

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT
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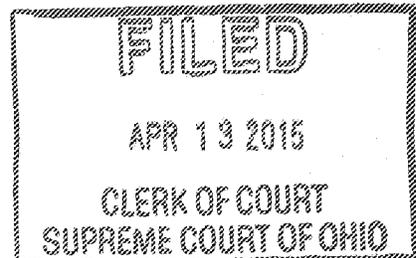
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INTRODUCTION

The Federal Housing Finance Agency (“FHFA”) ordered Fannie Mae *not* to “pay[] . . . any amount pursuant to Ohio Code 5301.36 or pursuant to any judgment in connection with [this specific case]” (Appx. A-039¹) because doing so would violate a federal statute mandating that Fannie Mae “shall not be liable for any amounts in the nature of penalties” while in conservatorship, 12 U.S.C. 4617(j)(4) (the “Penalty Bar”). In granting FHFA broad cease-and-desist powers, pursuant to which FHFA issued the Consent Order challenged in this litigation, Congress expressly divested all courts—state and federal—of jurisdiction to “affect . . . , review, modify, suspend, terminate, or set aside” FHFA orders. 12 U.S.C. 4635(b). In direct contravention of this congressional withdrawal of jurisdiction, the Eighth District nevertheless reviewed the substance of the Order at issue, criticized its reasoning, and effectively vacated the provision barring payment of any judgment in this case. Plaintiff argues this was proper because FHFA never “made a finding” that a monetary judgment in this case would constitute liability for a penalty. Although no such “finding” is needed to trigger the jurisdictional bar, the Consent Order is FHFA’s explicit determination that any payment pursuant to R.C. 5301.36 in this case violates the Penalty Bar. Plaintiffs may disagree with FHFA’s conclusion that such a payment would violate the Penalty Bar, but the point of Section 4635(b) is that courts have no authority to second-guess any agency determination underlying a final and outstanding order to cease and desist, such as the Consent Order. Therefore, the Eighth District’s decision must be reversed.

In any event, even if federal law did not prohibit judicial review and vacatur of the Consent Order, the lower court erroneously construed both the Consent Order and the pertinent provisions of federal law. Contrary to Plaintiff’s position, R.C. 5301.36 imposes “amounts in the

¹ All citations to “Appx.” are citations to the Appellant’s appendix unless otherwise specified.

nature of penalties” within the meaning of the Penalty Bar because it allows the recovery of statutory damages in addition to actual damages.

Finally, Plaintiff argues that this case presents “no issue of great public or general interest,” and that this Court should conclude “that review was improvidently allowed.” (Pl.’s Br. at 47-48.) To the contrary, the comprehensive federal statutory scheme that the Eighth District ignored was enacted as a response to the 2008 financial crisis, and it reflected Congress’s considered judgment that orderly management of the housing finance market and protection of Fannie Mae’s assets required precluding judicial revision of final FHFA orders. The decision below guts that controlling congressional judgment, and invites precisely the type of judicial interference Congress sought to preclude. These issues have national importance and present questions of public or great general interest that are not unique to this case. Indeed, Plaintiff relies on numerous cases where application of the same statutory scheme is at issue, and both parties cite a body of law interpreting similar statutes stretching back some 50 years. Any decision by this Court allowing the Eighth District’s ruling to stand threatens that federal statutory framework for orderly management of the housing finance market and will invite state and federal courts around the country to chip away at congressional policy for preserving and conserving the assets of Fannie Mae (and, by extension, Freddie Mac). For these reasons, this Court should reverse the decision below and remand this case to the trial court for entry of dismissal.

LAW AND ARGUMENT

I. 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.

Plaintiff asserts that FHFA, despite issuing a Consent Order that explicitly bars the payment of any judgment awarded in this case, actually made no “determination” as to whether

the recovery Plaintiff seeks in this litigation is barred by Section 4617(j)(4), and thereby intended to leave that question of federal law to be decided by the state courts. (Pl.'s Br. at 8-11.) This argument fails on multiple levels.

The Consent Order issued by FHFA (Appx. A-039) reads in pertinent part as follows:

Pursuant to 12 U.S.C. § 4631, [Fannie Mae] and [Freddie Mac] (together, "the Enterprises") are hereby

1. 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 any state mortgage satisfaction law on the Enterprises for noncompliance.

Furthermore, Fannie Mae is

2. ORDERED 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).

The plain text of the Consent Order is unambiguous. Paragraph 1 is a general prohibition addressed to both Fannie Mae *and* Freddie Mac that flatly precludes violation of the Penalty Bar with respect to state mortgage satisfaction laws. Paragraph 2 is specific to this case: it expressly bars Fannie Mae from "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*]." (Appx. A-039.) This directive ends the matter.

Plaintiff instead reads the order as only prohibiting payment of a judgment in this case *if a court determines* that the judgment is a penalty for purposes of the Penalty Bar. But that simply ignores FHFA's order explicitly precluding Fannie Mae from making any payment "pursuant to any judgment in connection with [this case]." (Appx. A-039.) The absolute payment prohibition imposed by that order was effective and enforceable immediately upon

issuance, and it is not subject to review by this or any other court. *See* 12 U.S.C. 4635(b). Accordingly, the trial court properly dismissed this case.

Plaintiff's misreading of the Consent Order is based on a statement in a separate document, the Stipulation and Consent to the Issuance of a Consent Order ("Stipulation and Consent"). (Appx. A-035–A-038.) The Stipulation and Consent is, as the name implies, the mechanism through which Fannie Mae and Freddie Mac waived the procedural rights they otherwise possessed and agreed to the issuance of the Consent Order. But it provides no support for Plaintiff's central argument that execution of the Stipulation and Consent somehow nullified the congressional withdrawal of jurisdiction over the Consent Order effected by 12 U.S.C. 4635(b). The Consent Order became operative as a final order to cease and desist and is insulated from judicial review by Section 4635(b) upon its execution. The plain text of the Consent Order speaks for itself. Fannie Mae's waiver of procedural hearing rights does not—and cannot—affect the scope, meaning, or reviewability of FHFA's order that Congress insulated from judicial review.

In any event, even if the meaning of the Consent Order were somehow ambiguous (and it is not), FHFA has filed an amicus brief in this Court explaining exactly what its Consent Order means—*i.e.*, it precludes Fannie Mae from paying any judgment in this litigation. (*See* FHFA Amicus Brief at 3, 7.) Plaintiff's position would require ignoring not only the plain text of FHFA's Order, but FHFA's understanding and written confirmation of what its own Order says.

Plaintiff relies primarily on two federal district court decisions, neither of which is on point. (*See* Pl.'s Br. at 12-16.) The consent order in *Rex v. Chase Home Finance, LLC*, 905 F.Supp.2d 1111, 1125 (C.D.Cal.2012), simply required the defendant to create a plan, which, according to the district court, "may or may not provide the same relief sought in the case

brought by the non-party to the consent order.” The complaint in *Rex* had no effect on the consent order’s requirement that the defendant develop a plan. Indeed, the *Rex* Court went out of its way to distinguish its ruling from cases where, as here, courts are divested of jurisdiction because the relief sought was “*expressly banned* by a federal banking agency’s order,” noting that the plaintiff in *Rex* did “not seek relief expressly banned by the 2011 Consent Order.” *Id.* at 1132 (emphasis in original). As explained above, Paragraph 2 of the Consent Order at issue cannot credibly be read as anything other than a prohibition on payment of any amount in this case. Accordingly, the ruling in *Rex* is consistent with Fannie Mae’s position in this case.

