



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 19, 2016

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)	Case No.: 09-17008-MKN
)	Jointly Administered with
JESUS MARTINEZ and MARCO CIRO)	Case No.: 09-17010-MKN
FLORES,)	Chapter 11
)	
Debtors.)	Date: July 18, 2016
)	Time: 11:00 a.m.

MEMORANDUM DECISION ON MOTION FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE ORDER¹

On June 21, 2016, an evidentiary hearing was conducted on the Motion for Sanctions for Violation of the Discharge Order (“Sanctions Motion”) brought by Jesus Martinez and Marco Ciro Flores (“Debtors”). The appearances of counsel were noted on the record. After the evidence was presented, post-trial briefing was ordered, and the hearing was continued for closing arguments.

On July 18, 2016, closing arguments were presented, and the matter was taken under submission.

This Memorandum Decision constitutes the court’s findings of fact and conclusions of law entered pursuant to FRBP 7052 and FRCP 52.

¹ In this Memorandum Decision, all references to “ECF No.” are to the numbers assigned to the documents filed in the jointly administered cases or the minute entries of the court as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRCP” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

BACKGROUND²

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2 On May 1, 2009, Jesus Martinez filed a voluntary Chapter 11 petition. On the same date,
3 Marco Ciro Flores filed a voluntary Chapter 11 petition. On their respective real property
4 Schedule "A," each Debtor listed the same eight separate parcels of real property, including an
5 investment property located at 4520 36th Street in San Diego, California ("36th Street
6 Property").

7 On May 5, 2009, four days after filing their Chapter 11 petitions, Debtors filed a motion
8 to jointly administer the two Chapter 11 cases. (MECF No. 11; FECF No. 12).³ On the same
9 date, Debtors filed a motion to value their investment properties ("Valuation Motion"), including
10 the 36th Street Property. (MECF No. 17; FECF No. 18). The motion identified Central
11 Mortgage Corporation ("CMC") as having a lien on the 36th Street Property securing a loan
12 having a balance of \$286,957.58. The motion proposed to value the 36th Street Property at
13 \$120,000 for purposes of allowing CMC a secured claim in that amount pursuant to Section
14 506(a). The certificate of service attached to the Valuation Motion states that it was served on
15 all of the affected creditors, including CMC.

16 On May 6, 2009, an order was entered authorizing joint administration of the two
17 Chapter 11 proceedings, with the Martinez bankruptcy serving as the lead case. (MECF No. 18;
18 FECF No. 19). On the same date, notice of the hearing on the Valuation Motion was served on
19 all of the affected creditors, including CMC. (ECF No. 21).⁴ No opposition, objection, or
20 response to the Valuation Motion was filed or presented by CMC.

21 On June 12, 2009, an order was entered valuing the 36th Street Property at \$120,000
22 ("Valuation Order"), thereby treating CMC's claim as allowed in the secured amount of
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24 ² The parties stipulated to the admission of 123 exhibits, as described below. In this
25 Memorandum Decision, the exhibits will be referenced as "Ex." followed by the applicable
26 number or letter designation.

27 ³ "MECF No." refers to the documents and minute entries in the Martinez proceeding
28 while "FECF No." refers to the documents and minute entries in the Flores proceeding.

⁴ After joint administration was ordered, all subsequent documents and minute entries are
for the docket in the lead case (Martinez) and will be referred to solely as "ECF No."

1 \$120,000, and allowed in the unsecured amount of \$166,957.58. (ECF No. 41).

2 On September 3, 2009, CMC filed a proof of claim (“POC”). (Ex. 1). The claim was in
3 the secured amount of \$299,788.72. Attached to the POC is a copy of an Adjustable Rate Note
4 (“Adjustable Note”) dated February 3, 2005, executed by the Debtors in favor of Downey
5 Savings and Loan Association, F.A., along with a copy of the Deed of Trust against the 36th
6 Street Property. Also attached to the POC as Exhibit “1” is a statement attesting that the
7 monthly payments on the Adjustable Note from November 2008 through March 2009 were
8 \$1,054.87 and the monthly payments from April 2009 through May 2009 were \$1,133.99.

9 On October 26, 2009, Debtors jointly filed a Disclosure Statement (“First Disclosure
10 Statement”) (ECF No. 82) to accompany their jointly proposed Plan of Reorganization. (ECF
11 No. 81). CMC was served with the Debtors’ joint proposed Plan of Reorganization that
12 provided for CMC to retain its lien against the 36th Street Property, for its secured claim to be
13 allowed in the revalued amount of \$120,000, and for the allowed amount to be paid in full in
14 accordance with the terms of the original note and mortgage. The unsecured portion of CMC’s
15 claim would receive pro rata payments from the amounts paid to unsecured creditors from the
16 Debtors’ projected monthly income under the plan. Article VI of the proposed Plan of
17 Reorganization provided that after confirmation, all property would vest in the reorganized
18 debtors. Additionally, like all individual Chapter 11 cases, Article VII of the proposed Plan of
19 Reorganization provided that the Debtors would not receive a discharge of their personal liability
20 on their creditors’ claims until completion of all payments under the proposed plan in accordance
21 with Section 1141(d)(5). Article IV of the First Disclosure Statement addressed the means for
22 implementation of the Debtors’ proposed plan. It stated in pertinent part that “The Debtors’
23 Cash Flow Analysis is attached hereto as Exhibit D and outlines the Debtors’ sources and uses of
24 income.” The Cash Flow Analysis attached as Exhibit D to the First Disclosure Statement sets
25 forth each of the Debtors’ investment properties, including the original and revalued mortgage
26 payments for each property. As to the 36th Street Property, Exhibit D discloses the existing
27 monthly payment as \$1,107.61, and a proposed revalued payment of \$465.20.

28 On December 28, 2009, Debtors filed a Second Amended Plan of Reorganization (ECF

1 No. 101) accompanied by a Second Amended Joint Disclosure Statement. (ECF No. 102). The
2 Second Amended Plan of Reorganization did not change the proposed treatment of any secured
3 creditor claims, including the allowed secured claim of CMC. Attached as Exhibit D to the
4 Second Amended Joint Disclosure Statement is the same Cash Flow Analysis disclosing a
5 revalued monthly payment of \$465.20 for the 36th Street Property.

6 On December 29, 2009, CMC filed a motion for relief from stay as to the 36th Street
7 Property (“CMC Stay Relief Motion”). (ECF No. 107). (Ex. 2).

8 On January 19, 2010, an objection to approval of the Second Amended Joint Disclosure
9 Statement as well as to confirmation of the Second Amended Plan of Reorganization was filed
10 by the Office of the United States Trustee (“UST”). (ECF No. 114). On the same date, CMC
11 objected to confirmation of the Second Amended Plan of Reorganization as well as approval of
12 the Second Amended Joint Disclosure Statement. (ECF No. 115). While CMC’s objection cited
13 Section 1322(b)(2), rather than Section 1123(b)(5), it argued only that CMC’s claim was
14 misclassified as unimpaired rather than impaired because it was being bifurcated into secured
15 and unsecured portions.

16 On January 26, 2010, Debtors filed an opposition to the CMC Stay Relief Motion. (ECF
17 No. 127).

18 On February 3, 2010, Debtors filed a Third Amended Joint Plan of Reorganization (ECF
19 No. 134) along with a Third Amended Joint Disclosure Statement (ECF No. 136).⁵ The Third
20 Amended Joint Plan of Reorganization did not change the proposed treatment of any secured
21 creditor claims, including CMC’s allowed secured claim.⁶ The Third Amended Joint Disclosure
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23 ⁵ A combined hearing on approval of the Second Amended Joint Disclosure Statement
24 and confirmation of the Second Amended Plan of Reorganization was held on January 25, 2010.
25 Due primarily to the objections raised by the UST, the Debtors agreed that approval and
26 confirmation should be denied, and that an amended plan and disclosure statement would be
27 filed. The written order denying approval and confirmation eventually was entered on March 15,
28 2010. (ECF No. 158).

⁶ Article II, Section 2.02 of the Third Amended Joint Plan of Reorganization sets for the
treatment of CMC’s allowed secured claim in Class 2(f). Subparagraph (b) reiterates that the
allowed amount of CMC’s secured claim shall be paid “in accordance with the terms of its

1 Statement referred to the same Cash Flow Analysis attached as Exhibit D to the prior disclosure
2 statements.⁷

3 On February 17, 2010, notice of the hearing to approve the Third Amended Joint
4 Disclosure Statement was filed, that included a certificate stating that the notice was served
5 electronically and by first class mail on CMC and its counsel. (ECF No. 146). No objection to
6 approval of the Third Amended Joint Disclosure Statement was filed or presented by CMC.

7 On March 17, 2010, the court approved the Third Amended Joint Disclosure Statement
8 and a written order was entered on April 8, 2010. (ECF No. 171). The order scheduled a
9 hearing on confirmation of the Third Amended Joint Plan of Reorganization to take place on
10 May 12, 2010. (ECF No. 171). The order approving the Third Amended Joint Disclosure
11 Statement was not appealed.

12 On April 8, 2010, notice of the hearing on confirmation of the Third Amended Joint Plan
13 of Reorganization was served on all creditors, including CMC. (ECF No. 174).

14 On May 11, 2010, objections to confirmation of the Third Amended Joint Plan of
15 Reorganization were filed by secured creditors BankUnited (ECF No. 181) and EMC Mortgage
16 Corporation (ECF No. 182), both based on separate Chapter 11 claim treatment elections filed
17 under Section 1111(b) (“1111(b) Election”). No creditors holding allowed unsecured claims
18 objected to plan confirmation under Section 1129(a)(15), and no objection to plan confirmation
19 was filed by CMC.

20 On May 12, 2010, the hearing on plan confirmation was continued to May 26, 2010.
21 (ECF No. 191).

22 On May 26, 2010, the continued hearing on confirmation of the Third Amended Joint
23 Plan of Reorganization was conducted at which both Debtors were available for examination.

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26 related note and mortgage.”

27 ⁷ Prior to the confirmation hearing on the Third Amended Joint Plan of Reorganization,
28 Debtors filed another copy of the exhibits to the Third Amended Joint Disclosure Statement,
including the Cash Flow Analysis found in Exhibit D, notice of which was electronically served
on CMC’s counsel of record. (ECF No. 188).

1 Although issues surrounding the 1111(b) Election were resolved at plan confirmation, a late-
2 filed objection by America's Servicing Company ("ASC") was presented. As a result, after the
3 confirmation hearing was concluded, the matter was taken under submission.

4 On June 14, 2011, an order was entered confirming the Third Amended Joint Plan of
5 Reorganization ("Confirmation Order"). (ECF No. 249). (Ex. 3). The Confirmation Order
6 specifically referenced the Cash Flow Analysis set forth in Exhibit D to the approved Third
7 Amended Joint Disclosure Statement. Id. at 4:8-15.⁸ In addition to resolving the late objection
8 of ASC, the order specified the monthly payments required to be made to BankUnited and EMC
9 Mortgage Corporation to satisfy their 1111(b) Election. No other amendments to the Third
10 Amended Joint Plan of Reorganization were required in the Confirmation Order. Notice of the
11 order was mailed to all creditors, including CMC. (ECF No. 255). The order confirming the
12 Third Amended Joint Plan of Reorganization was not appealed.

13 On August 4, 2011, Debtors filed a proposed Fourth Amended Joint Plan of
14 Reorganization (ECF No. 258) along with a motion to modify the confirmed Third Amended
15 Joint Plan of Reorganization. (ECF No. 259). Notice of the hearing to approve the modification
16 was served on all creditors, including CMC. (ECF No. 260). The purpose of the proposed
17 modification, as set forth in the proposed Fourth Amended Joint Plan of Reorganization was to
18 eliminate any requirement for the Debtors to pay their projected disposable income to unsecured
19 creditors because no holder of an allowed unsecured claim had objected to plan confirmation
20 under Section 1129(a)(15). As a result, the payment of unsecured creditor claims under the
21 Debtors' plan, including the unsecured portion of the claims of secured claimants such as CMC,
22 would no longer be required. No modification of the plan treatment of any secured creditor
23 class, including CMC's allowed secured claim, was proposed.

24 On August 24, 2011, objections to modification of the confirmed plan were filed by
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26 ⁸ Debtors filed a brief in support of confirmation of their Third Amended Joint Plan of
27 Reorganization. (ECF No. 179). Electronic notice of the filing of the brief was served on
28 CMC's counsel. In support of the feasibility of their proposed Chapter 11 plan, Section 11 of the
Debtors' confirmation brief specifically referenced the Cash Flow Analysis as set forth in their
Third Amended Joint Disclosure Statement.

1 secured creditors Aurora Loan Services (ECF No. 262) and ACT Properties (ECF No. 263). No
2 opposition, objection, or response to the proposed modification was filed by CMC.

3 On October 25, 2011, an order was entered approving the modification and confirming
4 the Fourth Amended Joint Plan of Reorganization (“Plan Modification Order”). (ECF No. 277).
5 (Ex. 4). Notice of the order was mailed to all creditors, including CMC. (ECF No. 278). The
6 Plan Modification Order was not appealed.

7 On March 5, 2012, Debtors filed a motion for entry of a final decree and an order of
8 discharge. (ECF No. 289). Debtors asserted that payments were not required to be made on
9 unsecured claims as a result of the modified plan. Debtors also represented that Section 522(q)
10 is not applicable. Debtors argued that entry of a discharge was appropriate under Sections
11 1141(d)(5)(A) and 1141(d)(5)(C). Notice of the hearing on the motion was served on all
12 creditors, including CMC. (ECF No. 290). On March 28, 2012, an objection was filed by the
13 UST. (ECF No. 292). No opposition, objection, or response to the request was filed by any
14 creditor, including CMC. On June 14, 2012, an order was entered granting the Debtors’ motion.
15 (ECF No. 298). (Ex. 5).

16 On June 18, 2012, an order granting the Debtors’ Chapter 11 discharge was entered
17 (“Discharge Order”). (ECF No. 299). (Ex. 6). On June 20, 2012, notice of the Discharge Order
18 was mailed to all creditors, including CMC. (ECF No. 300). The Discharge Order was not
19 appealed.

