a penalty to punish a public wrong. The only issue was whether the defendant was entitled to a jury trial. *Id*. at 415. *Tull* resolved that by deciding whether the claim was legal or equitable. *Id*. at 417. *Tull* never addressed how to determine if statutory damages are in the nature of a penalty or otherwise outline or give any guidance as to how to determine if statutory damages are in the nature of a penalty. Rather, *Tull* was an action brought by the United States Government against a real estate developer for violating the Clean Water Act. *Id*. at 414. *Tull* was a classic penalty case where the Government sought penalties against the developer of over $22 million (*Id*. at 420) based on a law that was passed because of the need for retribution and deterrence. (*Id*. at 422).

Fannie's reliance on *Bowles v. Farmer Nat'l Bank*, 147 F.2d 425 (6th Cir. 1945) is likewise unavailing. In *Bowles* the Court held that treble damages for violating the Emergency Price Control Act of 1942 were a penalty. The *Bowles* statute was determined to be a penalty because it was a public wrong in violation of the Emergency Price Control Act of 1942 which was

> declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents' to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency….

Id. at 428. The present matter deals with private homeowners and their mortgage title, with a small, liquidated sum of $250 going to them, not the government.

Lastly, the Appellant spends multiple pages arguing to this Court why the case of *Higgins v. BAC Home Loans Servicing, LP*, 2014 US Dist Lexis 43278 (ED Ky. 2014) was wrongfully decided or why it is not controlling. Fannie either carelessly, or intentionally, missed the point of *Higgins* which is not helpful for the decision it reached, but for the test it confirmed must be applied.

Appellant first claims that the instant case is materially different from *Higgins* by virtue of the Consent Order. (The Consent Order "is a fundamental and dispositive difference…" Appellant Brief, p. 23). That is an odd position to take considering that FHFA is a defendant in the *Higgins* matter. The Order that is claimed to be "fundamentally different" states that it applies to "any state mortgage satisfaction law." As such, why does a federal court in *Higgins* have the ability to decide if Kentucky's state mortgage satisfaction law imposes a fine or penalty but the Ohio courts are barred from doing the exact same thing? Next, Fannie points solely to the outcome in *Higgins* ("three (3) times the actual damages, plus attorney's fee and court cost, but in no event less than five hundred dollars ($500)" are not a penalty) but stays carefully away from the test used to arrive at that result.

Whether "three (3) times the actual damages, plus attorney's fee and court cost, but in no event less than five hundred dollars ($500)" is penal, a $250 sum with no treble possibility is plainly not. Indeed, the differences noted by Fannie between these two laws make it **more** clear the Ohio law is not a penalty. Based upon the *Murphy* analysis, if any statute is to be found penalty would be Kentucky's.

What Fannie dodges from *Higgins* is the court's recitation of the correct test: the three-part analysis under *Murphy*. Fannie cannot reconcile its demand that Ohio's statute be found penal under federal law, with the fact that the award is for the wrong to the homeowner whose title is clouded by failure to release, *Pinchot v. Charter One*, 99 Ohio St.3d 390 (2003) and that the payment is made solely to the individual and not the government.

CONCLUSION

For all of the reasons stated above, Amicus First Priority Title Agency respectfully requests that the Court affirm the decision of the Eighth District Court of Appeal.

Respectfully submitted,

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