Similarly, Plaintiff’s reliance on *In re JPMorgan Chase Mortgage Modification Litigation*, 880 F.Supp.2d 220 (D.Mass.2012), is misplaced. That case “address[ed] the *same* jurisdictional argument advanced by the *same* Defendant based on the *same* 2011 Consent Order.” *Rex*, 905 F.Supp.2d at 1129-30 (emphasis in original) (footnote omitted). Therefore, *JP Morgan* too is consistent with Fannie Mae’s position. Plaintiff also points to *Rex*’s disagreement with an earlier case, *Bakenie v. JPMorgan Chase Bank, N.A.*, C.D.Cal. No. SACV-12-60 JVS, 2012 U.S. Dist. LEXIS 137809 (Aug. 6, 2012), which involved the same defendant and consent order as *Rex* and *JP Morgan*. *Rex*, 905 F.Supp.2d at 1132. The *Bakenie* Court reached a different result because it read the consent order more broadly than the *Rex* and *JP Morgan* Courts. But there was no fundamental disagreement among these courts that a clearly on-point consent order, like the one at issue here, divests courts of jurisdiction.

Nor is Plaintiff successful in distinguishing the cases relied upon by Fannie Mae. In *American Fair Credit Association v. United Credit National Bank*, 132 F.Supp.2d 1304 (D.Colo.2001) (“*AFCA*”), the consent order directed the defendant in that case to “cease and desist all activity and transactions relating to the products of [AFCA], including but not limited

to payment of funds *for any reason* to AFCA.” *Id.* at 1312 (emphasis added by court). Plaintiff says that order was different than the one at issue here because it prohibited payment of funds to the AFCA plaintiff (Pl.’s Br. at 15), but that is exactly what the Consent Order here prohibits—payment of “any amount” “for any reason” “pursuant to any judgment” relating to *this case*. (Appx. A-039.) And Plaintiff’s lengthy treatment of *Newton v. American Debt Services*, ___ F.Supp.3d ___, N.D. Cal. No. 3:11-cv-03228, 2014 U.S. Dist. LEXIS 173741 (Dec. 16, 2014), misses the mark. (Pl.’s Br. at 17-19.) In *Newton*, the plaintiff sought to use the FDIC order there to assert a state-law claim. The district court, noting that it lacked guidance from the FDIC on how to interpret the order, correctly concluded that judicial interpretation of the order “could lead to a direct conflict between the Court and the FDIC in interpreting and enforcing the Order.” 2014 U.S. Dist. LEXIS 173741, 32. The Eighth District similarly should have avoided conflict with FHFA’s Consent Order by upholding the trial court’s dismissal.

Because no court has jurisdiction to review or affect the Consent Order, this Court should reverse the Eighth District’s judgment and remand to the trial court for dismissal.

II. Proposition of Law II: FHFA’s Order determining 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, 825 N.E.2d 599.

Although the courts lack jurisdiction to conduct an independent review of Fannie Mae’s obligation to pay a judgment in this case, any such review would confirm FHFA’s conclusion that such a payment would violate the Penalty Bar. Under federal law, which governs the determination whether a state statute is penal for purposes of 12 U.S.C. 4617(j), R.C. 5301.36 imposes amounts “in the nature of” penalties. But the Penalty Bar exempts Fannie Mae from liability for amounts “in the nature of penalties or fines” and, therefore, bars liability under R.C. 5301.36. Moreover, even under Ohio law, the amounts imposed by R.C. 5301.36 are in the nature of penalties for purposes of the Penalty Bar, even if considered remedial in other contexts.

A. Federal Law Governs Legal Interpretation of Whether a Statute Imposes Amounts in the Nature of Penalties for Purposes of Section 4617(j)(4).

Whether a state statute imposes amounts “in the nature of penalties” for purposes of a federal statute is a question of federal law. *See, e.g., Missouri Pac. R.R. Co. v. Ault*, 256 U.S. 554, 565, 41 S.Ct. 593, 65 L.Ed. 108 (1921) (whether an amount is compensation or a penalty within the meaning of a federal statute “presents a question not of state, but of federal law”). This is so because “there is a strong federal interest in the question” and “we doubt that Congress intended the outcome to depend upon varying characterizations of state law.” *United States v. Lewis Cty.*, 175 F.3d 671, 677 (9th Cir.1999). Although some courts have noted that this inquiry may be “informed by” or “guided by reference to” state law, they consistently have held that federal law nonetheless controls. *See, e.g., National 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) [the materially identical FDIC analogue to § 4617(j)(4)] is a federal question informed by state law.”).

Plaintiff argues that state law alone governs whether a state statute imposes penalties for purposes of a federal statute. (Pl’s Br. at 24.) But the case law does not support that argument. Contrary to Plaintiff’s assertion, the Fifth Circuit’s decision in *Irving Independent School District v. Packard Properties*, 970 F.2d 58 (5th Cir.1992), is not inconsistent with the principle that federal law controls the analysis. In *Irving*, the court concluded that certain charges and collection costs under state law were penalties for which the FDIC could not be held liable. *See id.* at 59. Analyzing state law, the court concluded that the charges at issue constituted impermissible penalties. *Id.* at 64-66. Because there was no conflict between state decisional law and the scope of FDIC’s statutory immunity, the court did not need to rely on federal law. Notably, the district court in *Irving* expressly held that “whether the funds plaintiffs seek

constitute penalties or interest within the meaning of § 1825(b)(3) is a *federal question*, the resolution of which is guided by reference to Texas state law.” 741 F.Supp. 120, 123 (N.D.Tex.1990) (emphasis added). Nothing in the Fifth Circuit’s opinion calls this principle into question.

Plaintiff cites a string of cases that are either inapposite or affirmatively undermine Plaintiff’s argument. (Pl.’s Br. at 24-25.) Two of these cases, *Walters v. Warden*, 521 Fed.Appx. 375 (6th Cir.2013), and *Johnson v. Fankell*, 520 U.S. 911, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997), are irrelevant because the court was not interpreting a federal statute. To the extent that *Reconstruction Finance Corp. v. State of Texas*, 229 F.2d 9 (5th Cir.1956), and *Federal Reserve Bank of Richmond v. City of Richmond*, 957 F.2d 134 (4th Cir.1992)—two other cases cited by Plaintiff—suggest that state law controls, they are inconsistent with the overwhelming weight of authority, including the Supreme Court’s decision in *Ault*. Moreover, in a more recent and well-reasoned opinion, the Ninth Circuit “disagree[d] with the approach of the Fourth and Fifth Circuits” on which Plaintiff relies and instead expressly followed *Ault*, under which federal law controls. *Lewis Cty.*, 175 F.3d at 677.

Plaintiff argues that *Ault* “has nothing to do with any issues here,” insisting that it is distinguishable because the *Ault* defendant was the federal government. (Pl.’s Br. at 25.) But *Ault* was based not on the identity of the defendant, but on the fact that the Court was interpreting a federal statute that authorized compensatory but not penal suits. 256 U.S. at 563 (concluding that nothing in the Federal Control Act indicates that “Congress intended to authorize suit against the government for a penalty.”). Although the Arkansas Supreme Court had concluded that an amount imposed by state law was not a penalty, the U.S. Supreme Court

held that this “presents a question not of state, but of federal law” and that the amount was a penalty within the meaning of the federal statute. *Id.* at 565.

