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December 11, 2013

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Christopher Brewster v. Nationstar Mortgage, LLC, et al.*,
No. 12-56560

Dear Ms. Dwyer:

Following oral argument in this case, the Court ordered the parties to file supplemental letter briefs “addressing 1) whether the Servicemembers Civil Relief Act [SCRA] contains a private right of action, and 2) whether the [SCRA] authorizes a claim for punitive damages.” R. 34.¹ The United States has a strong interest in servicemembers’ continued ability to file their own SCRA cases, and in their continued ability to pursue punitive damages when it is appropriate for them to do so. Moreover, this Court’s resolution of the punitive damages issue may impact the United States’ ability to seek punitive damages on servicemembers’ behalf. The SCRA authorizes “appropriate relief, including monetary damages”

¹ “R. _” refers to a docket entry in this appeal. “ER_” refers to the page number of the Appellant’s Excerpts of Record. “SER_” refers to the page number of the Appellees’ Supplemental Excerpts of Record.

for cases brought by the Attorney General as well as for private cases like this one. See 50 U.S.C. App. 597(b)(2), 597a(a)(2). We thus submit this letter brief as *amicus curiae* pursuant to Federal Rules of Appellate Procedure 29(a) and (e) to address the issues raised in the Court's supplemental briefing order. We take no position on the merits of appellant's particular claim.

STATEMENT

1. The SCRA provision relevant to the Court's questions states:

Private Right of Action.

(a) In general

Any person aggrieved by a violation of this Act may in a civil action –

(1) obtain any appropriate equitable or declaratory relief with respect to the violation; and

(2) recover all other appropriate relief, including monetary damages.

(b) Costs and attorney fees

The court may award to a person aggrieved by a violation of this Act who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

50 U.S.C. App. 597a.

2. The dispute in this case involves a claim under 50 U.S.C. App. 533(c), which prohibits a lienholder from foreclosing on a servicemember's property without a court order "during, or within one year after, the period of the servicemember's military service." Plaintiff Christopher Brewster is a member of the United States Marine Corps Reserve. SER3. In December of 2009, while

Brewster was on active duty, SunTrust Bank filed a notice of default for his home mortgage, putting the loan in foreclosure and charging him about \$570 in associated fees. SER5. Brewster repeatedly informed SunTrust that the foreclosure proceeding violated the SCRA. SER6. In August 2010, SunTrust ended the foreclosure proceedings by removing the notice of default. SER6. In November 2010, SunTrust transferred Brewster's mortgage to Nationstar Mortgage. SER7. But the fees associated with SunTrust's foreclosure proceedings remained on Brewster's account. SER7. Brewster asked Nationstar to remove the fees, but it refused. SER7.

Brewster then filed suit asserting SCRA claims against both SunTrust and Nationstar. Brewster sought compensatory, consequential, and punitive damages, as well as attorney's fees and costs. SER9-10. After the litigation began, Nationstar removed the fees from Brewster's account, and Brewster settled his claims against SunTrust. See Appellees' Initial Br. 1-2.

The district court granted Nationstar's motion to dismiss. ER5. It concluded that Nationstar's attempts to collect foreclosure fees levied by another bank did not violate the SCRA. ER4-5. Brewster appealed. ER1. This Court held argument on November 8, 2013, and later issued the supplemental briefing order. R. 33, 34.

DISCUSSION

A. *The SCRA Contains A Private Right Of Action*

On October 13, 2010, Congress added an express private right of action to the SCRA. See Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2877. The SCRA now expressly gives victims the right to sue for “appropriate relief,” including “equitable or declaratory relief” and “monetary damages.” 50 U.S.C. App. 597a (quoted in full above). Though neither party cited Section 597a in its initial briefing in this case, the parties now agree that it establishes a private right of action to assert SCRA claims. See Appellant’s Letter Br. 1-2; Appellees’ Letter Br. 4. The United States concurs.²

B. *The SCRA Authorizes Punitive Damages Claims*

The SCRA is properly read as authorizing punitive damage awards in appropriate cases.