20 On July 17, 2012, notice of entry of the Chapter 11 discharge was filed and served on all
21 creditors, including CMC. (ECF No. 304). (Ex. 7).

22 On April 22, 2013, a final decree closing the Chapter 11 case was entered. (ECF No.
23 305). (Ex. 8).

24 On August 7, 2014, Debtors filed an ex parte motion to reopen their Chapter 11 case.
25 (ECF No. 308). On August 8, 2014, an order was entered reopening the case (ECF No. 310)
26 (Ex. 9), and notice of entry of the order was served on all creditors, including CMC. (ECF No.
27 314). (Ex. 11).

28 On August 8, 2014, Debtors filed a Motion to Clarify and Enforce Confirmation Order

1 and Request for an Accounting (“Clarification Motion”) (ECF No. 311), to address certain
2 alleged post-confirmation breaches by three secured creditors, including CMC. (Ex. 10). Notice
3 of the motion was served on all three secured creditors, including CMC. (ECF No. 316). As to
4 CMC, the Debtors alleged that CMC did not adjust its servicing of the loan to comply with the
5 Confirmation Order, see Clarification Motion at ¶ 14, but instead proceeded to file a notice of
6 default on the 36th Street Property and scheduled a foreclosure sale. Id. at ¶¶ 8 and 9. CMC did
7 not file an opposition, objection, or a response.

8 On September 23, 2014, an order was entered requiring CMC to provide a complete
9 accounting of the loan through September 15, 2014. (ECF No. 323). (Ex. 12). Notice of entry
10 of the order was served on CMC. (ECF No. 324). (Ex. 13). Because CMC did not comply,
11 Debtors filed a motion seeking an order to show cause (“OSC”) why CMC should not be held in
12 contempt. (ECF No. 329). (Ex. 14). On October 31, 2014, the OSC was entered (ECF No.
13 332), but a hearing was not scheduled. (Ex. 15).

14 On February 4, 2015, Debtors filed a Motion for Attorneys Fees and Costs (“Fee
15 Motion”) (ECF No. 349) alleging that after the OSC was entered, CMC provided a payment
16 history that showed a dispute of \$600.00 between the parties as to the unpaid principal balance
17 of the loan. See Fee Motion at ¶¶ 4, 5, and 6. Notice of the Fee Motion was served on CMC
18 (ECF No. 344) and no opposition, objection, or response was filed. On April 2, 2015, an order
19 was entered granting the Fee Motion in the amount of \$3,500 for attorneys fees and \$1,717.00
20 for the costs for reopening the Chapter 11 proceeding. (ECF No. 350). (Ex. 16). Notice of entry
21 of the order was served on CMC. (ECF No. 351). (Ex. 17). The order was not appealed.

22 On January 27, 2016, Debtors filed the instant Sanctions Motion seeking relief against
23 CMC (ECF No. 370) (Ex. 18), accompanied by the joint declaration of Marco Flores and Jesus
24 Martinez (“Joint Declaration”). (ECF No. 371). (Ex. 19). Debtors asserted that CMC violated
25 the Discharge Order as well as the discharge injunction arising under Section 524(a)(2)
26 (“Discharge Injunction”). As a result, Debtors requested an award of actual damages for
27 emotional distress, punitive damages for contempt, and attorneys fees incurred in enforcing the
28 Discharge Order and Discharge Injunction. The Sanctions Motion was noticed to be heard on

1 March 2, 2016. (ECF No. 372). On February 17, 2016, CMC filed opposition (“CMC
2 Opposition”). (ECF No. 375). (Ex. 20). CMC alleged that none of its conduct violated the
3 Discharge Injunction and that its conduct substantially complied with the terms of the
4 Confirmation Order and confirmed Chapter 11 plan. See CMC Opposition at 10:8-13. On
5 February 24, 2016, Debtors filed a reply. (ECF No. 376). (Ex. 21).

6 On March 2, 2016, counsel for the parties appeared at the scheduled hearing, at which the
7 court determined that numerous factual disputes could be resolved only through an evidentiary
8 hearing. Accordingly, on March 3, 2016, an order was entered scheduling an evidentiary hearing
9 to be conducted on May 24, 2016. (ECF No. 378). (Ex. 22).⁹ By stipulation of the parties, the
10 evidentiary hearing was continued to June 21, 2016. (ECF No. 383).

11 On June 17, 2016, Debtors filed their list of witnesses and exhibits (ECF No. 385), along
12 with their trial statement (“Debtors’ Trial Statement”). (ECF No. 386). On the same date,
13 Debtors filed their pre-trial brief in connection with the Sanctions Motion (“Debtors’ Pre-Trial
14 Brief”). (ECF No. 389). On the same date, CMC filed the declarations of Nathan F. Smith
15 (“Smith Declaration”) (ECF No. 388) and James M. McPherson (“McPherson Declaration”).
16 (ECF No. 387).¹⁰

17 On June 20, 2016, Debtors filed an amended trial statement (“Debtors’ Amended Trial
18 Statement”). (ECF No. 390). On the same date, CMC filed a response to Debtors’ pretrial brief
19 and the Debtors’ trial statements. (“CMC Pre-Trial Brief”). (ECF No. 391).

20 On June 21, 2016, the evidentiary hearing was conducted. At the outset, the court
21 granted CMC’s request, without prejudice, to strike certain of the Debtors’ claims asserted in
22 their pre-trial briefs and trial statements. Those claims sought additional or alternative relief
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24 ⁹ As a contested matter under FRBP 9014(a), the discovery rules applicable to adversary
25 proceedings also applied to the Sanctions Motion. See FED.R.BANKR.P. 9014©. The court is
26 unaware of whether either party sought discovery of the contentions or evidence in support of
their respective positions, or to depose each other’s witnesses prior to the evidentiary hearing.

27 ¹⁰ The McPherson Declaration appears to be a fill-in-the-blank document that does not
28 even include the declarant’s name in its title. Instead, the declarant’s name is inserted into the
identification line, his name is inserted into the capacity paragraph and signature block, and his
name does not actually appear under an illegible signature.

1 under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692, et seq., and under
2 certain Nevada consumer protection statutes. Those claims were stricken without prejudice.

3 After the evidentiary hearing was concluded, a post-trial briefing schedule was agreed
4 upon.

5 On July 15, 2016, Debtors filed their post-trial brief (“Debtors’ Closing Brief”). (ECF
6 No. 398). On the same date, CMC filed its post-trial brief (“CMC Closing Brief”). (ECF No.
7 399). Shortly thereafter, counsel orally presented their closing arguments.

8 THE EVIDENTIARY RECORD

9 The parties stipulated to the admission of 123 exhibits. Three witnesses were called to
10 testify: debtors Jesus Martinez and Marco Flores, and CMC officer James McPherson.¹¹ The
11 direct testimony of each witness, included in their previous declarations, was admitted. All of
12 the witnesses were subject to additional direct testimony as well as cross-examination.

13 A. The Exhibits.

14 The following exhibits were admitted into evidence by stipulation.

15 1. Debtors’ Exhibits.

No.	Date	Document
1	9/3/2009	CMC’s Proof of Claim No. 9
2	12/29/2009	CMC’s Stay Relief Motion
3	6/14/2011	Order on Plan Confirmation
4	10/25/2011	Order Granting Mtn. to Modify Debtors’ Plan
5	6/14/2012	Order Granting Discharge and Final Decree Closing Debtors’ Chapter 11 Cases
6	6/18/2012	Discharge of Individual Debtor in a Chapter 11 Case
7	7/17/2012	Ntc. of Entry of Order Granting Discharge and Final Decree Closing Debtors’ Chapter 11 Cases
8	4/22/2013	Order Entering Final Decree

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¹¹ At the trial, Christy Cahall, who apparently is a law clerk to the Debtors’ counsel, was available to testify concerning communications between the Debtors’ counsel and CMC’s attorneys as well as the foreclosure trustee used by CMC in connection with the 36th Street Property. Ms. Cahall was not called to testify.

9	8/8/2014	Order Reopening Chapter 11 Case
10	8/8/2014	Mtn. Clarify and Enforce Confirmation Order
11	8/8/2014	Ntc. of Entry of Order Reopening Chapter 11 Case
12	9/23/2014	Order Compelling CMC to Provide Accounting
13	9/23/2014	Ntc. of Entry Order Compelling CMC to Provide Accounting
14	10/28/2014	Ex Parte Mtn. for OSC Why CMC Should Not Be Held in Contempt for Failure to Comply with Order to Provide Accounting
15	10/31/2014	Order Granting Mtn. for OSC Re: CMC Not Complying with Order to Provide Accounting
16	4/2/2015	Order Granting Fee Motion
17	4/2/2015	Ntc. of Entry Order Granting Fee Motion
18	1/27/2016	Motion for Violation of Discharge Order
19	1/27/2016	Decl. Flores and Martinez re Motion for Violation of Discharge Order
20	2/17/2016	CMC's Opp. re Motion
21	2/24/2016	Reply to Opp. re Motion
22	3/3/2016	Order Scheduling Evidentiary Hearing
23	4/14/2014	Notice of Default and Election to Sell re San Diego Property
24	4/23/2014	Cahall email to Guiab re Notice of Default and Election to Sell
25	4/23/2014	Cahall email to Northwest Trustee re Notice of Default and Election to Sell
26	4/23/2014	Rasanen (Northwest Trustee) email re case status
27	4/23/2014	Cahall email to Rasanen re Discharge Order
28	4/23/2014	Rasanen email re forwarding all documents to bankruptcy department
29	4/29/2014	Guiab email indicating he forwarded email to CMC
30	6/10/2014	Cahall email to Rasanen following up on Notice of Default and Election to Sell
31	6/10/2014	Cahall email to Guiab following up on Notice of Default and Election to Sell and CMC foreclosure
32	7/7/2014	Cahall email to Guiab following up on Notice of Default and Election to Sell and CMC foreclosure

1	33	7/8/2014	Guiab email to Cahall in response to Notice of Default and Election to Sell
2	34	7/8/2014	Guiab email to Cahall regarding plan terms
3	35	7/8/2014	Cahall email to Guiab regarding plan terms
4	36	7/8/2014	Guiab email regarding maturity date
5	37	7/8/2014	Cahall email to Guiab regarding maturity date
6	38	7/11/2014	Guiab email to Cahall re incorrect plan payments
7	39	7/11/2014	Cahall email to Guiab requesting loan payment history
8	40		Notice of Trustee Sale on August 11, 2014
9	41	7/24/2014	Cahall email to Guiab attaching Notice of Trustee Sale
10	42	7/25/2014	Guiab email to Cahall confirming received message re Trustee Sale
11	43	7/28/2014	Schwartz ltr. to tenants at 36th Street Property
12	44	7/29/2014	Guiab email to Cahall re postponing Trustee Sale and obtaining accounting of the loan
13	45	7/29/2014	Barry email to Cahall re letter to tenant
14	46	7/30/2014	Cahall email to Guiab re status postpone Trustee Sale
15	47	7/30/2014	Cahall email to Barry re revising letter to tenant to correct typographical error
16	48	8/6/2014	Cahall email to Guiab re reopening case, file mtn clarify, enforce confirmation order, and postpone sale
17	49	8/8/2014	Cahall email to Guiab attaching filed copy of Order Reopening Chapter 11 Case
18	50	8/8/2014	Cahall email to Rasanen attaching filed copy of Order Reopening Chapter 11 Case and Ntc. of Trustee Sale w/request to stop foreclosure sale
19	51	8/12/2014	Schwartz email to Barry re case reopening
20	52	8/12/2014	Allen email to Katz attaching filed copy of Order Reopening Chapter 11 Case and Ntc of Trustee Sale . . .
21	53	8/13/2014	Katz email to confirm sale was rescinded
22	54	9/23/2014	Cahall email to Guiab Ntc. of Entry Order Compelling CMC to Provide Accounting
23	55		Payment history from CMC 6/26/2009-11/6/2014
24	56	12/9/2014	Schwartz email to Smith indicating CMC's accounting is incorrect
25	57	12/22/2014	Schwartz email to Smith request loan term and % rate
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1	58	12/29/2014	Exnowski email to Cahall confirm CMC's term/% rate
2	59		Schwartz Flansburg's loan amortization
3	60	8/11/2014	CMC ltr to Martinez/Flores re returned funds, etc . . .
4	61	7/8/2014	CMC ltr to Martinez/Flores re returned funds, etc . . .
5	62	5/12/2014	CMC ltr to Martinez/Flores re returned funds, etc . . .
6	63	2/10/2014	CMC ltr to Martinez/Flores re returned funds, etc . . .
7	64	2/4/2014	CMC ltr to Flores mailed to 36th Street Property re past due status & cure default . . .
8	65	2/4/2014	CMC ltr to Flores mailed to Summerhill Rd., LV address re past due status & cure default . . .
9	66	2/4/2014	CMC ltr to Martinez mailed to 36th Street Property re past due status & cure default . . .
10	67	2/4/2014	CMC ltr to Martinez mailed to Summerhill, LV address re past due status & cure default . . .
11	68	1/9/2014	Ltr to Martinez/Flores re credit balance, etc . . .
12	69	11/7/2013	Ltr to Martinez/Flores re credit balance, etc . . .
13	70	8/8/2013	Ltr to Martinez/Flores re credit balance, etc . . .
14	71	7/18/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
15	72	6/19/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
16	73	5/18/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
17	74	4/17/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
18	75	11/17/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
19	76	10/20/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
20	77	9/17/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
21	78	8/18/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
22	79	7/20/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
23	80	6/17/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
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1	81	5/19/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
2	82	4/14/2009	Foreclosure notice from CMC to Martinez/Flores
3	83	3/20/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
4	84	2/16/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
5	85	1/18/2012	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
6	86	12/20/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
7	87	11/17/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
8	88	10/18/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
9	89	9/19/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
10	90	8/18/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
11	91	7/19/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
12	92	6/17/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
13	93	5/18/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
14	94	4/19/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
15	95	3/18/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
16	96	2/15/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
17	97	1/18/2011	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
18	98	12/20/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
19	99	11/17/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
20	100	10/19/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
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101	09/17/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
102	8/18/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
103	7/20/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
104	6/17/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
105	5/18/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
106	4/19/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
107	3/18/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
108	2/18/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
109	1/19/2010	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
110	12/21/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .
111	12/18/2009	Rate Adj. Ltr. to Martinez/Flores re payment not going to be adjusted, etc . . .