B. Under Federal Law, R.C. 5301.36 Imposes “Amounts in the Nature of Penalties or Fines.”

Under federal law, a statute generally imposes a penalty if it imposes liability “in favor of the person wronged, *not limited to the damages suffered,*” and with “no reference to the actual loss sustained by him who sued for its recovery.” *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir.1954) (citing *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892)) (emphasis added). Where, as here, a statute provides for fixed statutory damages *in addition to* recovery of actual damages, “[i]t is because the statutory damages are allowed in addition to compensatory (actual) damages that they are considered a penalty” because they go well beyond what is necessary to compensate for actual injuries. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 341 (N.D.Ill.2002). Moreover, the Penalty Bar prohibits liability not only for penalties, but also for “amounts *in the nature of* penalties or fines.” 12 U.S.C. 4617(j)(4) (emphasis added). Tellingly, Plaintiff has no response to Fannie Mae’s argument that the statutory term “in the nature of penalties or fines” is broader than the term “penalty,” and R.C. 5301.36 is “in the nature of” a penalty even if it is not defined as a penalty for all purposes. (Fannie Mae’s Br. at 21-22.)

R.C. 5301.36 authorizes statutory damages and expressly preserves “any other legal remedies that may be available to the mortgagor,” including recovery of actual damages. This feature of R.C. 5301.36 demonstrates that R.C. 5301.36’s statutory damages are “in the nature of” penalties, and not compensation. Further, the facts show that R.C. 5301.36 is “in the nature of” a penalty in this case. Plaintiff has alleged no actual damages and has already received a payment from Countrywide to settle her claim based on the same late recordation of the same

mortgage at issue here. But Plaintiff again seeks to recover, this time from Fannie Mae. Although Plaintiff implies that she received no payment from Countrywide (Pl.'s Br. at 36), this Court can see for itself the documentation that was part of the record below, attached for the Court's convenience here (A-062–A-063).

To support its conclusion that R.C. 5301.36 is not in the nature of a penalty, the Eighth District relied primarily on *Higgins v. BAC Home Loans Servicing, LP*, E.D.Ky.No. 12-cv-183-KKC, 2014 U.S. Dist. LEXIS 43278 (Mar. 31, 2014).² *Radatz v. Federal Natl. Mtge. Assn.*, 2014-Ohio-2179, 11 N.E.3d 1230, ¶¶ 15-18 (8th Dist.), Appx. A-016–A-018. But the Kentucky statute at issue in *Higgins* requires individuals to choose between actual damages and statutory damages, whereas R.C. 5301.36 permits recovery of *both* actual and statutory damages. See *Higgins*, 2014 U.S. Dist. LEXIS 43278, 16; see also Fannie Mae's Br. at 22-23. Unlike Kentucky law, the Ohio statute *does* permit recovery of statutory damages plus actual damages, so it is not a liquidated-damages provision under the reasoning of *Higgins*. Plaintiff does not address this critical distinction between the Kentucky statute and R.C. 5301.36. Instead, Plaintiff maintains that the “key distinction” is that the Kentucky statute permitted higher statutory damages than R.C. 5301.36 and trebling of actual damages, thereby supposedly making the Kentucky statute *more* punitive. (Pl.'s Br. at 28.) But Plaintiff misses the point. *Higgins* concluded that these amounts—or at least the statutory damages, because treble damages were not at issue—were “liquidated damages” that provided a rough estimate of the true amount of injury. Here, neither Plaintiff nor the Eighth District explains how R.C. 5301.36 approximates actual injury when it authorizes statutory damages *in addition to* other remedies such as actual damages.

² Oral argument in the Sixth Circuit on interlocutory review in *Higgins* is scheduled for April 30, 2015. See *In re Fed. Hous. Fin. Agency*, No. 14-6167 (6th Cir.).

Beyond *Higgins*, Plaintiff relies heavily on cases that deemed fixed statutory damages to be “liquidated damages,” designed to compensate a plaintiff for an injury where actual damages were either unavailable or inadequate to remedy the injury. (Pl.’s Br. 29-32.) “Liquidated damages” sometimes are deemed remedial because they essentially serve as a substitute for actual damages. In this case, however, R.C. 5301.36 authorizes statutory damages *and* expressly preserves recovery of actual damages. Plaintiff does not and cannot contend that actual damages are unavailable, inadequate, or difficult to quantify here. Therefore, the amounts imposed by R.C. 5301.36 are a supplement rather than a substitute for actual damages, and thus are properly characterized as penalties rather than liquidated damages. *See Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 913 (3d Cir.1991) (where there is “a reliable means of determining actual harm,” additional damages are “punitive rather than liquidated damages” because they are not necessary to compensate plaintiffs).

Plaintiff’s reliance on cases involving disclosure violations under the Truth in Lending Act (“TILA”) is also misplaced. (Pl.’s Br. at 29-31.) These cases are inapplicable for two reasons. First, these cases address whether a pending TILA cause of action survives the plaintiff’s entry into bankruptcy. Courts have concluded that TILA’s statutory damages are penal for most purposes but may be remedial for purposes of deciding whether a plaintiff’s cause of action survives his or her entry into bankruptcy. *See, e.g., In re Wood*, 643 F.2d 188, 195 (5th Cir.1980), fn.15 (acknowledging that TILA’s statutory damages are deemed a “statutory penalty” in other contexts, but “emphasiz[ing] the remedial nature of the TILA in the context of survival under the Bankruptcy Act”). Second, in the cases holding that TILA’s statutory damages are sufficiently remedial to survive in bankruptcy, courts rely on the premise that actual damages under TILA are unusually difficult to prove—an issue not present with R.C. 5301.36. *Perrone v.*

General Motors Acceptance Corp., 232 F.3d 433, 437 (5th Cir.2000) (“[F]ew if any TIL plaintiffs have proven or can prove actual damages.”) (quoting *The Law of Truth in Lending*, ¶ 12.04[a] (1984)). In contrast, many individuals will suffer no harm from a violation of R.C. 5301.36, and those who are harmed (*e.g.*, if the delayed recording interfered with a specific property transaction) will be able to show actual damages more easily than victims of TILA disclosure violations.

Plaintiff incorrectly argues that the three factors set out in *Murphy v. Household Finance Corp.*, 560 F.2d 206 (6th Cir.1977), support the conclusion that R.C. 5301.36 is remedial. *Murphy* does not provide a rigid formula, however, and the first *Murphy* factor—“whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public”—supports the conclusion that the statute is penal. “R.C. 5301.36 is intended to promote efficiency and certainty in clearing and transferring title in residential real property transactions.” *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-4122, 792 N.E.2d 1105, ¶ 58. It is “not simply aimed at aiding the individual borrower,” who “might not be harmed in an individual case”; rather, “it assists all others involved in all real estate transactions, and assists the State by encouraging those transactions and reducing costly disputes.” *Pinchot v. Charter One Bank, F.S.B.*, 8th Dist. Cuyahoga No. 79359, 2002-Ohio-1654, ¶ 27. The third *Murphy* factor—whether the amounts are “wholly disproportionate to the harm suffered”—also supports the conclusion that R.C. 5301.36 is penal because Plaintiff has alleged *no* actual harm, and even if she had, R.C. 5301.36 preserves her right to seek full compensation in addition to statutory damages.