1. First, the few cases that have considered the issue have concluded that punitive damages are available to remedy SCRA violations. The Fourth Circuit briefly considered this issue in *Gordon v. Pete’s Auto Service of Denbigh*, 637 F.3d 454 (4th Cir. 2011). It assumed punitive damages were available under 50

² The parties disagree about whether Brewster’s claim against Nationstar is based on conduct that occurred before or after Section 597a was enacted. See Appellant’s Letter Br. 2; Appellees’ Letter Br. 5. Nationstar, taking the position that the relevant conduct predated Section 597a’s enactment, also argues: (1) that Section 597a may not be applied retroactively; and (2) that before Section 597a was enacted, the SCRA was not enforceable in a private suit. Appellees’ Letter Br. 4-21. These arguments go beyond the questions this Court asked, and accordingly we do not address them.

U.S.C. App. 597a, and rejected the notion that the prospect of punitive damages liability made the new statutory private cause of action impermissibly retroactive. *Id.* at 460-461. On remand, the district court interpreted the Fourth Circuit’s opinion as having decided that “[p]unitive damages are * * * available for willful and wanton violation of the SCRA.” *Gordon v. Pete’s Auto Serv. of Denbigh, Inc.*, 837 F. Supp. 2d 581, 587 (E.D. Va. 2011). See also *Canfield v. Atlas Storage S. Bay, LLC*, No. 12-CV-1574, 2012 WL 4062479 (S.D. Cal. Sept. 14, 2012) (denying a defendant’s motion to dismiss an SCRA punitive damages claim); *Hurley v. Deutsche Bank Trust Co. Americas*, No. 1:08-CV-361, 2009 WL 701006, at *10 (W.D. Mich. Mar. 13, 2009) (concluding, before Congress added an express private right of action, that under *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the SCRA allowed punitive damages “[b]ecause there is no indication in the statute that Congress intended to exclude punitive damages as a remedy”).

2. Second, the SCRA allows victims to seek “all * * * appropriate relief,” language that invokes the Supreme Court’s “appropriate relief” jurisprudence. 50 U.S.C. App. 597a. That jurisprudence reveals that punitive damages are available to remedy SCRA violations in appropriate circumstances. Under the logic of the “appropriate relief” line of cases, punitive damages are available for certain SCRA violations – for example, those that are tortious, intentional, and outrageous.

In defining available remedies to vindicate federal statutory rights, the Supreme Court has provided three basic guideposts. First, all appropriate relief not expressly excluded is generally available. *Franklin*, 503 U.S. at 70-71 (“The general rule * * * is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.”). Second, the relief provided must be consistent with the structure or purposes of the statute. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284-285 (1998). And third, courts should look to analogous common law causes of action to determine what relief is appropriate. See *Smith v. Wade*, 461 U.S. 30, 34-56 (1983) (holding, based upon tort-law principles, that certain Section 1983 violations may be remedied with punitive damages); see also *Barnes v. Gorman*, 536 U.S. 181, 187-188 (2002) (determining, based upon analogy to contract law, that Section 202 of the Americans with Disabilities Act does not permit punitive damages).

Recently, this Court applied this “appropriate relief” jurisprudence to hold that a statute that authorizes “damages” and “creates a cause of action that sounds in tort” allows for punitive damages. *Ditullio v. Boehm*, 662 F.3d 1091, 1096 (9th Cir. 2011). Looking to tort law, the Court concluded that punitive damages were appropriate relief in civil causes of action brought under the Trafficking Victims Protection Act. *Id.* at 1096-1098. This Court reasoned that the statutory cause of

action covers conduct that is tortious and often intentional and outrageous, and that allowing punitive damages was consistent with the statute's purposes. *Id.* at 1098.

Similarly, punitive damages should be permitted to remedy certain SCRA causes of action, particularly causes of action that, like the claim at issue in *Ditullio*, sound in tort. Many SCRA claims, including claims under Section 533 (at issue in this case), resemble the common law tort of conversion. Indeed, before Congress amended the SCRA in 2010 to add an express private cause of action, Section 533 (and other similar SCRA provisions) provided that SCRA claims did not preclude state-law conversion claims:

The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including any consequential or punitive damages.