2. CMC's Exhibits.

Ltr	Date	Document
A		CMC Post-petition Loan payment history
B	4-14-2014	CMC's notice of default and election to sell
C	7-18-2014	CMC's notice of trustee's sale
D	7-25-2014	Emails between counsel
E	8-8-2014	Emails between Debtors' counsel and foreclosure trustee
F	1-14-2015	Emails between counsel
G	8-15-2015	Emails between counsel
H		Second revised stipulation sent between counsel
I	9-23-2015	Email regarding commencement of litigation
J		Loan amortization table from Debtors' counsel
K	8-8-2013	CMC's return payment letters

L	2-4-2014	CMC's letters re notice of default
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2 **B. The Witnesses.**

3 Three witnesses testified and were subject to cross-examination.

4 **1. Jesus Martinez ("Martinez").**¹²

5 Martinez testified that he grew up in Havana, Cuba, before immigrating to Miami,
6 Florida, when he was twenty-four years old. He was educated in Cuba and lived in Florida for
7 one year before moving to Reno, Nevada. Five years later, he moved to Las Vegas. In Reno, he
8 worked in a kitchen at the MGM Hotel and then worked in the grocery business after moving to
9 Las Vegas. He currently works for a Smith's grocery store.

10 Martinez testified that he started purchasing investment real estate in around 1992, in San
11 Diego and Las Vegas. He recalled purchasing the 36th Street Property some time in 1996,
12 initially residing in it. Martinez purchased that property with his partner, Marco Flores, and the
13 purchase originally was financed by a lender other than CMC. He recalled that the property was
14 refinanced through CMC two or three years later.

15 Martinez testified that the amount of the original loan on the 36th Street Property was
16 around \$264,000, and that the monthly payment was in excess of \$1,000.00. He acknowledged
17 that it was an adjustable interest rate loan, but he did not recall how often the monthly payment
18 amounts changed.

19 Martinez testified that he makes the mortgage payments on the investment properties
20 while Flores deals with the tenants and property managers. He testified that the arrangement was
21 very successful until the economic recession hit in 2008 and 2009. Martinez stated that Flores
22 attempted to work out the mortgage problems, but was unsuccessful. For that reason, both of
23 them filed separate Chapter 11 cases in May 2009.

24 Martinez testified that after the bankruptcy cases were filed, the 36th Street Property was
25 revalued at \$120,000 and payments of around \$465.00 per month were made to CMC based on
26 that value. He stated that he paid that amount each month and never missed a payment.
27

28

¹² Martinez testified with the occasional assistance of an interpreter.

1 Martinez testified that during the Chapter 11 proceeding, he received letters from CMC
2 dated October 20, 2009 (Ex. 76) and November 17, 2009 (Ex. 75),¹³ stating that he owed
3 payments of \$1,133.99 each month rather than \$465.00. He recalled that the bankruptcy process
4 was very stressful, causing him to lose concentration at work, because he thought he would lose
5 the property. Martinez testified that he also received telephone calls from CMC after the
6 Chapter 11 was filed. He answered calls from CMC three times per week and spoke to a
7 different person each time.¹⁴ Martinez stated that the caller always asked for more than the
8 amount he was paying. When the calls came to work, he testified that when messages were left,
9 the message only said that the caller “had to talk to me.”

10 Martinez recalls that his Chapter 11 plan was approved by the court on June 14, 2011.
11 He testified that after the plan was confirmed, he continued to make the \$465.00 monthly
12 payments. Martinez acknowledged on cross-examination that Class 2(f) of the confirmed plan
13 does not mention a \$465.00 monthly payment on CMC’s claim, but testified that he “didn’t just
14 make it up.” He acknowledged that he never received any document from CMC saying to make
15 monthly payments of \$465.00, nor did he receive anything changing the adjustable interest rate

16
17 ¹³ The November 16, 2009 letter, like the October 20, 2009 letter, says “Notice of Rate
18 Adjustment” near the top. Unlike all of the other letters (“Rate Adjustment Letters”) admitted
19 into evidence, however, the November 2009 letter contains an additional paragraph near the
20 bottom stating as follows: “Your monthly payment is not large enough to cover the interest that
21 is due each month. The interest not covered by your payment, which is called deferred interest,
22 will be added to the principal balance. Presently your loan has a deferred interest balance of
23 \$24,122.55. If you continue to make the payment of \$1,133.99, your principal balance will go
24 from \$286,461.95 to \$287,283.30 as of the next rate change on January 1, 2010.” None of the
25 subsequent Rate Adjustment Letters explained that the Debtors’ monthly payments of \$465.20
26 (or even \$1,133.99) would be insufficient to cover interest or that there would be a growing
27 deferred interest balance. Martinez testified that he received such letters every month during the
28 bankruptcy.

24 ¹⁴ It is not clear whether CMC sought discovery to obtain copies of any phone records -
25 either cellular, land line, or internet-based - for Martinez or Flores. Perhaps consumer telephone
26 records are simply unavailable or cost-prohibitive. Barring an employee’s use of a personal cell
27 phone to conduct business, an employer should be able to obtain a record of outbound calls by its
28 employees as well as inbound calls to the employer. Given the proliferation of both bankruptcy
and non-bankruptcy claims alleging wrongful telephonic and electronic communications
received by debtors and plaintiffs, one would expect that such records, if any, would be sought in
the first instance.

1 on his loan to a fixed rate. Martinez conceded that if the loan was not modified, the monthly
2 payments would be much higher, probably around \$1,000.00.

3 Martinez testified that after his Chapter 11 plan was confirmed, he received letters from
4 CMC dated April 17, 2012 (Ex. 74) and May 18, 2012 (Ex. 73), stating that monthly payments
5 of \$1,341.58 were owed instead. CMC, however, had been accepting the \$465.00 payments.

6 Martinez testified that he received a Chapter 11 discharge on June 18, 2012, and that his
7 case was closed. He testified that he remembers receiving a call from CMC some time around
8 October 5, 2012, which is Flores's birthday. He stated that during that call, someone from CMC
9 demanded payment of the amount set forth in the prior letters. Martinez testified that after that
10 initial call, he received calls from CMC approximately three times every week, at home and at
11 work, asking for payment of the amount contained in the prior letters. He testified that those
12 calls continued until CMC eventually foreclosed on the 36th Street Property.

13 Martinez reviewed a letter from CMC dated August 8, 2013 (Ex. K), indicating that a
14 payment of \$547.40 had been received and that an additional \$82.20 was due. He testified that
15 he does not know why CMC claimed that \$82.20 was due. Martinez testified that he called
16 CMC to obtain an accounting, but CMC never called him back. Martinez was shown letters
17 from CMC dated November 7, 2013, January 9, 2014, and February 10, 2014 (Ex. K), all stating
18 the monthly payment amount to be \$547.40.

19 Martinez testified that CMC stopped accepting payments some time around July 2014,
20 and he received a letter from CMC dated July 8, 2014 (Ex. 61), returning a \$465.00 payment
21 even though those payments had been accepted since 2009. He received a letter from CMC
22 dated May 12, 2014 (Ex. 62), returning a check and no accounting of payments was given.
23 Martinez recalled receiving a letter dated February 10, 2014 (Ex. 63), returning an electronic
24 payment, and the letter stated that \$547.40 was due rather than \$465.00. He stated that CMC's
25 letter did not explain how CMC came up with the higher amount. Martinez testified that he
26 contacted CMC periodically, but CMC never responded even though CMC kept calling to
27 collect. Based on the various letters, he believed that CMC was attempting to collect the full
28 amount of the debt.

1 Martinez testified that CMC filed a Notice of Default and Election to Sell (“NOD”) on
2 the 36th Street Property (Ex. 23; Ex. B)¹⁵ even after he contacted his lawyers. He testified that
3 the notice was sent to the tenants of the property, which led to many problems for Flores.
4 Martinez testified that he does not understand how the \$2,278.43 arrearage amount in the NOD
5 was calculated. He therefore understood that CMC was attempting to collect the full amount of
6 the original \$264,000 loan.

7 Martinez testified that the NOD led to many arguments with Flores, because it was his
8 responsibility to make the payments. He testified that the stress caused him to lose sleep,
9 interfered with taking care of customers at work, and led to fights with Flores.

10 Martinez testified that CMC foreclosed on the 36th Street Property on August 11, 2014.
11 He recognized the notice of trustee’s sale (“Notice of Sale”) and acknowledged that the notice
12 stated that there was a total unpaid loan balance of \$104,346.49 (Ex. 40; Ex. C). Martinez
13 testified that he does not believe that he had paid more than \$160,000 on the original \$264,000
14 loan. He therefore acknowledged that the \$104,346.49 unpaid loan balance set forth in the
15 Notice of Sale must have been based on payments made toward the revalued amount under the
16 confirmed Chapter 11 plan.

17 Martinez testified that even after the foreclosure, some other company continued to call
18 to collect the debt for CMC. He testified that the caller sought between \$70,000 and \$80,000,
19 and also told him that he was personally responsible for the debt. Martinez testified that he does
20 not recall the name of the company that called him or the name of the person. He testified that
21 he received three calls per week telling him that the original loan amount was still due. Martinez
22 stated that his Chapter 11 case was reopened on August 8, 2014, and a few weeks later the calls
23 stopped after the foreclosure was unwound and the 36th Street Property was returned. He
24

25
26 ¹⁵ There is a difference between the copies of the NOD offered as exhibits by the Debtors
27 and CMC. Debtors’ copy (Ex. 23) does not include the first page of the NOD, but does include
28 what appears to be the face of an envelope from the foreclosure trustee, Northwest Trustee
Services, Inc., addressed to “TENANTS” at the 36th Street Property. CMC’s copy (Ex. B) does
include a copy of the first page of the NOD, but no copy of the envelope showing that it was
mailed to the tenants.

1 attested that he continues to pay the \$465.00 amount electronically and is current.

2 **2. Marco Flores (“Flores”).**

3 Flores testified that he was born in Tijuana, Mexico, and immigrated to San Diego,
4 California, when he was eight years old. He obtained his bachelor’s degree in speech
5 communication from San Diego State University and a master’s degree from National
6 University. Flores worked in the social services field from 1987 through 2007, primarily for a
7 county public health department focusing on HIV/AIDS education. He testified that he has
8 worked as a therapist and program director for HIV and AIDS treatment in Las Vegas.

9 Flores testified that to meet his retirement goals, he began investing in real estate in 1992
10 along with Martinez, whom he had met in Las Vegas. In his business partnership with Martinez,
11 Flores would deal with tenants, property managers, and lenders, due to his fluency in English,
12 while Martinez would take care of making the monthly mortgage payments. He started investing
13 in San Diego real estate after September 2001. Flores testified that the 36th Street Property was
14 purchased some time during the 2000s.

15 Flores testified that he and Martinez lived in the 36th Street Property for two years before
16 treating it as investment property. After the recession hit in around 2008, he contacted CMC
17 about the mortgage, but he could not refinance the property because its value had dropped to a
18 point where it was underwater. Flores testified that he used his retirement funds to make various
19 mortgage payments, but real estate values had dropped by 30% in San Diego and by 60% in Las
20 Vegas. On May 1, 2009, both he and Martinez filed separate Chapter 11 proceedings in Nevada
21 because they were not viewed as a married couple even though they were domestic partners in
22 California.¹⁶

23 After his bankruptcy was filed, Flores thought all mortgage payments would be made in
24 accordance with a list received from his attorneys. He testified that he understood that the
25 monthly payment on the 36th Street Property was \$465.00 based on a value of \$120,000. Flores

26
27 ¹⁶ Because the Debtors’ assets and liabilities were nearly or actually identical, the cases
28 were jointly administered even though, at the petition date, they did not qualify as joint debtors.
If the Debtors are now married, they would be eligible to simply file a joint bankruptcy petition
under Section 302(a), and their bankruptcy estates would be consolidated under Section 302(b).

1 testified that he had checked bank statements each month to confirm that the payments were
2 made.

3 Flores testified that the Chapter 11 process was stressful because he had to go through the
4 confirmation process twice. He testified that after his plan was confirmed in 2011 and he
5 received his discharge in 2012, he thought he was done with the process.

6 Flores testified that he started receiving calls from CMC around October 20, 2012, which
7 was about two weeks after his birthday. He testified that sometimes there were three calls in a
8 single day, but recalls that he would answer only one of three because they distracted him from
9 his work.¹⁷ Flores testified that he would refer the calls to his attorneys and that the callers
10 would state that it was an attempt to collect a debt, that the call was being recorded, and that the
11 amount requested was between \$980 and \$1,000, which he thought was the monthly payment
12 amount under the original adjustable rate loan. He testified that he does not recall the names of
13 the people who called from CMC. Flores testified that the calls were initially automated calls
14 that would go live after he answered.

15 Flores testified that he thought automatic payments were being made to CMC. He does
16 not know when CMC started rejecting the \$465.00 monthly payments. Flores testified that CMC
17 never sent him tax statements reflecting interest payments because CMC told him that payments
18 were not being applied to interest. He does not recall ever receiving a loan history document,
19 which was offered by CMC in the form of the Post-petition Loan History at trial, and he does not
20 know if Martinez ever received it.

21 Flores testified that the NOD recorded by CMC had been received by the tenants at the
22 36th Street Property. He stated that the tenants panicked, as well as the property manager.
23 Flores was not familiar with the NOD when a copy was shown to him at trial, but testified that
24 the arrearage amount set forth in the notice was not paid. He testified that he had heard that
25 other people started peering into the windows of the property after foreclosure proceedings were
26

27 ¹⁷ Flores was not asked whether he had screened all incoming calls through a message
28 machine or was using a caller identification device on his phone in order to know that an
unanswered call actually was from CMC or a representative of CMC.