Unable to prevail under federal law, Plaintiff insists the remands from the Northern District of Ohio establish that there is no federal issue in this case (Pl.’s Br. at 4-6), going so far

as to claim that a federal court in Ohio “twice rejected” the argument that Fannie Mae makes here (Pl.’s Br. at 26). But that claim is untrue, and the remands are irrelevant here because the Northern District of Ohio considered only two discrete questions of federal law, neither of which is at issue in this appeal. Nonetheless, Plaintiff suggests that the same statute was at issue in the removal. (Pl.’s Br. at 27.) But Fannie Mae did *not* raise the jurisdictional-withdrawal provision of 12 U.S.C. 4635(b) or the Penalty Bar of 12 U.S.C. 4617(j)(4) as a basis for federal jurisdiction—and the federal court did *not* address these issues. Instead, the federal court analyzed whether the unrelated removal provision of Section 4617(b)(11)(B) conferred federal jurisdiction, and no federal court has considered whether 12 U.S.C. 4635(b) divests any court, state or federal, of jurisdiction over this lawsuit. Significantly, when the federal court remanded this case on March 29, 2010, FHFA had not issued the Consent Order at issue here that triggers the jurisdictional bar of Section 4635(b). FHFA did not issue that order under 12 U.S.C. 4631 until nearly three years later on March 9, 2013. Without an order issued pursuant to Section 4631, Section 4635(b)’s withdrawal of jurisdiction from all courts does not come into play.³

Further, Plaintiff contends that, even if federal law controls, this court still must apply *Rosette* because the analysis of federal law is “informed by state law.” (Pl.’s Br. at 25-26.) But *Rosette* addresses whether R.C. 5301.36 imposes a penalty, not an amount “in the nature of

³ Contrary to Plaintiff’s claim, the record contains no evidence showing that the order resulted from Plaintiff’s efforts to identify class members. Plaintiff claims that her counsel communicated to Fannie Mae that they had identified class members by February 2013, which prompted issuance of the order at issue in March 2013. (Pl.’s Br. at 6.) This account suffers from a fatal flaw: it simply did not happen. Counsel for Fannie Mae has no record of communicating with Plaintiff’s counsel on this matter in February 2013, or for many months prior.

Rather, Plaintiff’s counsel contacted Fannie Mae’s counsel on Friday, March 8, 2013, offering to send data regarding late satisfactions. By this time, however, Fannie Mae and Freddie Mac had already agreed to the order, which they signed on March 6, 2013. (Brief of Fannie Mae, 8th Dist. Cuyahoga No. CA-13-100205, at 30, fn. 13; Reply Brief of Fannie Mae, C.P. No. CV-03-507616, at 10, fn. 6.)

penalties,” which is a broader term. (Fannie Mae’s Br. at 21-22, 24.) This important distinction can be dispositive, as in *Triplett v. United States*, N.D.Cal.No. C97-2251, 1998 U.S. App. LEXIS 3030, 6 (Feb. 13, 1998), in which the court contrasted “the use of ‘in the nature of’” in an IRS regulation with the absence of such “broadening” language in an exception the court therefore ruled inapplicable. R.C. 5301.36 has a significant penal element, *i.e.*, recovery of a fixed amount on top of (or in the absence of) actual damages, rendering it “in the nature of a penalty” even assuming *arguendo* that it is not a penalty in the strictest sense. Moreover, Plaintiff has no response to longstanding Ohio law that provides that a statutory award may be “compensation” from the perspective of one party but “in the nature of a penalty” from the perspective of another. (Fannie Mae’s Br. at 24-25 (citing *State ex rel. Emmich v. Industrial Comm.*, 148 Ohio St. 658, 76 N.E.2d 714 (1947)).) Although R.C. 5301.36 may be compensation from the perspective of a plaintiff for statute-of-limitations purposes, it is “in the nature of a penalty” from Fannie Mae’s perspective and for purposes of the Penalty Bar.⁴

In addition, courts may not rely on a state-law definition to interpret federal statutes when the state-law definition conflicts with the federal definition. *See Reconstruction Finance Corp. v. Beaver County, Pa.*, 328 U.S. 204, 208, 66 S.Ct. 992, 90 L.Ed. 1172 (1946) (concluding that “Pennsylvania’s definition of ‘real property’ cannot govern if it conflicts with the scope of that term as used in the federal statute”). Under federal law, the test for whether a statute imposes a penalty “is not by what name the statute is called by the legislature[,]” but rather the statute’s

⁴ The non-partisan agency that drafts legislation for the General Assembly agrees that R.C. 5301.36 is “in the nature of” a penalty, at least to some degree. In the Final Bill Analysis to the recent amendment to the statute, the Legislative Service Commission twice refers to the statutory damages as a “penalty.” Under the heading “*Penalties* for noncompliance,” the Analysis states: “The bill maintains the *penalty* for a mortgagee’s failure to record the satisfaction of a mortgage in accordance with the law”. Ohio Final Bill Analysis at 4, 2014 House Bill 201 (Mar. 25, 2014) (emphasis added) (located at <http://www.lsc.ohio.gov/analyses130/h0201-ph-130.pdf>).

“essential character and effect.” *Huntington*, 146 U.S. at 683, 13 S.Ct. 224, 36 L.Ed. 1123; *see also, e.g., National Loan Investors*, 204 F.3d at 412 (legislative label cannot be dispositive). *Rosette* is squarely at odds with this principle because it gives dispositive weight to the label the General Assembly uses. *Rosette*, 105 Ohio St.3d 296, 2006-Ohio-1736, 825 N.E.2d 599, ¶¶ 13, 14. It is impossible to reconcile the test in *Rosette*, which makes the statute’s terminology dispositive, with federal law, which expressly rejects such a test in favor of analyzing the statute’s effect. Because analysis of federal law may be “informed”—but not replaced—by state law, this Court cannot apply *Rosette* to resolve a question of federal law in the face of contrary and controlling federal precedent.

C. The Penalty Bar Applies to Fannie Mae.

Plaintiff asserts that the Penalty Bar, 12 U.S.C. 4617(j)(4), applies only to FHFA as Conservator and not to Fannie Mae in conservatorship, but cites no case law in support of this position. (Pl.’s Br. at 36-37.) Contrary to Plaintiff’s claim, courts consistently have held that the Penalty Bar applies to Fannie Mae and Freddie Mac while in conservatorship to the same extent the Penalty Bar protects FHFA. (*See Fannie Mae’s Br. at 18.*) Indeed, even *Higgins*, on which Plaintiff otherwise extensively relies, agrees that the Penalty Bar applies to Fannie Mae. *See Higgins*, 2014 U.S. Dist. LEXIS 43278, 8-9. And after Fannie Mae filed its Merit Brief, yet another federal court ruled that the Penalty Bar applies to Fannie Mae. Order, *Mwangi v. Federal Nat’l Mortg. Ass’n*, N.D.Ga. No. 4:14-cv-0079, 26 (Mar. 9, 2015) (attached at A-064) (rejecting argument that Penalty Bar applies only to FHFA and not to Fannie Mae).

Plaintiff nevertheless insists that application of the Penalty Bar to Fannie Mae conflicts with the language of the Penalty Bar. Not so. Under 12 U.S.C. 4617(b), FHFA as Conservator succeeds to “all rights, titles, powers, and privileges of” Fannie Mae. By transferring Fannie Mae’s assets to the Conservator and granting the Conservator immunity from penalties, Congress

necessarily exempted Fannie Mae from penalties, since any penalties levied against Fannie Mae are levied against, and paid out of, assets of the Conservator, which is exactly what the Penalty Bar in Section 4617(j)(4) prohibits.

III. The Trial Court Correctly Dismissed This Action for Lack of Jurisdiction.

The trial court correctly concluded that the Consent Order and Section 4635(b) require immediate dismissal of this action. Plaintiff contends that dismissal was unnecessary because the consent order bars payment, not judgment. This argument fails for two independent reasons.

First, Section 4617(j)(4) itself says that Fannie and FHFA “shall not be *liable* for any amounts in the nature of penalties or fines.” 12 U.S.C. 4617(j)(4) (emphasis added). A judgment in this case would impose “liab[ility]” for amounts in the nature of penalties without regard to whether those amounts are ever paid. Plaintiff is thus wrong in asserting that the Penalty Bar applies only to “*payments* of fines and penalties, not to judgments.” (Pl.’s Br. at 37 (emphasis in original).) To the contrary, if a plaintiff brings a claim against Fannie Mae seeking an amount in the nature of a penalty or fine, then dismissal is required because any judgment would render Fannie Mae “liable” in violation of the Penalty Bar. Under HERA and the equivalent FDIC statute, courts have dismissed claims for amounts in the nature of penalties and fines, rather than allowing them to proceed to judgment. *See, e.g., Mwangi v. Federal Natl. Mortg. Ass’n, supra* (dismissing a plaintiff’s demand for punitive damages against Fannie Mae under Section 4617(j)(4)); *Alexander v. Washington Mut., Inc.*, E.D.Pa. Civ. A. No. 07-4426, 2011 U.S. Dist. LEXIS 69906, 21 (June 28, 2011) (dismissing claim for multiple damages for “failure to state a claim upon which relief can be granted” because Section 1825(b)(3) bars amounts in the nature of penalties).