50 U.S.C. App. 533(d)(2) (2006). This pre-amendment statutory language thus expressly recognized that punitive damages may be available for certain conversion claims. For conversion claims, as with any other tort claim, punitive damages may be appropriate relief for "conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." See Restatement (Second) of Torts § 908 (1979). Likewise, under the logic of *Ditullio* and the line of Supreme Court cases it applies, punitive damages are available to remedy certain conversion-like SCRA claims. Thus, where the conduct that gives rise to a Section 533 wrongful foreclosure violation is outrageous, punitive damages may appropriately be awarded.

Indeed, this case may be easier to resolve than *Ditullio*. There, the relevant statutory language simply said that a plaintiff “may recover damages,” 662 F.3d at 1096; moreover, Congress had considered language that would have expressly made punitive damages available, but had not adopted it, *id.* at 1103-1104 (Callahan, J., dissenting). The SCRA’s legislative history shows no similar congressional consideration of an express authorization of punitive damages. More importantly, the relevant language of the SCRA expressly invokes the “appropriate relief” principle set out above: it allows aggrieved persons to recover “any appropriate equitable or declaratory relief,” and to “recover *all other appropriate relief*, including monetary damages.” 50 U.S.C. App. 597a(a)(2) (emphasis added). In *Ditullio*, the dissent argued that it was a mistake to apply the “appropriate relief” line of cases at all. See 662 F.3d at 1103 (Callahan, J., dissenting). But here, Congress chose language that strongly indicates its intent to apply that line of cases to SCRA claims.

3. Finally, “monetary damages” as used in the SCRA should be interpreted to include punitive damages. First, the ordinary meaning of the term is broad enough to include punitive damages. The term “monetary damages” is not a technical one. *Black’s Law Dictionary*, for example, defines more than 60 different types of damages, but does not include a definition of “monetary damages.” See *Black’s Law Dictionary* 445-449 (9th ed. 2009). But punitive damages are unquestionably monetary and, just as plainly, are a type of damages.

Nothing in the term “monetary damages” suggests any intent to limit the forms of damages that are available. Without some indication that Congress intended to limit the natural meaning of the term, this Court should interpret the SCRA to allow for punitive damages.

Additionally, Congress used the term “monetary damages” in a similar context in the Fair Housing Act (FHA), and courts have determined that it includes punitive damages. The FHA uses “monetary damages” to describe the relief the Attorney General may obtain on behalf of aggrieved persons in pattern-or-practice cases. The relevant provision states that a court may award, in addition to preventative relief, “such other relief as the court deems appropriate, including monetary damages to persons aggrieved.” 42 U.S.C. 3614(d)(1)(B). The United States regularly obtains punitive damage awards for victims in FHA pattern-or-practice cases. See, e.g., *United States v. Peterson, et al.*, No. 09-10333 (E.D. Mich. Aug. 6, 2010) (jury verdict) (awarding punitive damages to victims of sexual harassment); *United States v. Matusoff Rental Co.*, No. 3:99-cv-626 (S.D. Ohio Mar. 30, 2007) (final judgment) (awarding punitive damages to victims of racial and familial status discrimination); *United States v. L.T. Jackson*, No. 3:99-CV-556 (S.D. Miss. June 11, 2002) (final judgment) (awarding punitive damages to victims of sexual harassment).