1 commenced. Flores testified that he was in disbelief that CMC was not following the legal
2 process, and he started arguing with Martinez who had assured him the payments were being
3 made. He testified that after CMC completed the foreclosure on August 11, 2014, additional
4 notices were sent to the tenants, giving them 72 hours to vacate the premises. Flores stated that
5 this caused additional stress.

6 Flores testified that after the foreclosure was completed, he received calls to his cell
7 phone from another company asserting that it represented CMC. The caller told him that
8 \$72,000 was due and attempted to collect the debt from him personally. Flores testified that the
9 calls stopped after the Chapter 11 proceeding was reopened by his attorneys, and CMC thereafter
10 returned the 36th Street Property.

11 Flores testified that he sought professional help for the stress, anxiety, and feeling of
12 helplessness caused by CMC's actions starting in May 2014. He still takes antidepressant
13 medication, although he has not missed work. Flores acknowledges that his job as a therapist,
14 listening to other people's problems, is also very stressful.

15 **3. James McPherson ("McPherson").**

16 McPherson is a litigation supervisor and a vice president at CMC. In December 2010, he
17 graduated from the law school at the University of Arkansas in Little Rock, and he was admitted
18 to practice in Arkansas the following year. McPherson has worked for CMC for more than ten
19 years. According to his declaration, McPherson is familiar with the type of records maintained
20 by CMC for the Debtors' loan. He testified that he has access to the books and records for the
21 loan, and reviewed the records on which his testimony is based. He also testified that he has
22 reviewed a comment history on the loan that involves calls that were made or attempted to be
23 made to the borrowers.¹⁸

24 _____
25 ¹⁸ McPherson initially testified on direct examination that he had reviewed a "comment
26 history" that includes calls made to the Debtors. Later in his testimony, counsel asked
27 McPherson if CMC had ever produced a "call log" which does not appear to be the same as a
28 comment history. The call log that McPherson reviewed apparently had not been disclosed in
discovery. As became clear from his later testimony, however, McPherson did not review any
auto-dialed calls and had no personal knowledge of the calls made in connection with the loan.
Rather, his knowledge of CMC's call history in this case was based solely on what he could

1 McPherson testified that a document entitled Post-petition Loan History had been
2 prepared for the loan.¹⁹ He testified that after Debtors' plan was confirmed, the history showed
3 that on November 1, 2011, CMC applied \$17,679.60 that had been received from the Debtors
4 after the bankruptcy was filed.²⁰ McPherson testified that CMC reduced the balance of the loan

5 _____
6 ascertain from the CMC records that he did not create. McPherson offered no explanation as to
7 how CMC creates, updates, maintains, or secures its call logs, or how the comment histories of
8 the loan records are created.

9 ¹⁹ At the evidentiary hearing, CMC offered a loan history that was admitted as CMC's
10 Exhibit "A." The exhibit is entitled a "Post-petition Loan History" even though it begins with
11 payments due as of November 1, 2011, i.e., 2.5 years after the bankruptcy proceedings were
12 commenced. Attached as Exhibit "A" to the CMC Opposition filed on February 17, 2016 (Ex.
13 20), was another document entitled "Payment History" for the same loan that begins with a
14 payment posting date of June 26, 2009, and ends with a payment posted on November 6, 2014.
15 At the hearing, McPherson curiously testified that Payment History "may have been" created by
16 CMC even though CMC previously represented that it is the accounting that CMC provided to
17 the Debtors. See CMC Opposition at ¶ 12. The Payment History, however, provides
18 information that the Post-petition Loan History does not. Page two of the Payment History
19 includes twelve entries posted on 8/17/2012. The first ten of those entries show that on that date,
20 CMC applied monthly payments of \$547.40, from the Debtors' accumulated post-petition
21 payments on hand (\$17,679.60), for the contractual payments due for the first day of November
22 2011 through August 2012. The last two of those entries for 8/17/2012, show that CMC applied
23 the remaining portion of the Debtors' accumulated post-petition payments to escrow payments
24 and to reduce the principal balance of CMC's allowed secured claim that was crammed down by
25 the confirmed Chapter 11 plan. In other words, the Payment History indicates that on August 17,
26 2012, more than a year after the Third Amended Joint Plan of Reorganization was confirmed,
27 and shortly after the Debtors received their Chapter 11 discharge, CMC changed the amount of
28 the monthly payment approved by the confirmed plan and retroactively applied that changed
amount to the payment that would have been due on November 1, 2011.

21 ²⁰ The \$17,679.60 total is equal to 38 payments of \$465.20. According to CMC's own
22 Payment History, however, the 38th payment of \$465.20 was posted on August 9, 2012. By
23 contrast, CMC's own Post-petition Loan History does not show the date the August 2012,
24 payment was received from the Debtors. Instead, the latter document shows a total amount
25 received of \$17,679.60 against which CMC subtracted \$547.40 in principal and interest
26 payments each month beginning with November 1, 2011, leaving \$12,205.60 after it subtracted
27 the August 1, 2012 payment. From that amount, CMC appears to have subtracted an escrow
28 payment of \$2,854.57, leaving a balance of \$9,351.03 from the Debtors' total post-petition
payments. It apparently applied the \$9,351.03 balance to the principal of the cramdown amount
(\$120,000) of CMC's secured claim. After the principal reduction left a balance of \$108,127.91
on the cramdown loan amount, CMC continued to administer the loan as if monthly payments of
\$547.40 were due rather than the \$465.20 amount specified in the Cash Flow Analysis. As a
result, from September 1, 2012 forward, Debtors' monthly plan payments of \$465.20 continued

1 to \$120,000 in accordance with the confirmed plan. He testified that from November 1, 2011,
2 CMC applied monthly payments of \$547.40 to the reduced loan through August 1, 2012, rather
3 than the \$465.20 that the Debtors were paying.²¹ McPherson testified that CMC fixed an interest
4 rate to the loan based on the interest rate that would have existed on the confirmation date under
5 the original adjustable rate loan, and then added that amount to the \$465.20 payment. He
6 acknowledged that none of CMC's records reflect that CMC ever notified the Debtors how their
7 post-petition payments had been applied.

8 McPherson also acknowledged that CMC sent a letter dated April 17, 2012 (Ex. 74), to
9 the Debtors notifying them that no adjustable interest rate increase would be made and that their
10 monthly payment would remain at \$1,341.58. Additionally, the same letter stated that the
11 Debtors' new loan balance would be \$268,078.31. He acknowledged that the letter was
12 inaccurate because it did not reflect the cramdown payment and balance required by the
13 confirmed plan. McPherson also testified that similarly inaccurate letters were sent to the
14 Debtors dated May 18, 2012 (Ex. 73), June 19, 2012 (Ex. 72), and July 18, 2012 (Ex. 71), stating
15 that the monthly payments would be \$1,341.58, but that the new loan balances would be
16 \$267,385.14, \$266,689.01, and \$265,991.20, respectively.²² He also testified that based on

17 _____
18 to generate, according to CMC Post-petition Loan History, payment shortfalls. McPherson
19 testified that he "did not honestly know" how CMC made the decision in August 2012 to apply
20 the \$17,679.60 in post-petition payments to the cramdown loan amount that had been ordered in
21 June 2011. He testified that CMC decided on its own to apply the payment in that fashion.

22 ²¹ McPherson testified that he believed CMC had applied a 2.981 percent interest to a
23 revalued loan balance of \$120,000, thereby arriving at a monthly payment of \$547.40, i.e., an
24 additional \$82.20 of interest above the \$465.20 payment under the confirmed plan. It appears,
25 however, that the \$465.20 payment under the Cash Flow Analysis already may have included
26 interest because it was a payment in lieu of a monthly payment of \$1,107.61 under the original
27 Adjustable Note for the full amount of the loan. According to its POC, the monthly payments
28 under the Adjustable Note fluctuated from \$1,054.87 to \$1,133.99 between March 2009 and
29 April 2009. Debtors' Cash Flow Analysis accompanying their approved disclosure statement
originally was filed on October 28, 2009.

²² In contrast to those letters, McPherson also testified that CMC sent additional rate
adjustment notice letters dated May 19, 2009 (Ex. 81), June 17, 2009 (Ex. 80), July 20, 2009
(Ex. 79), August 18, 2009 (Ex. 78), September 17, 2009 (Ex. 77), October 20, 2009 (Ex. 76), and
November 17, 2009 (Ex. 75), that correctly reflected what was in CMC's books and records for

1 CMC's Post-petition Loan History, a \$465.00 payment was returned on February 1, 2014, but
2 that no payments were received at all in April, May, June, July, October, and December 2014.
3 He also testified that payments in 2015 and 2016, have been sporadic.

4 McPherson testified that the Post-petition Loan History did not reflect several payments
5 that the Debtors had made, but which had been returned by CMC. He acknowledged that CMC
6 sent letters dated February 4, 2014, May 12, 2014 (Ex. 62), July 8, 2014 (Ex. 61), and August
7 11, 2014 (Ex. 60), returning payments of \$465.20 each time, but that those returned payments
8 are not reflected on the Post-petition Loan History.

9 McPherson testified that CMC sent letters to the Debtors dated August 8, 2013,
10 November 7, 2013, and January 9, 2014. (Ex. K). He testified that the monthly payment amount
11 set forth in the letters reflected the proper amounts under the loan as crammed down by the
12 confirmed plan. McPherson testified that, according to the August 8, 2013 letter, the \$465.20
13 payment made by the Debtors on August 1, 2013, was insufficient, and that the Debtors were
14 delinquent on the payments required by the confirmed plan as of that date.²³ Although he did not
15 write the letters, he testified that the letters were not sent to collect the discharged portion of the
16 original loan. McPherson acknowledged that letters dated February 4, 2014 (Ex. L; Exs. 64, 65,
17 66, 67) were sent to various addresses demanding payment of a \$1,199.22 deficiency that was
18 based on the cramdown loan amount.²⁴ He testified that the demand was not for the discharged
19 amount and that the disclaimer on page two of the letter specifically indicated that no portion
20

21 _____
22 the Debtors' loan on those dates.

23 ²³ After accepting \$465.20 monthly payments for over three years, it is unclear why CMC
24 determined the payments to be insufficient and the Plan to be in default. CMC never objected to
25 the Cash Flow Analysis accompanying the Third Amended Joint Disclosure Statement, nor did it
26 object to confirmation of the Third Amended Joint Plan of Reorganization. It also did not appeal
27 the order approving the Third Amended Disclosure Statement nor the Confirmation Order.

28 ²⁴ McPherson also testified that CMC also sent a letter dated February 10, 2014 (Ex. K),
stating that the total amount due under the loan was \$199.22. He acknowledged that the
information set forth on the face of the two letters, six days apart, was not clear, but that the later
letter from CMC was referring to a shortfall in the latest bill payment, not the overall amount of
the arrearage.

1 discharged in bankruptcy was being sought.²⁵

2 McPherson testified that the NOD was sent by the foreclosure trustee, Northwest Trustee
3 Services.²⁶ He testified that the foreclosure trustee had been provided all of the information
4 regarding the loan including the various bankruptcy information. McPherson acknowledged that
5 the representative of its foreclosure trustee had expressed its belief on April 23, 2014, that the
6 Debtors' bankruptcy had been terminated on April 22, 2013 (Ex. 26; Ex. E), but McPherson did
7 not know where the foreclosure trustee obtained the erroneous information. McPherson stated
8 that the \$2,378.43 arrearage amount was the delinquency under the loan amount crammed down
9 under the confirmed plan. McPherson also testified that the \$104,346.49 amount set forth in the
10 Notice of Sale reflected the amount due after payments were made on the cramdown amount
11 determined by the confirmed plan.

12 McPherson testified that he reviewed the post-petition phone call records for the loan.
13 He testified that the first record of an auto-dialed phone call was in August 2013,²⁷ and that there
14 were many attempts to reach the Debtors at four different phone numbers, but that the Debtors
15 were never reached. McPherson testified that there were no calls to a Southern Nevada area

16 _____
17 ²⁵ The language states: "For borrowers filing for bankruptcy protection and automatic
18 stay has been lifted by order or discharge, please be advised Central Mortgage Corporation is
19 NOT attempting to collect a debt from you personally. However, notice is required under the
20 terms of the Security Interest prior to proceeding with any foreclosure action against the
21 property."

22 ²⁶ McPherson testified that CMC paid Northwest Trustee Services to conduct the
23 foreclosure sale, but he does not know whether Northwest Trustee Services was CMC's agent.
24 He acknowledged that CMC sent information to Northwest Trustee Services to conduct the
25 foreclosure sale, and that such information typically would include a copy of the promissory
26 note, mortgage, title policy, loan modification, cramdown, and other bankruptcy data.
27 McPherson testified that he does not know whether Northwest Trustee Services independently
28 obtained information that the Debtors' bankruptcy cases had been terminated before it completed
the foreclosure sale.

²⁷ As previously discussed, Martinez testified that after the Discharge Order was entered
on June 14, 2012, he started receiving phones calls from CMC shortly after Flores's birthday.
Flores testified that those calls from CMC started on or about October 20, 2012. McPherson
testified that CMC's first record of an auto-dialed phone call appears in August 2013. Thus,
there is about a 10 month period in which CMC suggests that no phone calls were ever made
after the Debtors received their discharge.

1 code and all calls were to a San Diego area code.²⁸ He testified that there were no records of
2 auto-dialed calls reaching the Debtors, nor records of calls threatening to seek personal liability.
3 McPherson testified that he did not review any of the auto-dialed calls, but that he has a general
4 familiarity with the outbound language. He testified that an outbound call would only identify
5 CMC as the caller and would only leave a number to call back, but would disclose no other
6 information. McPherson testified that CMC has its own collection and homeowners' assistance
7 departments, and CMC does not use third-party collection agencies.