Second, neither Section 4635(b) nor the Consent Order permits entry of a judgment in this case. Section 4635(b) is a jurisdiction-stripping statute. Among other things, it divests all

state and federal courts of jurisdiction to “review” the merits of the Consent Order, including the Regulator’s factual and legal determinations underlying that Order. A court cannot make a finding of liability or issue a judgment against Fannie Mae without “reviewing” and flatly rejecting the underlying determination FHFA made as Regulator—that the judgment at issue would render Fannie Mae “liable” for amounts in the nature of penalties in violation of the Penalty Bar. Accordingly, the trial court correctly dismissed this action; it cannot proceed on the merits without “reviewing” the Order, and it lacks jurisdiction to do so.

Contrary to Plaintiff’s claim (Pl.’s Br. at 40), FHFA’s Order does not command the state courts to “stand down.” Rather, the Order precludes Fannie Mae from paying any judgment in this case. The crucial point is that *Congress* precluded all courts—state *and* federal—from second-guessing that Order. There is no dispute—and Plaintiff does not dispute—that Congress has authority to make that jurisdictional determination.

IV. The Consent Order Does Not Violate Plaintiff’s Due Process Rights.

Plaintiff argues that if the Consent Order “precludes the trial court from entering a judgment in Radatz’s favor,” then it violates due process. (Pl.’s Br. at 42.) As an initial matter, Plaintiff incorrectly attributes her alleged deprivation of property to the Consent Order. Any alleged deprivation occurred not when FHFA issued its Consent Order, but when Congress enacted 12 U.S.C. 4631 and 4635(b), *i.e.*, establishing the Penalty Bar and authorizing FHFA to enforce that bar through consent orders that courts may not review, modify, or affect. FHFA acted consistently with these statutes.

Plaintiff claims that her cause of action is a “form of property that falls within the [procedural] protection of the due process clause.” (Pl.’s Br. at 45.) However, federal courts uniformly have held that due-process rights do not attach to a cause of action until the plaintiff has obtained a final, unreviewable judgment. *See, e.g., Arbour v. Jenkins*, 903 F.2d 416, 420

(6th Cir.1990) (“[A] legal claim affords no definite or enforceable property right until reduced to final judgment.”) (quoting *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir.1989)); *In re Consolidated U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir.1987) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir.1986) (“[R]ights in tort do not vest until there is a final, unreviewable judgment.”). Therefore, Plaintiff’s cause of action does not constitute a property interest sufficient to support assertion of a procedural due-process claim.

Plaintiff’s reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), and its progeny is misplaced. (See Pl.’s Br. at 45.) *Logan* identifies causes of action as a “species of property,” but expressly limited its holding to “a procedural limitation on the claimant’s ability to assert his rights, not a substantive element of the [underlying] claim.” *Id.* at 433. The Court explained that the government “remains free to create substantive defenses or immunities for use in adjudication or to eliminate its statutorily created causes of action altogether,” *id.* at 432, and that where a party is deprived of a property right following enactment of a statute, “the legislative determination provides all the process that is due,” *id.* at 433.

Plaintiff relies on *Merritt v. Mackey*, 827 F.2d 1368, 1372 (9th Cir.1987), and *O’Bannon v. Town Court Nursing Center*, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980), incorrectly asserting that these cases establish an extremely broad right to a hearing whenever “the government indirectly yet intentionally injures or affects the legal status of a person.” (Pl.’s Br. at 42-43 (quoting *Merritt*, 827 F.2d at 1372).) Plaintiff pulls statements from these cases devoid of context. Unlike Plaintiff, the plaintiff in *Merritt* had a “protected property interest.” *Merritt*, 827 F.2d at 1371. And *O’Bannon* merely holds that if the government acted against one person to punish another, the indirectly affected person “[c]onceivably . . . might have a constitutional right to some sort of hearing.” 447 U.S. at 789 fn.22. But again, the requirement of a hearing

attaches only if there is a threatened deprivation of a protected property interest. Plaintiff possesses no such interest here because there is no final, unreviewable judgment.

Plaintiff's argument that FHFA violated HERA's procedural requirements is premised on a faulty understanding of the procedure by which orders are entered by consent. (*See* Pl.'s Br. at 44.) FHFA is authorized to initiate cease-and-desist proceedings when it has reasonable grounds to believe that a regulated entity is about to violate a law. *See* 12 U.S.C. 4631(a). Pursuant to this broad statutory authority, FHFA issued the Consent Order, which became final and effective upon execution. *See* 12 U.S.C. 4631(c), 4633(a)(4).

Plaintiff notes that *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035 (D.C.Cir.1998), observed 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'" (Pl.'s Br. at 45 (quoting *Ridder*, 146 F.3d at 1041).) Plaintiff then asserts—without citing any supporting authority—that "[t]he inverse is also true," *i.e.*, that she has a due-process right to participate in enforcement proceedings against Fannie Mae because the order indirectly affects her and Fannie Mae "had no incentive to contest the consent order." (Pl.'s Br. at 45.) This does not follow. Under Plaintiff's novel theory, every third party whose interests are somehow affected by a consent order would have a constitutional right to challenge the order. Such a requirement would wreak havoc with the enforcement efforts of FHFA and the other federal financial regulators and run directly contrary to Congress' intent to "strip[] federal courts of jurisdiction whenever a determination could affect an agency decision." *DeNaples v. Office of the Comptroller of the Currency*, 404 Fed.Appx. 609, 613 (3d Cir. Dec. 17, 2010).

CONCLUSION

For the reasons stated above, as well as those in its Merit Brief, Defendant-Appellant Fannie Mae respectfully requests that this Court reverse the decision of the Eighth District Court of Appeals and remand this case to the trial court for entry of dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was served by ordinary U.S. mail on this 13th day of April 2015, with courtesy copies by electronic mail, on the following:

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4/13/2015

Appendix

CLAIM FORM

(DEADLINE: MUST BE POSTMARKED BY FEBRUARY 19, 2009)

If you are a member of the above Classes, and you want to participate in the settlement, you must fill out this form and return it, postmarked no later than February 19, 2009 to:

Countrywide Release Settlement Administration
P.O. Box 12983
Birmingham, AL 35202-2983

Your name(s): REBEKAH R. RADATZ
Your current mailing address: 819 OVERLOOK RIDGE DR
CLEVELAND, OH 44109
Your telephone number: 216-906-2911

Your e-mail address: BECKAH1@PEOPLEPC.COM
Address of the property that was subject to the mortgage for which you are making this claim: 819 OVERLOOK RIDGE DR, CLEVELAND, OHIO 44109

Date your loan was paid off: (This date is located above your name and address on the reverse side of this page.) 8/29/02

Your loan number (if you have it): 006629139
Date your mortgage was released: 12/11/02

Have you received a prior settlement payment in connection with the recordation of this loan?
Yes No

(If some or all original signers of the mortgage are dead, or if the original signers of the mortgage are divorced, then you must provide proof of your capacity to make a claim, as described above under the heading "If some or all mortgagors are dead or co-mortgagors have divorced.")