The United States’ authority to seek punitive damages in FHA cases has been uniformly upheld. The most extensive discussion of the issue is in *United*

States v. Rent America, 734 F. Supp. 474 (S.D. Fla. 1990). There, in reasoning equally applicable to the SCRA, the court determined that the “common-sense definition” of monetary damages includes punitive damages. *Id.* at 482. If Congress had wanted to exclude punitive damages, the court reasoned, it could have limited recovery to “actual damages” or some other defined type or types of damages. Because Congress chose that “all inclusive term of ‘monetary damages,’” the court saw no reason to create a limitation to exclude punitive damages. *Id.* at 481. Other courts have reached the same conclusion. See, e.g., *United States v. Gumbaytay*, 757 F. Supp. 2d 1142, 1150 (M.D. Ala. 2010) (ruling that the term “monetary damages” in the FHA, 42 U.S.C. 3614, includes punitive damages); *United States v. Autumn Ridge Condo. Ass’n, Inc.*, 265 F.R.D. 323, 326 (N.D. Ind. 2009) (“[T]he term ‘monetary damages’ in relation to 42 U.S.C. § 3614(d)(1)(B) ‘anticipates the inclusion of all damages which could be awarded in the form of monetary damages . . . includ[ing] actual damages . . . and punitive damages.’”) (citing *Rent America*, 734 F. Supp. at 482). The Seventh Circuit also has ruled that the government can obtain punitive damages in an FHA pattern-or-practice case, though it did not specifically address the meaning of “monetary damages.” See *United States v. Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (reversing the district court’s directed verdict against the government on punitive damages in an FHA pattern-or-practice case).

One place in federal law where “monetary damages” does not include punitive damages is 42 U.S.C. 12188, which defines the Attorney General’s authority to enforce the Americans with Disabilities Act’s public accommodations requirements. There Congress provided specifically that “the term ‘monetary damages’ and ‘such other relief’ [in that particular provision] does not include punitive damages.” 42 U.S.C. 12188(b)(4). That Congress specifically set out this limitation in Section 12188 indicates that it expected that, without the express limitation, the term “monetary damages” could be interpreted as including punitive damages.

In short, the SCRA’s invocation of “appropriate relief” and its use of the term “monetary damages” reveal that punitive damages are available under the Act. See *Rent America*, 734 F. Supp. at 482 (“[H]ad the monetary damages term [in the FHA provision discussed above] not been clearly subject to definition, the court could still award punitive damages and damages for emotional distress under the ‘may award such other relief as the court deems appropriate’ language of [that provision].”).

4. Citing the SCRA’s “preservation of remedies” section, appellees contend (Letter Br. 23) that Section 597b’s provision that certain types of damages are “available under ‘other law’ indicate[s] that they are not available for private civil actions for violations of the SCRA.” This argument fails for at least three reasons. First, it proves too much. Section 597b states that nothing in the SCRA’s public

and private enforcement provisions “shall be construed to preclude or limit any remedy otherwise available under other law, including consequential and punitive damages.” It thus preserves not just punitive damages, but “any remedy” available under “other law.” And yet Section 597a indisputably authorizes remedies for SCRA violations, including damages remedies. So it cannot be that Congress intended the remedies preserved in Section 597b to be unavailable in a suit under Section 597a. Second, appellees’ argument ignores the reality that Section 597b replaced a number of “preservation of remedies” provisions that specifically stated that the SCRA did not prevent servicemembers from pursuing wrongful conversion claims. See 50 U.S.C. App. 531(c)(2), 532(b)(2), 533(d)(2), 535(h)(2), 536(e)(2) and 537(c)(2) (2006). Congress enacted Section 597b to make clear that adding the express private right of action to the SCRA did not alter servicemembers’ freedom to pursue state-law claims or cut off any other otherwise available claims. See 156 Cong. Rec. H7334 (daily ed. Sept. 29, 2010) (explaining that Section 597b “would provide that the rights granted under [the new public and private enforcement provisions] will not limit or exclude any other rights that may also be available under Federal or state law”). Third, under any plausible interpretation, Section 597b does not override Section 597a’s plain language authorizing “all * * * appropriate relief, including monetary damages,” a phrase that (as we argue above) is naturally read to encompass punitive damages.

CONCLUSION

This Court should hold that the SCRA contains a private right of action and authorizes punitive damage awards.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on December 11, 2013, I electronically filed a true and correct copy of the foregoing letter brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I also certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that this letter brief contains 2776 words.

s/ Nathaniel S. Pollock
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