8 McPherson testified that he has no idea who would have made collection calls after the
9 foreclosure was completed. He stated that there would be little reason to make such calls after a
10 foreclosure on the 36th Street Property because the State of California is an anti-deficiency state.
11 McPherson testified that, moreover, CMC is not authorized to seek deficiencies unless the
12 investor holding the loan authorizes a deficiency to be pursued. He testified that the Debtors'
13 loan is not held by Freddie Mac or Fannie Mae, but he did not recall the name of the trust that
14 held the loan. McPherson further testified, however, that CMC's records did not show a
15 direction by the investor to seek a deficiency. He also testified that even after a discharge, phone
16 calls will be made to borrowers to remind them that they still need to keep current on their
17 payments to keep the property.

18 McPherson acknowledged that the foreclosure sale was completed on August 12, 2014,
19 but after the case was reopened, the foreclosure trustee informed CMC that the sale had to be
20 rescinded.²⁹ He testified that the third party who purchased the 36th Street Property had received
21

22 ²⁸ This is troubling because the exhibit attached to the NOD consisted of a declaration
23 from CMC's "foreclosure lead" signed on April 1, 2014, attesting to CMC's efforts to contact
24 the borrower. Under the option regarding efforts to contact the borrower by telephone, CMC's
25 employee declared under penalty of perjury that CMC had "no #s in which to contact borrower."
26 It is difficult to reconcile McPherson's testimony that CMC made many attempts to reach the
27 Debtors at four different phone numbers when CMC's foreclosure lead also attested that CMC
28 had no numbers in which to contact the Debtors before requesting the NOD to be filed.

²⁹ McPherson testified in writing that Debtors' counsel "did not consult with CMC prior
to unilaterally contacting the foreclosure trustee, which was done without CMC's knowledge or
consent." McPherson Declaration at ¶ 11. It is not clear why CMC's knowledge or consent
would have been required because CMC is not a law firm representing the foreclosure trustee.

1 its funds back.³⁰

2 SCOPE OF MATTERS PRESENTED

3 As previously mentioned, at the beginning of the evidentiary hearing, the court struck
4 without prejudice certain claims in the Debtors' pretrial brief that were never mentioned in their
5 Sanctions Motion. In their statements before trial, as well as their supporting brief, Debtors
6 requested a further award of damages for violation of the FDCPA in addition to NRS 598 and
7 NRS 41.600, as well as damages for violation of the automatic stay under Section 362(k). See
8 Debtors' Trial Statement at 2:12-19; Debtors' Pre-Trial Brief at ¶¶ 49-56, and ¶¶ 57-59; Debtors'
9 Amended Trial Statement at 2:12 to 3:2. CMC properly objected to being sandbagged as to the
10 FDCPA and state law claims, see CMC Pre-Trial Brief at 6:8 to 7:8, and the court agreed that
11 those claims would not be considered in connection with the Sanctions Motion. As to any
12 claims for violation of the Confirmation Order, the Discharge Order, the Discharge Injunction,
13 and the automatic stay, the court permitted the Debtors to proceed.

14 But the Debtors were not alone in overreaching in this matter. CMC has argued, both
15 prior to the evidentiary hearing on the Sanctions Motion and after the hearing, that Debtors'
16 claims for damages and attorneys' fees previously were settled. See CMC Pre-Trial Brief at 4:9-

18 Additionally, McPherson testified that CMC's bankruptcy counsel did not handle the foreclosure
19 process, and McPherson did not know whether the foreclosure trustee is CMC's agent.
20 Moreover, the exhibits admitted at trial indicate that Debtors' counsel initially contacted CMC's
21 bankruptcy counsel of record on April 23, 2014, to question the NOD, but CMC's bankruptcy
22 counsel did not respond until April 29, 2014. (Ex. 29). In the interim, Debtors' counsel
23 contacted Northwest Trustee Services directly by email on the same day and got a response the
24 same day. (Exs. 24, 25, 26, 27, 28). Debtors' counsel followed up with Northwest Trustee
25 Services on June 10, 2014 by email (Ex. 30), but the foreclosure trustee recorded the Notice of
26 Sale on July 18, 2014 (Ex. 40; Ex. C). Although CMC's bankruptcy counsel forwarded
27 counsel's inquiries to its client on April 29, 2014 (Ex. 29), apparently CMC had not responded to
28 its bankruptcy counsel as of July 7, 2014 (Exs. 31, 32). Additional communications between
counsel from July 8, 2014 to July 11, 2014 (Exs. 33, 34, 35, 36, 37, 38, 39), confirm CMC's
determination that the Debtors had been making the incorrect monthly payment on the loan.

³⁰ McPherson was not asked, nor did he testify, as to the identity of the purchaser at the
foreclosure sale or as to the amount paid. Thus, it is not known whether the investor on the
Adjustable Note attempted to acquire the 36th Street Property by credit bid or whether a third
party offered more than the balance set forth in the Notice of Sale.

1 25; CMC Closing Brief at 12:20 to 13:2. It alleges that a settlement was reached between
2 counsel and that a draft settlement stipulation was circulated. It asserts that the Debtors reneged
3 and filed the Sanctions Motion. As proof of this double dealing, CMC submitted a copy of the
4 draft settlement stipulation. (Ex. H).³¹ CMC emphasized that, in fact, it had paid \$5,217.00 in
5 attorneys' fees and costs to the Debtors as further proof that a binding settlement had been
6 reached and consummated.

7 CMC conceded at closing argument, however, that the purported settlement was never
8 approved by the court, nor was approval ever sought. It acknowledged that the draft settlement
9 stipulation was never executed.³² CMC also conceded, as argued by the Debtors, that CMC's
10 payment of \$5,217.00 was the result of the court order granting the Debtors' unopposed Fee
11 Motion. Under these circumstances, CMC's assertion that Debtors' claims were resolved by a
12 settlement stipulation that was never approved by the court is factually preposterous. Moreover,
13 to suggest that an unsigned, unapproved settlement agreement is enforceable comes dangerously
14 close to being legally frivolous. Compare Shahrestani v. Alazzeh (In re Alazzeh), 509 B.R. 689
15 (B.A.P. 9th Cir. 2014)(informal agreement to extend discharge objection deadline under FRBP
16 4004 is ineffective if no formal stipulation is executed and approved by bankruptcy court).

17 Because the claims encompassed by the Sanctions Motion have not been resolved, the
18 court will address them in the chronological order in which they could arise in the Debtors' now-
19 reopened bankruptcy proceeding.

20 **APPLICABLE LEGAL STANDARDS**

21 Section 362(k) provides for an award of actual damages for an individual injured by a
22 willful violation of the automatic stay. Actual damages may include costs and attorneys' fees,
23

24 ³¹ Perhaps because CMC was asserting that the dispute had been settled, neither side
25 objected under FRE 408(a) to admission of the evidence of the settlement communications
between their counsel. (Exs. 54, 55, 56, 57, 58; Exs. F, G, H, and I).

26 ³² The documentary evidence submitted by CMC demonstrates that counsel for the
27 Debtors and CMC exchanged numerous emails over several months attempting to finalize a
28 settlement stipulation but without reaching a final agreement. (Exs. G and I). The Smith
Declaration that addressed counsel's settlement negotiations, however, was never offered or
admitted into evidence, nor was attorney Smith ever called as a witness.

1 and, in appropriate circumstances, punitive damages. See 11 U.S.C. § 362(k)(1). Actual
2 damages may include compensation for emotional distress. Proof of pecuniary loss is not
3 required for an award of emotional distress damages. See Dawson v. Washington Mutual Bank
4 (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004). “To recover damages for emotional
5 distress under § 362(k), ‘an individual must (1) suffer significant harm (2) clearly establish the
6 significant harm, and (3) demonstrate a causal connection between that significant harm and the
7 violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent
8 in the bankruptcy process).’ . . . Emotional harm may be proved by: (1) medical evidence, (2)
9 non-experts, such as family members, friends, or coworkers; or (3) ‘even without corroborative
10 evidence where significant emotion distress is readily apparent.’ . . . The last category includes
11 cases where the violator’s conduct is ‘egregious,’ or where the conduct is not egregious but the
12 circumstances make it obvious that a reasonable person would suffer significant emotional harm
13 . . . ‘Fleeting or trivial anxiety or distress does not suffice . . .’” See America’s Servicing Co. v.
14 Schwartz-Tallard, 438 B.R. 313, 321-22 (D. Nev. 2010), citing In re Dawson, 390 F.3d at 1149-
15 50.

16 An award of attorneys’ fees under Section 362(k) may include the fees incurred in
17 seeking to enforce the automatic stay, including on appeal, and is no longer limited to the
18 attorneys’ fees incurred up to the time the automatic stay violation ceases. See America’s
19 Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015),
20 overruling Sternberg v. Johnson (In re Sternberg), 595 F.3d 937 (9th Cir. 2010).

21 A prerequisite to awarding any actual or punitive damages under Section 362(k) is a
22 finding that the creditor’s violation of the automatic stay was willful. Proof of specific intent to
23 violate the automatic stay is not required. See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178,
24 1191 (9th Cir. 2003). Instead, the moving party need only demonstrate that the creditor knew of
25 the automatic stay, and that the creditor’s actions that violated the stay were intentional. See
26 Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th Cir. 1995). A party with knowledge of the
27 bankruptcy proceeding is considered to have knowledge of the automatic stay. See Eden Place,
28 LLC v. Perl (In re Perl), 513 B.R. 566, 576 (B.A.P. 9th Cir. 2014), rev’d on other grounds, 811

1 F.3d 1120 (9th Cir. 2016).

2 Section 524(a)(1) provides in relevant part that a bankruptcy discharge “voids any
3 judgment at any time obtained, to the extent such judgment is a determination of the personal
4 liability of the debtor with respect to any debt discharged . . .” Section 524(a)(2) provides in
5 relevant part that the bankruptcy discharge “operates as an injunction against the commencement
6 or continuation of an action, . . . or an act, to collect, recover or offset any such debt as a
7 personal liability of the debtor . . .”

8 A debtor who asserts that the Discharge Injunction has been violated must seek relief
9 from the bankruptcy court by motion rather than through commencement of an adversary
10 proceeding. See Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186, 1190 (9th Cir. 2011).

11 The Bankruptcy Appellate Panels for the Ninth Circuit (“BAP”) summarized the
12 standards applicable to the enforcement of the Discharge Injunction as follows:

13 To be subject to sanctions for violating the discharge injunction, a party’s
14 violation must be “willful.” The Ninth Circuit applies a two-part test to determine
15 whether the willfulness standard has been met: (1) did the alleged offending party
16 know that the discharge injunction applied; (2) and did such party intend the
17 actions that violated the discharge injunction? *In re Nash*, 464 B.R. at 880 (citing
18 *Espinosa v. United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n.7 (9th
19 Cir.2008), *aff’d*, — U.S. —, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010); *Zilog,*
20 *Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996, 1007 (9th Cir.2006). For the
21 second prong, the bankruptcy court’s focus is not on the offending party’s
22 subjective beliefs or intent, but on whether the party’s conduct in fact complied
with the order at issue. *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R. 747,
758 (9th Cir.BAP2000), *rev’d on other grounds*, 285 F.3d 882 (9th Cir.2002). “A
party’s negligence or absence of intent to violate the discharge order is not a
defense against a motion for contempt.” *Jarvar v. Title Cash of Mont., Inc. (In re*
Jarvar), 422 B.R. 242, 250 (Bankr. D. Mont.2009)(citing *Atkins v. Martinez (In*
re Atkins), 176 B.R. 998, 1009–10 (Bankr.D.Minn.1994)); *see also In re Sanburg*
Fin. Corp., 446 B.R. 793, 804 (S.D. Tex.2011)(that the offending party may have
not understood its actions to violate the discharge injunction does not negate the
willfulness finding, even if true).

23 The moving party must prove by clear and convincing evidence that the
24 offending party violated the order. *In re Zilog, Inc.*, 450 F.3d at 1007; *Knupfer v.*
Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir.2003). The moving party
25 also has this same burden to prove that sanctions are justified. *Espinosa*, 553 F.3d
26 at 1205 n.7. The burden then shifts to the offending party to demonstrate why it
was unable to comply. *In re Bennett*, 298 F.3d at 1069. If a bankruptcy court
27 finds that a party has willfully violated the discharge injunction, it may award
actual damages, punitive damages and attorney’s fees to the debtor. *In re Nash*,
464 B.R. at 880 (citing *Espinosa*, 553 F.3d at 1205 n.7 (citing 2 Collier
28 Bankruptcy Manual ¶ 524.02[2][c] (3d rev. ed.))). The bankruptcy court has
broad discretion in fashioning a remedy for violation of the discharge injunction.

1 *In re Bassett*, 255 B.R. at 758.

2 Rosales v. Wallace (In re Wallace), 2012 WL 2401871 at *5 (B.A.P. 9th Cir. June 26, 2012).³³

3 A bankruptcy court's civil contempt authority under Section 105(a) is limited to
4 relatively mild, non-compensatory fines rather than serious punitive sanctions. See Dyer, 322
5 F.3d at 1193.³⁴ An award of attorneys' fees also is an appropriate component of a civil contempt
6 award. See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002). Because actual
7 damages can include emotional distress damages for an automatic stay violation, see Dawson,
8 390 F.3d at 1148, courts also have authority to award emotional distress damages for a discharge
9 violation. See Green Point Credit, LLC v. McLean (In re McLean), 794 F.3d 1313, 1325 (11th
10 Cir. 2015).

11 More recently, the BAP also observed as follows:

12 Taken together, *Bennett*, *Dyer*, and *Zilog*, demonstrate that the Ninth
13 Circuit has crafted a strict standard for the actual knowledge requirement in the
14 context of contempt before a finding of willfulness can be made. This standard
15 requires evidence showing the alleged contemnor was aware of the discharge
16 injunction *and* aware that it applied to his or her claim. Whether a party is aware
17 that the discharge injunction is applicable to his or her claim is a fact-based
18 inquiry which implicates a party's subjective belief, even an unreasonable one.
19 Of course, subjective self-serving testimony may not be enough to rebut actual
20 knowledge when the undisputed facts show otherwise. See Chionis v. Starkus (In
21 re Chionis), BAP No. CC-12-1501-KuBaPa, 2013 WL 6840485, at *6 (9th Cir.
22 BAP Dec. 27, 2013) (reversing the bankruptcy court's finding that actual
23 knowledge of the discharge injunction was not shown based on alleged
24 contemnor's self-serving testimony when the undisputed facts showed otherwise).