I request payment as provided for in the settlement, and I agree to the terms of the release set forth below my signature:

Rebekah R. Radatz 1/12/09
Signature Date

Signature _____ Date _____

Upon receiving that amount, I release any claims related to the timing of the recording of the satisfaction of the mortgage that is the subject of this claim. I (on my behalf and on behalf of my heirs, successors, and assigns, or on behalf of all persons on whose behalf I am acting) release Countrywide Home Loans Inc.—and any of its predecessors, departments, divisions, successors, and third-party loan servicers, from any and all claims or liabilities during the Class period, which were or could have been raised with respect to the recording of the satisfaction of the mortgage that is the subject of this claim—but this release is limited to claims or liabilities relating to any alleged failure to timely record my mortgage satisfaction for the mortgage that is the subject of this claim, as required by Ohio Revised Code § 5301.36.

INCOMPLETE CLAIM FORMS AND ONES POSTMARKED AFTER FEBRUARY 19, 2009 WILL NOT BE ACCEPTED

THE CHECK IS VOID WITHOUT A GREEN BACKGROUND

<p>COUNTRYWIDE CLASS ACTION SETTLEMENT P.O. Box 12983 Birmingham, AL 35202-2983</p>	<p>VERIFIED BY POSITIVE PAY Compass June 26, 2009 <small>Not valid for an amount greater than Two Hundred Twenty-Five Dollars and Zero Cents.</small></p>	<p>No. 6301958 VOID AFTER 90 DAYS FROM DATE ISSUED Amount: **\$225.00*</p>
<p>Two Hundred Twenty-Five Dollars and Zero Cents</p>		
<p>Pay 0001126767 to the REBEKAH R RADATZ order 818 Overlook Ridge Dr Unit D of Cleveland OH 44109-3794</p>		
<p>⑆ 6301958 ⑆ ⑆ 062001888 ⑆ 2518720476 ⑆</p>		

SIGNATURE HAS A COLORED BACKGROUND-BORDER CONTAINING MICROPRINTING

1001733666302809	4	71	1
1001733666302809	4	71	1

ORIGINAL SECURE DOCUMENT

William Wells

DO NOT WRITE STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ELIZABETH MWANGI,

Plaintiff,

v.

CIVIL ACTION FILE NO.:
4:14-CV-0079-HLM

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, et al.,

Defendants.

ORDER

This case is before the Court on Plaintiff's Motion for Declaratory Judgment Against Fannie Mae (Affirmative Defense No. 12) ("Motion for Declaratory Judgment") [41] and on the Cross Motion for Judgment on the Pleadings Regarding Count VIII of Plaintiff's Amended Complaint ("Motion for Judgment on the Pleadings") filed by Defendant

Federal National Mortgage Association (“Defendant Fannie Mae”) [50].

I. Procedural Background

On March 4, 2014, Plaintiff filed this lawsuit in the Superior Court of Paulding County, Georgia. (Compl. (Docket Entry No. 1-1) at 1.) On April 9, 2014, Defendant Fannie Mae removed the action to this Court. (Notice of Removal (Docket Entry No. 1).) On December 4, 2014, the Court granted Plaintiff’s Motion to Add Party Defendants. (Order of Dec. 4, 2014 (Docket Entry No. 28).)

On December 5, 2014, Plaintiff filed her First Amended Complaint. (Docket Entry No. 29.) Plaintiff asserted a number of claims against Defendant Fannie Mae, including: (1) conversion (Count I) (First Am. Compl. (Docket Entry

No. 29) ¶¶ 27-40); (2) wrongful eviction (Count II) (id. ¶¶ 41-49); (3) civil trespass (Count III) (id. ¶¶ 50-56); and (4) punitive damages (Count VIII) (id. ¶¶ 100-02).¹

Defendant Fannie Mae filed an Answer to the First Amended Complaint. (Answer (Docket Entry No. 38).) In its Twelfth Defense, Defendant Fannie Mae stated: “Defendant Fannie Mae is a federal instrumentality for purposes of exemption from liability and punitive damages.” (Id. at 3.)

On January 9, 2015, Plaintiff filed her Motion for Declaratory Judgment. (Docket Entry No. 41.) Plaintiff seeks a declaration that Defendant Fannie Mae is not

¹Plaintiff also asserted Count VIII against Defendants A Plus Realty Georgia and Asset Management Specialists, Inc. (Am. Compl. ¶¶ 100-02.)

exempt from punitive damages and that Defendant Fannie Mae's Twelfth Defense fails as a matter of law. (See generally id.)

On January 23, 2015, Defendant Fannie Mae filed its Motion for Judgment on the Pleadings. (Docket Entry No. 50.) Defendant Fannie Mae argues that Plaintiff's punitive damages claim fails as a matter of law because Defendant Fannie Mae is exempt from punitive damages. (See generally id.)

The briefing processes for both the Motion for Declaratory Judgment and the Motion for Judgment on the Pleadings are complete. The Court therefore finds that the matter is ripe for resolution.

II. Applicable Standards

A. Motion for Declaratory Judgment

Federal Rule of Civil Procedure 57 provides that the Federal Rules of Civil Procedure “govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201,” and states that “[t]he court may order a speedy hearing of a declaratory-judgment action.” Fed. R. Civ. P. 57. 28 U.S.C. § 2201(a), in turn, provides, in relevant part:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

B. Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure provides for motions for judgment on the pleadings. Fed. R. Civ. P. 12(c). “Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts.” Cunningham v. Dist. Attorney’s Office for Escambia Cnty., 592 F.3d 1237, 1255 (11th Cir. 2010) (quoting Andrx Pharm., Inc. v. Elan Corp., 421 F.3d 1227, 1232-33 (11th Cir. 2005)). “Motions for judgment on the pleadings based on allegations of a failure to state a claim are evaluated using the same standard as a Rule 12(b)(6) motion to dismiss.” Anderson v. S. Home Care Servs., Inc., No. 1:13-

CV-840-WSD, 2014 WL 1153393, at *2 (N.D. Ga. Mar. 21, 2014).

“In considering a motion for judgment on the pleadings, the allegations contained in the complaint must be accepted as true and the facts and all inferences must be construed in the light most favorable to the nonmoving party.” Anderson, 2014 WL 1153393, at *3. The court, however, “need not accept as true [a] plaintiff’s legal conclusions, including those couched as factual allegations.” Edmonds v. Southwire Co., Civil Action No. 3:14-CV-00032-TCB-RGV, 2014 WL 5804527, at *3 (N.D. Ga. Nov. 10, 2014). “Allegations entitled to no assumption of truth include ‘[l]egal conclusions without adequate factual support’ or ‘[f]ormulaic recitations of the elements of a claim.’” Lenbro Holding Inc.

v. Falic, 503 F. App'x 906, 909 (11th Cir. 2013) (alterations in original) (quoting Mamani v. Berzain, 654 F.3d 1148, 1153 (11th Cir. 2011)).

“Ultimately, the complaint is required to contain ‘enough facts to state a claim to relief that is plausible on its face.’” Anderson, 2014 WL 1153393, at *3 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “To state a claim to relief that is plausible, the plaintiff must plead factual content that ‘allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). “‘Plausibility’ requires more than a ‘sheer possibility that a defendant has acted unlawfully,’ and a complaint that alleges facts that are ‘merely consistent with’ liability ‘stops

short of the line between possibility and plausibility of entitlement to relief.” Id. (quoting Ashcroft, 556 U.S. at 678 (internal quotation marks omitted)).

“[A] court ordinarily cannot consider matters outside the pleadings when evaluating a motion to dismiss or a motion for judgment on the pleadings.” Collins v. Fulton Cnty. Sch. Dist., Civil Action No. 1:12-CV-1299-ODE-JSA, 2012 WL 7802745, at *6 (N.D. Ga. Dec. 26, 2012). The Court consequently has not considered the deposition excerpts attached to Defendant Fannie Mae’s Cross Motion for Judgment on the Pleadings. (Docket Entry Nos. 50-3, 50-4.)

III. Discussion

“[Defendant] Fannie Mae is one of two federally-chartered government-sponsored enterprises that serve the public policy of expanding home ownership to moderate and low-income families, in part, by supplying capital and liquidity for residential mortgages.” Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP, 812 F. Supp. 2d 1211, 1216 (D. Nev. Sept. 16, 2011); see also Cnty. of Oakland v. Fed. Hous. Fin. Agency, 716 F.3d 935, 937 (6th Cir. 2013) (“Defendant Fannie Mae is a corporation chartered by Congress to ‘establish secondary market facilities for residential mortgages,’ in order to ‘provide stability in the secondary market for residential mortgages,’ and ‘promote access to mortgage credit throughout the

Nation.” (quoting 12 U.S.C. § 1716)). Defendant Fannie Mae “is a private shareholder-owned company, and its common stock is publicly traded on the New York Stock Exchange.” Nevada ex rel. Hager, 812 F. Supp. 2d at 1217. “[Defendant] Fannie Mae is a private, for-profit entity[] that is owned by its private shareholders.” Id. “Although regulated by the federal government in some aspects of its business, [Defendant] Fannie Mae is essentially a privately-owned mortgage banker providing secondary mortgage loans.” Id.; see also Roberts v. Cameron-Brown Co., 556 F.2d 356, (5th Cir. 1977) (“Although regulated by the federal government in some aspects of its business, [Defendant

Fannie Mae] is essentially a privately-owned mortgage banker providing secondary mortgage loans.”²

In support of her contention that Defendant Fannie Mae is not immune from punitive damages, Plaintiff points to cases holding that Defendant Fannie Mae is not a government actor for purposes of constitutional claims. See, e.g., Giles v. Suntrust Mortg. Inc., Civil Action No. 1:13-CV-2992-RWS, 2014 WL 2779527, at *2 (N.D. Ga. June 19, 2014); Matveychuk v. One West Bank, FSB, Civil Action No. 1:13-CV-3464-AT, 2013 WL 6871981, at *4-5 (N.D. Ga. Dec. 19, 2013); Williams v. Fed. Nat’l Mortg.

²Opinions of the United States Court of Appeals for the Fifth Circuit issued prior to October 1, 1981, the date marking the creation of the United States Court of Appeals for the Eleventh Circuit, are binding precedent on this Court. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

Ass'n, No. 1:13-CV-1899-WSD, 2013 WL 5361211, at *2 n.3 (N.D. Ga. Sept. 25, 2013); Herron v. Fannie Mae, 857 F. Supp. 2d 87, 95-96 (D.D.C. Apr. 30, 2012). A finding that Defendant Fannie Mae is not a governmental instrumentality for purposes of constitutional claims, however, does not preclude a finding that Defendant Fannie Mae is a federal instrumentality for other purposes. See Paslowski v. Standard Mortg. Corp. of Ga., 129 F. Supp. 2d 793, 802 n.12 (W.D. Pa. Aug. 14, 2000) ("A finding that Freddie Mac is not a governmental entity for constitutional purposes does not preclude a determination that Freddie Mac is a federal instrumentality for [other] purposes, because an entity simultaneously can be a federal instrumentality for some purposes but not a federal

agency or entity for others.” (emphasis omitted)); see also Garcia v. Fed. Nat’l Mortg. Ass’n, No. 1:13-CV-1259, 2014 WL 2210784, at *3 n.5 (W.D. Mich. Apr. 30, 2014) (“[A]n entity is not a governmental actor for purposes of constitutional claims merely because it is considered a governmental or quasi-governmental entity for other purposes.”); Alam v. Fannie Mae, Civil Action NO. H-02-4478, slip op. at 25 (S.D. Tex. Sept. 29, 2005) (“[A]n organization’s status as a ‘federal instrumentality’ may differ depending upon the party (e.g., principal or agent) committing the tortious act, or the nature of the suit being brought.” (citations omitted)) (unpublished) (Docket Entry No. 41-7).

The United States Court of Appeals for the Eleventh Circuit has noted that “[t]he established rule is that punitive damages cannot be recovered from the United States or its agencies.” Smith v. Russellville Production Credit Ass’n, 777 F.2d 1544, 1549 (11th Cir. 1985). Indeed, “a federal agency or instrumentality of the United States cannot be liable for punitive damages unless Congress makes a special provision permitting such damages.” Id. at 1550. The Eleventh Circuit concluded that production credit associations (“PCAs”), federally-chartered institutions that were privately organized, owned, and operated, “remained federal instrumentalities, operated pursuant to Congressional mandate,” even though the PCAs had private characteristics. Id. The Eleventh Circuit noted that

“[a] federal instrumentality does not divest itself of the privileges of instrumentality status when it acts more like a privately owned institution than a federal agency.” Id. Applying that reasoning, and relying on “the principle of sovereign immunity, which generally bars the award of punitive damages in actions against the United States as sovereign,” the Eleventh Circuit found that “punitive damages cannot be awarded against PCAs.” Id. The Eleventh Circuit explained:

“If the relief sought requires payment of monies from the Federal Treasury, interferes with public administration, or compels or restrains the government, the action is deemed to be one against the United States as sovereign.” State of Florida, Department of Business Regulation v. U.S. Dept. of Interior, 768 F. 2d 1248, 1251 (11th Cir. 1986). Although punitive damages awards against PCAs would not be paid out of the federal treasury, such awards would interfere with public

administration. PCAs fulfill a government mission of channeling credit primarily to farmers. See 12 U.S.C.A. § 2096 (PCA loans restricted to farmers and other food producers). Punitive damages would have to be paid from money that could otherwise be targeted to financing tractor equipment purchases, land expansion, or supply needs. The government's purposes in establishing the PCAs would thus be undercut.

Id.

Applying that reasoning, the Court concludes that Defendant Fannie Mae is not subject to punitive damages. Defendant Fannie Mae, like the PCAs in Smith, is a privately-owned institution that was originally chartered by the federal government. See 12 U.S.C. § 1716b ("The purposes of this title include the partition of the Federal National Mortgage Association as heretofore existing into two separate and distinct corporations, each of which shall

circumstances, Defendant Fannie Mae is exempt from an award of punitive damages. See Alam, slip op. at 25-26 (“[T]he Court holds that Fannie Mae is a federal instrumentality of the government for purposes of exemption from punitive damages.”); Paley v. Fed. Home Loan Mortg. Corp., No. CIV. A. 93-5081, 1994 WL 327659, at *2 (E.D. Pa. July 7, 2004) (finding that the Federal Home Loan Mortgage Corporation (“Freddie Mac”), an institution that is similar to Defendant Fannie Mae, “is a federal instrumentality and remains under the guidance of the government” and “is not subject to punitive damages absent an express provision of Congress”).⁴

⁴Further, as the Alam court noted, public policy supports this determination:

Fannie Mae is a federal government-sponsored

Alternatively, the Court finds that Defendant Fannie Mae is exempt from punitive damages while it is under the conservatorship with the Federal Housing Finance Agency (the "FHFA"). The FHFA "is an independent federal agency, created under the Housing and Economic Recovery

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. See 12 U.S.C. §§ 1716, 1716b. Congress has affirmed Fannie Mae's national goal, as set forth in Section 1441 of Title 42, of a "decent home and a suitable living environment for every American family." The Court agrees with Fannie Mae that allowing punitive damages could undermine Fannie Mae's ability to purchase mortgage loans and may decrease the availability of mortgage credit. This would impede Fannie Mae's national goal. In light of the significant role played by Fannie Mae in the national housing market, any exemptions from punitive damages immunity are better declared by Congress than this Court.