25 With respect to the second prong - the intent requirement for a finding of
26 willfulness - the analysis concerning a "willful" violation of the discharge
27 injunction is the same as a finding of willfulness in connection with violation of
28 the automatic stay under § 362(k). In connection with the second prong's intent

22 ³³ The summary cites, and is consistent with, the view previously expressed by the BAP
23 in Nash v. Clark Cnty. Dist. Attorney's Office (In re Nash), 464 B.R. 874, 880 (B.A.P. 9th Cir.
24 2012). Although Nash was decided in 2012, neither Nash nor Espinosa addressed whether a
25 bankruptcy court has authority under Section 105(a) to award punitive damages for contempt.
That issue was decided in the negative by the Ninth Circuit in Dyer, and Dyer was not overruled
by Espinosa.

26 ³⁴ The easy distinction between sanctions for violation of the automatic stay and
27 sanctions for violation of a court order is that Section 362(k) expressly authorizes a bankruptcy
28 court to award punitive damages, while Section 105(a) does not expressly authorize a bankruptcy
court to punish a contemnor in a criminal fashion for violating a court order through an award of
punitive damages. See Dyer, 322 F.3d at 1192.

1 requirement, we have previously observed that “the bankruptcy court’s focus is
 2 not on the offending party’s subjective beliefs or intent, but on whether the
 3 party’s conduct in fact complied with the order at issue.” *Rosales v. Wallace (In*
re Wallace), BAP No. NV-11-1681-KiPaD, 2012 WL 240171, at *5 (9th Cir.
 4 BAP June 25, 2012) (citing *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R.
 5 747, 758 (9th Cir. BAP 2000), *rev’d on other grounds*, 285 F.3d 882 (9th Cir.
 6 2002) (stating that courts have applied an objective test in determining whether an
 7 injunction should be enforced via contempt power) (citing *In re Hardy*, 97 F.3d at
 8 1390); *see also In re Dyer*, 322 F.3d at 1191 (noting that a “willful violation”
 9 does not require a specific intent to violate the automatic stay).

10 Accordingly, each prong of the Ninth Circuit’s two-part test for a finding
 11 of contempt in the context of a discharge violation requires a different analysis,
 12 and distinct, clear, and convincing evidence supporting the analysis, before a
 13 finding of willfulness can be made.

14 *Emmert v. Taggart (In re Taggart)*, 548 B.R. 275, 288 (B.A.P. 9th Cir. 2016).³⁵

15 DISCUSSION

16 Debtors allege that CMC violated the automatic stay as to the collection of its claim
 17 under the Adjustable Note and as to the enforcement of its lien against the 36th Street Property.
 18 Debtors also maintain that CMC violated the Confirmation Order by unilaterally imposing a
 19 payment requirement of \$547.40 each month rather than \$465.20 each month. Finally, Debtors
 20 assert that CMC violated the Discharge Order and Discharge Injunction by attempting to collect
 21 the full amount of the Adjustable Note.

22 I. The Automatic Stay.

23 The automatic stay arose immediately upon the filing of the Debtors’ bankruptcy
 24 petitions on May 1, 2009. Under Section 362(a)(6), the automatic stay precludes any act to
 25 collect, assess, or recover any pre-petition claim against the debtors. Under Section 362(a)(4),
 26 the automatic stay precludes any act to enforce any lien against property of the estate. Under
 27 Section 362(c)(2)(C), the automatic stay terminates as to the debtors at the time the bankruptcy
 28

29 ³⁵ The *Taggart* panel also noted that:

30 The clear and convincing evidence standard requires the moving party to “place
 31 in the ultimate factfinder an abiding conviction that the trust of its factual
 32 contentions are ‘highly probable.’” . . . Factual contentions are highly probable if
 33 the evidence offered in support of them “instantly tilt[s] the evidentiary scales in
 34 the affirmative when weighed against the evidence [the non-moving party]
 35 offered in opposition.”

36 548 B.R. at 288 n.11 (citations omitted).

1 case is closed, dismissed, or a discharge is granted or denied. Under Section 362(c)(1), the
2 automatic stay terminates as to property of the estate at the time the property is no longer
3 property of the estate.

4 CMC clearly knew of the Debtors' bankruptcy filing and therefore had knowledge of the
5 automatic stay. The automatic stay terminated as to the Debtors on June 18, 2012, when they
6 received their Chapter 11 discharge, and their case had not been closed or dismissed.³⁶ As to the
7 36th Street Property, the automatic stay terminated on June 14, 2011, when the Third Amended
8 Joint Plan of Reorganization was confirmed, vesting the property in the Debtors. When CMC
9 foreclosed on the 36th Street Property after confirmation of the Third Amended Joint Plan of
10 Reorganization, the automatic stay already had terminated as a matter of law because the
11 property was no longer property of the bankruptcy estate. As a result, no violation of the
12 automatic stay occurred at that time as to the 36th Street Property.

13 As to the Debtors, the inquiry under Section 362(k) is whether CMC engaged in any act
14 to collect, assess, or recover their claim under the Adjustable Note between May 1, 2009 and
15 June 18, 2012. Debtors argue that CMC violated the automatic stay by making collection calls
16 and by sending certain correspondence during that period. Debtors argue that the collection calls
17 occurred over a sixteen-week period between June 14, 2011 and October 1, 2011. See Debtors'
18 Closing Brief at ¶ 33. Debtors also maintain that CMC sent numerous Rate Adjustment Letters
19 (Exs. 73 through 81, and 83 through 111) between May 19, 2009 and May 18, 2012, that
20 violated the automatic stay. Id. at ¶¶ 30 and 31.

21 Martinez testified that he received three calls per week from CMC after the bankruptcy
22 was filed. As discussed above, Debtors argue that those calls occurred over a sixteen-week
23 period between June 14, 2011 and October 1, 2011. Martinez was protected by the automatic
24 stay until he, along with Flores, received their bankruptcy discharge on June 18, 2012. Flores
25 also testified that he received three calls per week from CMC, but he also stated that those calls

26
27 ³⁶ Some individual Chapter 11 debtors obtain orders closing their cases before receiving
28 their discharge so as to prevent payment of fees to the Office of the United States Trustee. By
doing so, they risk terminating the protection of the automatic stay under Section 362(c)(2)(A)
without yet having obtained the protection of the discharge injunction under Section 524(a)(2).

1 did not start until after his birthday in October 2012. Assuming those calls occurred, none of
2 them were during the period in which Flores was protected by the automatic stay because Flores
3 already had received his Chapter 11 discharge.

4 Martinez testified specifically as to the two Rate Adjustment Letters that he received
5 dated in October and November 2009, as well as two additional Rate Adjustment Letters that he
6 received dated in April and May 2012. Martinez did not testify specifically as to the 36 other
7 Rate Adjustment Letters admitted into evidence, but recalled that he received such letters from
8 CMC every month during the bankruptcy case. Flores did not testify as to any of the Rate
9 Adjustment Letters.

10 **A. Willful Violations.**

11 For purposes of this analysis, the court assumes that Martinez received forty-eight phone
12 calls from CMC after the bankruptcy petition was filed and before the discharge was received.
13 The court also assumes for purposes of this analysis, that each of the calls sought to collect the
14 original amount of the Adjustable Note. The court further assumes for purposes of this analysis
15 that CMC intended to make each of the forty-eight phone calls to Martinez. Based on those
16 assumptions, the court concludes that there was a willful violation of the automatic stay as to
17 Martinez. Because Flores did not receive any phone calls from CMC until after the discharge
18 was entered, the court also concludes that there was no willful violation of the automatic stay as
19 to Flores.

20 For purposes of this analysis, the court assumes that Martinez received each of the Rate
21 Adjustment Letters sent by CMC, and that Flores received none of them. The court having
22 reviewed each of the Rate Adjustment Letters, however, concludes that none of them demands
23 payment of the Adjustable Note. Instead, each of the Rate Adjustment Letters simply informs
24 the Debtors of the monthly payments that would be required at the time under the terms of the
25 Adjustable Note. The word “due” appears in each of the letters, but only to explain that no
26 adjustment to the monthly payment is due rather than to state that a payment in any amount is
27 due. There is no express statement in any of the Rate Adjustment Letters that CMC is
28 attempting to collect a debt. Rather, the letters provide information that would be equivalent to

1 that provided outside of bankruptcy, and do not demand payment separate from a monthly
2 mortgage statement. Under these circumstances, the court concludes that CMC's issuance of
3 these Rate Adjustment Letters did not constitute willful violations of the automatic stay as to
4 either of the Debtors. Compare In re Lemieux, 520 B.R. 361, 366-67 (Bankr. D. Mass.
5 2014)(post-discharge notice of change in loan interest rate did not violate discharge injunction).

6 **B. Actual Damages.**

7 Martinez testified that he received the forty-eight phone calls from CMC, but offered no
8 testimony or documentary evidence establishing that he missed time from work or incurred any
9 medical or legal expenses as a result. He suffered no pecuniary losses which, by itself, does not
10 preclude the recovery of emotional distress damages as a component of actual damages.

11 Martinez's testimony at trial, however, was that the bankruptcy process itself was very stressful,
12 which caused him to lose focus at work.

13 Martinez also testified that after the NOD was recorded by CMC, it caused him to lose
14 sleep, created problems taking care of customers at work, and led to fights with his partner,
15 Flores. The NOD, however, was recorded well after Martinez received his discharge and the
16 automatic stay had expired.

17 As previously discussed, the recovery of emotional distress damages under Section
18 362(k) requires proof that the stay violation caused significant harm distinct from the anxiety and
19 inherent pressure of the bankruptcy process. See discussion at 30, supra. In this case, Martinez,
20 along with Flores, voluntarily filed Chapter 11 reorganization proceedings that were
21 significantly more complex than typical consumer Chapter 7 liquidation or Chapter 13 debt
22 adjustment cases. Debtors' first attempt to confirm a Chapter 11 plan of reorganization failed
23 primarily due to the objections raised by the UST. Only after the Debtors made a second attempt
24 to confirm a Chapter 11 plan, were they successful. In other words, a complex bankruptcy
25 process was made even more difficult because the Debtors had to address issues and parties that
26 they could not control.

27 No medical evidence was offered and no percipient witness testimony was adduced
28 inferring that Martinez experienced any additional anxiety or stress as a result of any calls from

1 CMC. Not even Flores testified that Martinez exhibited any additional strain caused by the calls.
2 According to Flores, the Debtors never informed their bankruptcy attorney about calls from
3 CMC until after they received their discharge. Unlike Flores, there is no evidence that Martinez
4 sought professional treatment for depression or was prescribed antidepressants as a result of
5 either the commencement of the Chapter 11 proceedings or the actions of CMC. In short, the
6 evidence is insufficient to conclude that Martinez suffered emotional distress separate and apart
7 from, and distinct from, the anxiety of the very bankruptcy process he chose.

8 Under these circumstances, the court concludes that Martinez has failed to establish that
9 he suffered any actual damages, both monetary and non-monetary, as a result of any willful
10 violation of the automatic stay by CMC.

11 **II. The Confirmation Order.**

12 CMC maintains that the \$465.20 monthly payment amount was “self-selected” by the
13 Debtors and not ordered by the court. See CMC Closing Brief at 2:3-7 & n.1. CMC also
14 contends that after it changed the payment amount to \$547.40 per month, it was the Debtors’
15 responsibility to ask CMC to provide an explanation. Id. at 2:7-9 & n.2. Doubling down, CMC
16 further argues that it “is not responsible for Debtors’ failure to recognize that their plan payment
17 is higher than their self-selected adequate protection.” Id. at 2:9-10.

18 Debtors argue that CMC violated the Confirmation Order after its entry on June 14, 2011,
19 by sending twelve Rate Adjustment Letters through May 18, 2011, that included unpaid
20 principal balances that conflict with the Confirmation Order. See Debtors’ Closing Brief at ¶ 31.
21 They argue that CMC sent fifteen additional letters and notices leading up to the foreclosure of
22 the 36th Street Property. Id. at ¶ 32.³⁷ Debtors also maintain that CMC violated the
23 Confirmation Order through phone calls to the Debtors seeking the full amount of the Adjustable
24 Note balance after the order was entered, as well as after the Discharge Order was entered. Id. at
25 ¶ 33.

26 **A. Willful Violation.**

27
28 ³⁷ Those fifteen additional letters include two Rate Adjustment Letters (Exs. 71 and 72).

1 At the evidentiary hearing, CMC attempted to establish through its examination of
2 Martinez, that the \$465.20 monthly payment was not required by the language of the confirmed
3 plan. Martinez's partner, Flores, was not examined on the subject, and CMC's only witness,
4 McPherson, also did not address the subject on direct or cross-examination. No one from CMC
5 who had personal knowledge of the servicing of the Debtors' obligation was called to testify.
6 CMC's only witness, McPherson, did not dispute that CMC had notice of the Debtors'
7 reorganization proceeding, actually participated in the confirmation process, and had notice of all
8 of the documents filed in the Chapter 11 case. Because McPherson relied solely on the records
9 prepared by other CMC employees, he had no personal knowledge of whether CMC's
10 employees even read the bankruptcy information in the loan file. Thus, to the extent that the
11 amount of the monthly payment required by the confirmed plan is a factual issue instead of a
12 legal one, the witness testimony infers that CMC, rather than the Debtors, failed to take
13 reasonable steps to comply with the requirements of the Confirmation Order.

14 All of the Chapter 11 reorganization plans proposed by the Debtors referenced a Cash
15 Flow Analysis setting forth their proposed monthly payments to all of their secured creditors.
16 Debtors' source of plan payments was always their monthly rental income as well as their
17 income from employment. Their monthly mortgage payments were always to be based on the
18 reduced value of their rental properties, including the 36th Street Property, as determined by the
19 court.