Alam, slip op. at 26. Notwithstanding Plaintiff's contentions that Alam was wrongly decided, the Court finds the reasoning of that decision persuasive.

Act of 2008 ['HERA'].” Cnty. of Oakland, 716 F.3d at 937; see also Nevada ex rel. Hager, 812 F. Supp. 2d at 1217 (noting that FHFA “is an independent agency of the federal government [that] has authority over [Defendant] Fannie Mae.”). “On September 6, 2008, the Director of the FHFA placed [Defendant] Fannie Mae into the FHFA’s conservatorship ‘for the purpose of reorganizing, rehabilitating, or winding up [its] affairs.’” Nevada ex rel. Hager, 812 F. Supp. 2d at 1217 (second alteration in original) (quoting 12 U.S.C. § 4617(a)(2)); see also Stabb v. GMAC Mortg., LLC, 579 F. App’x 706, 707 n.2 (11th Cir. 2014) (per curiam) (“In September 2008, Freddie Mac and [Defendant Fannie Mae] were placed into conservatorship with [the FHFA] as conservator, pursuant to 12 U.S.C. §

4617.”)); Herron, 857 F. Supp. 2d at 94 (“[O]n September 6, 2008, FHFA placed [Defendant] Fannie Mae into conservatorship.”). “As conservator, FHFA is charged with taking any action ‘necessary to put the regulated entity in a sound and solvent condition’ and any action ‘appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity.’” Nevada ex rel. Hager, 812 F. Supp. 2d at 1217 (quoting 12 U.S.C. § 4617(b)(2)(D)).

“The Housing and Economic Recovery Act of 2008 (‘HERA’) provides the FHFA, as a conservator, with broad powers.” Nevada ex rel. Hager, 812 F. Supp. 2d at 1217,.

To illustrate, the FHFA ‘by operation of law, immediately succeed[ed] to . . . all rights, titles, powers, and privileges of [Defendant Fannie Mae], and of any stockholder, officer, or director of

[Defendant Fannie Mae],’ and all rights (i) to the assets of [Defendant] Fannie Mae; (ii) to collect all obligations and money due [Defendant] Fannie Mae; (iii) to perform all functions of [Defendant] Fannie Mae, in its name, consistent with the appointment of the conservator; and (iv) to exercise such incidental powers as may be necessary to carry out all powers and authorities specifically granted.

Id. at 1217-18 (some alterations in original) (quoting 12 U.S.C. § 4617(b)(2)(A)). “As conservator, FHFA took over the assets and operations of [Defendant] Fannie Mae with all the powers of the shareholders, officers, and directors to conduct [Defendant] Fannie Mae’s business, in order to preserve and conserve the assets and property of [Defendant] Fannie Mae.” Herron, 857 F. Supp. 2d at 94. “Thus, like [the Federal Deposit Insurance Corporation] when it serves as a conservator or receiver of a private

entity, FHFA when it serves as conservator step[s] into the shoes of the private corporation, [Defendant] Fannie Mae.” Id. (second alteration in original) (internal quotation marks and footnote omitted).

“Congress also exempted the FHFA, when acting as a conservator, from any penalties and fines.” Id. at 1218. Indeed, 12 U.S.C. § 4617(j)(4) provides that the FHFA “shall not be liable for any amounts in the nature of penalties or fines.” 12 U.S.C. § 4617(j)(4). In light of that provision, the Court finds that “while under conservatorship with the FHFA, [Defendant] Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent that the FHFA is.” Nevada ex rel. Hager, 812 F. Supp. 2d at 1218; see also Higgins v. BAC Home Loans Servicing, LP, Civil Action

No. 12-CV-0183-KKC, 2014 WL 1332825, at *3 (E.D. Ky. Mar. 31, 2014) (“By prohibiting the imposition of fines and penalties on [the FHFA] in any case in which [the FHFA] is acting as a receiver, HERA necessarily prohibits the imposition of fines and penalties on [Defendant] Fannie Mae also.” (internal quotation marks omitted)). “[P]unitive damages represent penalties.” Poku v. FDIC, Civil Action No. RDB-08-1198, 2011 WL 1599269, at *3 (D. Md. Apr. 27, 2011). Under those circumstances, the Court agrees with those courts that have concluded that Defendant Fannie Mae is exempt from punitive damages while it is under conservatorship with the FHFA.⁵

⁵This conclusion is consistent with decisions noting that the Federal Deposit Insurance Corporation (“FDIC”), in its capacity as receiver for a failed financial institution, is immune from punitive damages under 12 U.S.C. § 1825(b), a statute similar to 12 U.S.C.

In sum, the Court finds that Defendant Fannie Mae is exempt from punitive damages. The Court therefore denies Plaintiff's Motion for Declaratory Judgment, grants Defendant Fannie Mae's Motion for Judgment on the Pleadings, and dismisses Count VIII of Plaintiff's Complaint as to Defendant Fannie Mae.

§ 4617(j) that prohibits the imposition of fines and penalties against the FDIC in its capacity as receiver. See Kistler v. Fed. Deposit Ins. Corp., No. CV411-024, 2013 WL 265803, at *8 n.7 (S.D. Ga. Jan. 23, 2013) (noting that 12 U.S.C. § 1825(b)(3) "bars the FDIC from any liability for punitive damages"); Poku, 2011 WL 1599269, at *4 ("As punitive damages represent penalties, the plain language of Section 1825(b) precludes the imposition of punitive damages on the FDIC as Receiver.").

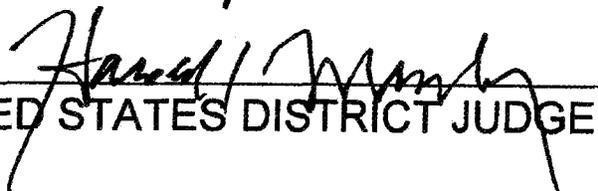
In reaching this decision, the Court acknowledges Plaintiff's contentions that the penalty bar simply applies to the FHFA, not to Defendant Fannie Mae. Given that Defendant Fannie Mae is in receivership with the FHFA, the Court finds that this distinction makes no real practical difference. Similarly, Plaintiff's argument that the FHFA has not assumed complete control over Defendant Fannie Mae does not compel a different conclusion. Defendant Fannie Mae has been placed into conservatorship with the FHFA, and that is enough to make the penalty bar applicable here.

IV. Conclusion

ACCORDINGLY, the Court **DENIES** Plaintiff's Motion for Declaratory Judgment [41], **GRANTS** Defendant Fannie Mae's Motion for Judgment on the Pleadings [50], and **DISMISSES** Count VIII of Plaintiff's Complaint, which contains Plaintiff's punitive damages claim, as to Defendant Fannie Mae. In light of this conclusion, the Court **MODIFIES** its November 20, 2014, Order [23] to provide that Defendant Fannie Mae need not respond to Topics 17, 21, and 22 of Plaintiff's Rule 30(b)(6) deposition notice to Defendant Fannie Mae. The Court finds, however, that responses to Topics 16, 18, 19, and 20 of that Notice, limited to the period from 2012 to the present, are still required, as those Topics are reasonably likely to lead to

the discovery of relevant and admissible evidence. As provided in the January 26, 2015, Order, Defendant Fannie Mae must provide documents responsive to those Topics, as modified, within twenty-one (21) days after the date of this Order.

IT IS SO ORDERED, this the 9th day of March, 2015.


UNITED STATES DISTRICT JUDGE