20 At the inception of the Chapter 11 proceedings, Debtors filed the Valuation Motion by
21 which the court determined the fair market value of the 36th Street Property to be \$120,000.
22 That valuation resulted in an allowed secured claim in that amount in favor of CMC, with an
23 allowed unsecured claim for the balance owed on the Adjustable Note. CMC was served with
24 the Valuation Motion and never opposed it. It did not appeal the order granting the motion.
25 Instead, CMC filed its POC for the full amount of the Adjustable Note balance and more.³⁸

26
27 ³⁸ In its post-trial brief, CMC argues that the Debtors never sought court approval of their
28 use of cash collateral in order to make the "self-selected adequate protection payment of
\$465.20" based on a \$120,000 secured claim. See CMC Closing Brief at 2 n.1. This is an odd

1 CMC was served with all of the Chapter 11 reorganization plans proposed by the Debtors
2 as well as the Chapter 11 disclosure statements that included the Cash Flow Analysis. It never
3 objected to the proposed monthly payment of \$465.20 set forth in the Cash Flow Analysis and
4 never objected to confirmation of proposed Third Amended Joint Plan of Reorganization, nor the
5 amendment proposed in the Fourth Amended Joint Plan of Reorganization.

6 CMC actively participated in the Chapter 11 proceeding and was represented by counsel.
7 It administered the Adjustable Note throughout the bankruptcy on behalf of the investor holding
8 the interest in the note, and its loan files included the note, the deed of trust, the title policy, any
9 loan modification, and any cramdown information and other bankruptcy data. CMC provided all
10 of that information to its foreclosure trustee.

11 The Confirmation Order entered on June 14, 2011, approved the Third Amended Joint
12 Plan of Reorganization, including the payments set forth in the Cash Flow Analysis. CMC was
13 served with a copy of the Confirmation Order and never appealed the order. The Plan
14 Modification Order entered on October 25, 2011, approved the Fourth Amended Joint Plan of
15 Reorganization, including the payments set forth in the Cash Flow Analysis. CMC was served
16 with a copy of the Plan Modification Order and never appealed the order.

17 In spite of having the Debtors' bankruptcy information in its loan file, including the
18 Confirmation Order and the Plan Modification Order approving the Debtors' monthly payment

19 _____
20 objection to make more than seven years after the Debtors' Chapter 11 petitions were filed and
21 when CMC undisputedly had notice of the bankruptcy proceedings from day one. Despite
22 having notice of the bankruptcy proceedings and actively participating in the case, there is no
23 record of CMC ever objecting to the Debtors' use of cash collateral. Even more curious is that
24 CMC cites no language in the Adjustable Note or the Deed of Trust attached to its POC that
25 would establish its interest in the rents generated by the 36th Street Property. Paragraph 11 of
26 the Deed of Trust does include an assignment of "Miscellaneous Proceeds," but the description
27 of Miscellaneous Proceeds found in Definition (M) of the Deed of Trust does not include rents.
28 On most occasions, an assignment of rents provision is boldly stated, included in the title of a
deed of trust, or accompanies the deed of trust as a separately recorded document. Perhaps the
court overlooked the rent assignment language in the Deed of Trust, but probably not. So just
what interest of CMC in the 36th Street Property constituted "cash collateral" under Section
363(a) entitling it to adequate protection under Section 363(e) as required by Section
363(c)(2)(B)? This appears to be another baffling position taken by CMC similar to its assertion
that the Debtors' claims were settled.

1 of \$465.20 on CMC's allowed secured claim, CMC changed the payment amount to \$547.40 on
2 August 17, 2012, without any court order authorizing it to do so, and made that change
3 retroactive to November 1, 2011. CMC's only witness did not know how CMC made that
4 decision and could provide no evidence that CMC was unable to comply with the Confirmation
5 Order. Its witness did not testify to any efforts being made by CMC to review the bankruptcy
6 data in its loan file, to examine the records of the bankruptcy court, to seek advice from its
7 bankruptcy counsel, or to even seek advice from the witness, before deciding after four years of
8 accepting the Debtors' payments to change the amount required by the Confirmation Order.
9 Additionally, CMC never notified the Debtors why it made the change or how the additional
10 payment amount was determined. During the same period of time, CMC continued to send the
11 Rate Adjustment Letters to the Debtors each month that provided information regarding the
12 monthly payment amounts that would have been required by the terms of the original Adjustable
13 Note. In fact, the Rate Adjustment Letters encompassing the November 1, 2011, retroactive
14 adjustment date expressly informed the Debtors that the monthly payment amount under the
15 Adjustable Note would not change.³⁹ Thus, for some reason, someone at CMC apparently came
16 to the conclusion that what it could not do under the terms of the Adjustable Note, i.e., adjust the
17 required monthly payments without giving prior notice to the borrowers, it somehow could do to
18 monthly payments specified under a confirmed Chapter 11 plan.⁴⁰

19 The notion that CMC could unilaterally change the amount of the payment under the
20 confirmed plan without prior notice to the Debtors is contradicted by CMC's own legal position.
21 In its written response to the Sanctions Motion, CMC expressed its own understanding of the

22
23 ³⁹ The Rate Adjustment Letters dated in May, June, July, August, September, October,
24 November, and December, 2011, all explained that the Debtors' monthly payment under the
Adjustable Note would remain at \$1,362.11. (Exs. 93, 92, 91, 90, 89, 87, and 86).

25 ⁴⁰ CMC's suggestion that it made a good faith interpretation of the Confirmation Order,
26 see CMC Closing Brief at 10:11-18, is contrary to the testimony of its own witness who did not
27 even know how CMC made its determination on August 17, 2012, to increase the monthly
28 payment and apply it retroactively to November 1, 2011. Moreover, CMC offered no evidence
suggesting that its employees reviewed any of the bankruptcy documents in the loan file, sought
any information from the case docket, or even consulted with its bankruptcy attorneys and in-
house counsel.

1 Confirmation Order as follows:

2 The Plan left little guidance as to the specific terms of the re-amortization of the
3 Loan, excepting that “Class 2(f) Secured Claim shall be impaired and paid the
4 allowed amount of its claim [\$120,000] in accordance with the terms of its related
note and mortgage.” Thus, there was in fact no modification to CMC’s Loan
except that the Plan reduced the principal balance of the Loan to \$120,000.

5 CMC Opposition at 4:23-28 (Emphasis added). Apparently, CMC is unaware of the
6 requirements of the very loan that it is servicing in this case. The loan documents were attached
7 as exhibits to its POC. Those documents consist of the Deed of Trust, an Adjustable Rate Rider,
8 a Condominium Rider, and the Adjustable Note.

9 Section 2 of the Adjustable Note sets forth the method by which changes in the interest
10 rate are to be calculated by the lender, and Section 3 sets forth the borrower’s obligation to make
11 the monthly payment in accordance with the adjusted interest rate. Section 4 of the Adjustable
12 Note specifies that the lender will provide notice to the borrower “of any change in the amount
13 of my monthly payment before the effective date of the change.” Section 4 also provides that the
14 notice “will include information required by law to be given to me and also the title and
15 telephone number of a person who will answer any question I may have regarding the notice.”
16 The language in Sections 2, 3, and 4 of the Adjustable Note are so important that identical or
17 substantially identical language was included in the Adjustable Rate Rider and the Debtors were
18 required to initial each page. The purpose of Section 4 was to let the consumer borrower know
19 in advance that his or her loan payments would change and to provide a contact person to answer
20 any questions. The obvious goal was to provide transparency to prevent misunderstandings
21 between the lender and the borrower. Because CMC takes the position that the confirmed plan
22 reduced the principal balance of the Debtors’ obligation to \$120,000, but made no other
23 modification to the loan, it cannot claim that it could unilaterally make any changes in the
24 amount of the monthly payments without giving prior notice.

25 Under these circumstances, CMC’s assertion that the Confirmation Order did not
26 provide for a monthly payment of \$465.20, is contrary to the record. Additionally, its assertion
27 that it did not understand that the \$465.20 amount was required by the Confirmation Order, is
28 not credible. More important, its assertion that it was not required to comply with the notice

1 requirements of its loan documents is factually unsupportable. The notion that a loan servicer
2 can unilaterally change the amount of the monthly payment on a consumer loan without notice or
3 explanation, especially in a bankruptcy setting, is risible at best. CMC's additional suggestion
4 that the Debtors had the burden of seeking an explanation for the payment change in this case,
5 while CMC simultaneously is sending Rate Adjustment Letters in connection with the
6 Adjustable Note, is even worse. To the extent that CMC had the burden of demonstrating that it
7 was unable to comply with the Confirmation Order, it utterly failed to meet that burden.

8 Clear and convincing evidence establishes that CMC violated the Confirmation Order
9 when it unilaterally increased the monthly payment amount and then retroactively applied the
10 amount to the allowed secured claim that was crammed down by the Debtors' confirmed plan.
11 The record also establishes that CMC had the ability to comply with the Confirmation Order, but
12 it offered no evidence that it was unable to comply. The court therefore concludes that a willful
13 violation of the Confirmation Order has been established.

14 **B. Actual Damages.**

15 The Confirmation Order was entered on June 14, 2011. The order specified that the
16 Debtors' monthly payment on CMC's allowed secured claim as crammed down under the
17 confirmed plan would be \$465.20. The record establishes that CMC accepted those payments
18 for years before starting to reject those payments in August 2013. Additionally, the Payment
19 History indicates that CMC did not unilaterally change the monthly plan payment to \$547.40
20 until August 17, 2012. No contrary evidence was presented as to the date CMC unilaterally
21 changed and retroactively applied the increased monthly payment amount. The court therefore
22 will use the August 17, 2012 date as the beginning point to measure the Debtors' actual
23 damages, if any, caused by CMC's violation of the Confirmation Order.

24 CMC initially argued that there is no evidence of any damages suffered by the Debtors.
25 See CMC Closing Brief at 2:15-17. This argument is, of course, incorrect because both Debtors
26 provided written and oral testimony in support of their claims of emotional distress. At closing
27 argument, CMC changed its position to assert that no significant or substantial damages had
28 occurred, rather than that there was no evidence of any damages.

1 After the Confirmation Order was entered, the twenty-seven letters and notices received
2 from CMC included fourteen Rate Adjustment Letters. While each of the Rate Adjustment
3 Letters includes an unpaid principal balance amount that would be owed on the original
4 Adjustable Note, none of them state that the principal balance of the Adjustable Note is owed or
5 that a payment is due. As the court previously concluded in connection with the alleged
6 automatic stay violation, see discussion at 35-36, supra, the court similarly concludes that the
7 fourteen Rate Adjustment Letters did not violate the Confirmation Order. The remaining letters
8 and notices sent by CMC, however, are much different.

9 The other letters and documents included: a copy of the NOD that was addressed to the
10 tenants at the 36th Street Property (Ex. 23); a copy of the Notice of Sale (Ex. 40); copies of the
11 May 12, 2014 (Ex. 62), July 8, 2014 (Ex. 61), and August 11, 2014 (Ex. 60) letters returning the
12 Debtors' monthly payments and notifying them that their loan had been referred to CMC's legal
13 counsel to begin foreclosure proceedings; copies of the February 4, 2014 letters sent to four
14 different addresses declaring a breach of the Adjustable Note and Deed of Trust (Exs. 64, 65, 66,
15 and 67); a copy of the February 10, 2014 letter returning an electronic payment of \$465.20
16 stating that there are late charges and other amounts due totaling \$199.22 (Ex. 63); and copies of
17 the August 8, 2013 (Ex. 70), November 7, 2013 (Ex. 69), and January 9, 2014 (Ex. 68) letters
18 stating that there are unapplied balances and that CMC cannot post the balances because they are
19 less than the payments due.

20 All of these letters and notices were sent to the Debtors as a result of CMC's unilateral
21 change to the monthly payment. There is no dispute, however, that all of these letters and
22 notices were sent to the Debtors after the Discharge Order was entered. To avoid duplicating
23 any award of actual damages, the court will address below the post-confirmation letters and
24 notices in connection with the violation of the Discharge Order and Discharge Injunction, if any.

25 After the Confirmation Order was entered, Debtors argue that they received three phone
26 calls each week through October 1, 2011. See Debtors' Closing Brief at ¶ 33.i. They also argue
27 that they received three phone calls per week after they received their discharge (June 18, 2012),
28 starting after Flores's birthday in October 2012. Id. at ¶ 33.ii. As previously discussed, Flores

1 testified that he never received any calls from CMC until two weeks after his birthday, which
2 was well after he received his discharge. To avoid any duplication of damages, the court
3 therefore will address the post-confirmation calls to Flores in connection with the violation of the
4 Discharge Order and Discharge Injunction, if any. The court will do the same with respect to
5 any post-confirmation calls made to Martinez after entry of the Discharge Order.

6 As to the post-confirmation calls made by CMC to Martinez through October 1, 2011,
7 i.e., prior to the discharge, the court already has concluded that Martinez has failed to establish
8 that he suffered any actual damages, both monetary and non-monetary, resulting from the alleged
9 automatic stay violation. See discussion at 36-37, supra. The causation analysis required to
10 award damages for an automatic stay violation is equally applicable when the beneficiary of a
11 court order seeks damages for violation of the order.⁴¹ Here, there is no evidence that CMC's
12 post-confirmation calls to Martinez, if any, were the cause of any monetary injuries such as lost
13 wages or medical expenses. Additionally, there is no specific testimony from Martinez, nor
14 corroborating testimony from Flores, other friends and co-workers, or medical providers, that the
15 calls received after the Confirmation Order was entered, produced anxiety or stress exceeding
16 the emotional burden resulting from the Chapter 11 process itself. In this individual Chapter 11
17 case, confirmation of the Chapter 11 plan did not relieve the Debtors of their obligation to make
18 the required payments on the allowed secured claim in order to eventually obtain removal of the
19 lien against the 36th Street Property. Moreover, confirmation of the Chapter 11 plan also did not
20 relieve the Debtors of their obligation to complete all plan payments in order to obtain their
21 discharge.

22 Under these circumstances, the court concludes that Martinez has not met his burden of
23 proving that the post-confirmation calls from CMC, if any, were the cause of any emotional
24 distress sufficient to warrant compensation. In short, no actual damages for violation of the
25 Confirmation Order are appropriate.

26
27 ⁴¹ A causation analysis is less important, and perhaps inapplicable, when a court
28 criminally sanctions a party for violating a court order. In those circumstances, the sanction is
designed to punish the offending party in order to preserve the court's judicial authority. In
those circumstances, a willful violation of the order itself causes damage to the court's authority.

1 **III. The Discharge Order and Discharge Injunction.**

2 The Discharge Order entered on June 18, 2012, was straightforward: it granted a
3 discharge to both Martinez and Flores under Section 1141(d). Other than the bankruptcy
4 discharge, the order grants no other relief. As previously discussed, however, the discharge
5 triggered certain statutory consequences, including the Discharge Injunction. Because the
6 Discharge Order provides no additional relief, the court will address only whether CMC violated
7 the Discharge Injunction.

8 **A. Willful Violation.**

9 As discussed above, the standard in this circuit for finding a willful violation of the
10 Discharge Injunction requires an analysis of two prongs.

11 **1. Did CMC have knowledge that the discharge injunction**
12 **applied to its claim?**

13 The evidence is clear and convincing that CMC knew that the Discharge Injunction
14 applied to its claim. CMC knew that the Debtors filed for Chapter 11 relief. CMC was
15 scheduled as a secured creditor in both Chapter 11 proceedings.

16 CMC was served with the Debtors' jointly proposed Chapter 11 plans of reorganization
17 that provided for CMC to retain its lien against the 36th Street Property and for its secured claim
18 to be allowed in the revalued amount of \$120,000. Like all individual Chapter 11 debtors, the
19 proposed plans provided that the Debtors would not receive a discharge of their personal liability
20 on CMC's claims until completion of plan payments. CMC was served with the disclosure
21 statements that included the Debtors' Cash Flow Analysis setting forth the proposed amount of
22 the \$465.20 monthly mortgage payment based on the allowed secured claim.

23 CMC was an active participant in the Debtors' case. It filed its POC in the secured
24 amount of \$299,788.72. It filed a motion for relief from stay alleging that it was owed
25 \$305,587.20 as of December 29, 2009. See CMC Lift Stay Motion at ¶ 5. It objected to
26 confirmation of the Debtors' Second Amended Plan of Reorganization as well as approval of the
27 Second Amended Disclosure Statement, but not to the \$465.20 proposed monthly mortgage
28 payment set forth in the Cash Flow Analysis.

1 CMC was served with the Third Amended Joint Plan of Reorganization as well as the
2 Third Amended Joint Disclosure Statement. The identical Cash Flow Analysis was incorporated
3 in the Third Amended Joint Disclosure Statement, but CMC did not object to plan confirmation,
4 including the proposed monthly mortgage payment.

5 CMC was served with notice of the Confirmation Order that expressly discussed the Cash
6 Flow Analysis in support of plan feasibility. CMC did not appeal the Confirmation Order, and it
7 continued to receive and accept payments of \$465.20 per month after the Chapter 11 plan was
8 confirmed.

9 CMC was served with the motion for entry of a final decree and an order of discharge.
10 The Discharge Order was entered on June 18, 2012, and CMC did not appeal the entry of
11 discharge.

12 Having received notice of the Chapter 11 proceedings, having filed a POC for the balance
13 of the Adjustable Note, having sought relief from the automatic stay, having participated in the
14 plan confirmation process, having received the Confirmation Order, and having received the
15 Discharge Order, CMC clearly knew that the Discharge Injunction applied to its claim under the
16 Adjustable Note.⁴² While CMC disputes that it violated the Discharge Injunction, that dispute is
17 immaterial to whether it had knowledge of its applicability to its claim. Thus, the first prong of
18 the Ninth Circuit standard for a finding of willfulness has been met.

19 **2. Did CMC intend the actions that violated the discharge**
20 **injunction?**

21 As previously discussed, the Debtors' discharge did not eliminate CMC's lien against the
22 36th Street Property, but it did eliminate the Debtors' personal liability for the Adjustable Note
23 pursuant to Sections 1141(d)(1) and 1141(d)(5). As a result, the Discharge Injunction prohibited

24 ⁴² CMC does not assert that it relied in good faith on a judicial determination that its
25 claim had not been discharged. Compare In re Gubler, Case No. 12-16811-MKN, Memorandum
26 on Debtor's Motion to Reopen Chapter 7 Under § 350 and F.R.B.P. 5010 to Hold Creditors in
27 Contempt and an Order Sanctioning the Creditors for Violation of the Discharge Injunction 11
28 U.S.C. § 524(a)(2), at pp. 14-15 and 22, Docket No. 27, entered April 20, 2016 (Spraker, J.)
(finding, *inter alia*, that individual creditors reasonably relied on a state court's erroneous
pronouncements that their unsecured debt had not been discharged by the debtor's prior no-
asset Chapter 7).

1 any “act, to collect, recover or offset any such debt as a personal liability of the debtor . . .” 11
2 U.S.C. § 524(a)(2).

3 After the Debtors received their discharge, CMC continued to receive and accept
4 payments of \$465.20 per month. On August 17, 2012, however, more than a year after the
5 Debtors’ Chapter 11 plan was confirmed and nearly two months after the Debtors received their
6 discharge, CMC came to the conclusion that the \$465.20 monthly payments were insufficient. It
7 then changed the monthly payment to \$547.40 and applied that payment amount retroactively to
8 November 1, 2011, without telling the Debtors that it had done so.

9 Almost a year later, CMC mailed the Debtors a letter dated August 8, 2013, in which it
10 finally mentioned that the monthly payment amount was \$547.40. The August 8, 2013 letter did
11 not explain how the monthly payment amount of \$547.40 was determined; it only stated that the
12 payment of \$465.20 left a balance due of \$82.20. As previously discussed, during the Debtors’
13 Chapter 11 proceeding, CMC continued to send the Rate Adjustment Letters each month. Out of
14 all of the Rate Adjustment Letters admitted into evidence, only the February 18, 2010 letter (Ex.
15 108) stated that the monthly payment under the original Adjustable Note would have increased
16 by approximately \$52.00, and only the February 16, 2012 letter (Ex. 84) stated that the monthly
17 payment under the Adjustable Note would have decreased by approximately \$21.00. All of the
18 Rate Adjustment Letters provided information explaining how any monthly payment adjustment
19 was calculated. If the Debtors would have had to increase their monthly payment under the
20 Adjustable Note, they were notified in advance. If the Debtors would have had to decrease their
21 monthly payment under the Adjustable Note, they were notified in advance. However, no such
22 information was included in the August 8, 2013 letter. Moreover, CMC never explained in the
23 August 8, 2013 letter that it had retroactively applied the increased payment amount to
24 November 1, 2011, and that it would continue to do so.

25 After August 8, 2013, CMC considered the Debtors to be in default on payment of the
26 allowed secured claim that had been crammed down by the Confirmation Order,⁴³ and CMC

27 _____
28 ⁴³ As previously identified in connection with the Confirmation Order, see discussion at
43, supra, the other letters and documents sent to the Debtors by CMC included: a copy of the

1 admittedly commenced making telephone calls to the Debtors. CMC continued to assert that
2 monthly payments of \$547.40 were required, creating a shortfall each month of \$82.20. It
3 admittedly never notified the Debtors how the new payment amount was determined or how the
4 monthly payments were being applied. CMC then started rejecting the Debtors' monthly plan
5 payments, again without explaining why the monthly payments provided under the confirmed
6 plan suddenly were insufficient.⁴⁴

7 CMC's foreclosure trustee, Northwest Trustee Services, recorded the NOD setting forth
8 an arrearage amount of \$2,378.43 that was based on the loan delinquency information obtained
9 from CMC. The NOD also referred to the original Adjustable Note amount of \$264,000, rather
10 than the allowed secured claim amount crammed down by the confirmed plan. Under the
11 signature line of the three-page NOD appeared the words, in capital letters: "THIS OFFICE IS
12 ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE
13 USED FOR THAT PURPOSE." Immediately below those capitalized words appeared the
14 following additional language, in much smaller print: "If you have received a discharge of the
15 debt referenced herein in a bankruptcy proceeding, this notice does not constitute an attempt to
16 collect a debt or to impose personal liability for such obligation. However, a secured party
17 retains rights under its security instrument, including the right to foreclose its lien."⁴⁵

18 _____
19 NOD that was addressed to the tenants at the 36th Street Property; a copy of the Notice of Sale;
20 copies of the May 12, 2014, July 8, 2014, and August 11, 2014 letters returning the Debtors'
21 monthly payments; copies of the February 4, 2014 letters sent to four different addresses
22 declaring a breach of the Adjustable Note and Deed of Trust; a copy of the February 10, 2014
23 letter returning an electronic payment of \$465.20; and copies of the August 8, 2013, November
24 7, 2013, and January 9, 2014 letters stating that there are unapplied balances and that CMC
25 cannot post the balances because they are less than the payments due.

26 ⁴⁴ McPherson testified that the "call campaign" commenced at the time the August 8,
27 2013 letter was sent, but he also attested that CMC's phone records showed that CMC never
28 spoke to the Debtors. Debtors, of course, testified that they spoke many times to representatives
of CMC. If McPherson is correct, then CMC never provided an oral explanation to the Debtors
as to how it recalculated the monthly payment amount after accepting the \$465.20 payments for
more than four years.

⁴⁵ At the time the foreclosure trustee recorded the NOD, there is no question that the
Debtors already had received a discharge, and McPherson testified that a variety of bankruptcy

1 After recording the NOD emphasizing that it was attempting to collect a debt, CMC's
2 foreclosure trustee subsequently recorded the two-page Notice of Sale that sets forth a total
3 unpaid balance amount of \$104,346.49, that made no reference to the original Adjustable Note
4 amount, and that stated in capital letters at the bottom of the last page: "THIS OFFICE IS
5 ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE
6 USED FOR THAT PURPOSE." Unlike the NOD, however, the Notice of Sale does not
7 disclaim that the sale is part of an attempt to collect a debt as a personal liability of the
8 borrowers. In other words, the Notice of Sale announces, without limitation, that the foreclosure
9 trustee is attempting to collect a debt in the amount of \$104,346.49 owed by the trustors,
10 Martinez and Flores.

11 Both prior to the foreclosure sale and even after the foreclosure sale, Debtors testified
12 that they received calls from CMC, or someone on behalf of CMC, seeking to collect from the
13 Debtors personally, either the full amount of the Adjustable Note or up to \$80,000. Debtors
14 allege that each of them received three post-discharge calls per week beginning shortly after
15 Flores's birthday on October 5, 2012, through the foreclosure sale date of August 11, 2014. See
16 Debtors' Closing Brief at ¶ 33.ii.

17 Because the NOD references the full amount of the Adjustable Note rather than the
18 allowed secured claim crammed down by the confirmed Chapter 11 plan, because the Notice of
19 Sale seeks to foreclose on the balance of the allowed secured claim without limitation, and
20 because they received numerous phone calls seeking up to the full amount of the Adjustable
21 Note, Debtors maintain that CMC's intentional actions violated the Discharge Injunction.

22 CMC, of course, maintains that it did not attempt to collect either the remaining balance
23 of the Adjustable Note or the unpaid balance of its allowed secured claim. It denies making any
24 of the post-discharge collections calls alleged by the Debtors to have occurred either before or
25 after the foreclosure of the 36th Street Property. CMC's primary evidence consists of the
26 _____
27 information would have been provided by CMC to Northwest Trustee Services. When a creditor
28 already knows that a debt has been discharged, inclusion of the phrase "If you received a
discharge" serves only to create doubt in the mind of a consumer debtor that bankruptcy has
provided relief from his or her creditors.

1 testimony of its only witness.

2 McPherson testified at length, both in writing and in open court, in response to the
3 Debtors' claims. As previously mentioned at note 10, supra, McPherson does not appear to have
4 been the author of his own declaration, but instead was the CMC officer responsible for
5 reviewing it, signing it, and defending it in court. Unfortunately, McPherson admittedly has no
6 personal knowledge of how CMC decided to recalculate the monthly mortgage payments after
7 accepting them for more than four years. Surely someone at CMC, but not McPherson, actually
8 made that decision and could have testified on personal knowledge how the decision came about.

9 It also appears that McPherson does not know who prepared the prior Payment History
10 even though his employer previously submitted it as proof of CMC's servicing of the Debtors'
11 loan, and he clearly did not prepare the Post-petition Loan History that proved to be materially
12 inaccurate. Surely someone at CMC, but not McPherson, actually prepared both documents and
13 could testify on personal knowledge how the documents were prepared and could explain why
14 certain information was omitted.

15 McPherson also testified that he reviewed CMC's call log (which was never produced by
16 CMC in discovery), but he was not asked to explain how CMC generates, updates, maintains,
17 and secures its phone records. Surely someone at CMC, but not McPherson, actually knows and
18 could have testified on personal knowledge regarding CMC's protocol to assure the accuracy of
19 its phone records and how call information is inserted into the comment history of the loan
20 records. Based on his review of the call log (or perhaps the comment history), McPherson did
21 testify that CMC had four different phone numbers for the Debtors, that CMC started a call
22 campaign in August 2013, and that CMC never talked to the Debtors. However, that testimony
23 contradicted CMC's representations to its foreclosure trustee. In seeking issuance of the NOD,
24 CMC's lead foreclosure employee represented under penalty of perjury on April 1, 2014, that
25 CMC had no telephone numbers by which to contact the Debtors. See discussion at 26 & n.28.
26 Assuming the testimony of CMC's lead foreclosure employee was not some humor-challenged
27 April Fool's Day prank, CMC's phone records, therefore, do not appear to be any more reliable
28 than its Post-petition Loan History.

1 McPherson testified, without contradiction, that California is an anti-deficiency
2 jurisdiction that does not permit a lender recourse against its borrower once a non-judicial
3 foreclosure on residential property is completed. He therefore suggested that CMC would have
4 no reason to seek a personal judgment against the Debtors for any balance of the Adjustable
5 Note, or the unpaid balance of the allowed secured claim for that matter, once the foreclosure
6 sale was completed. That suggestion, however, misses the point of the discharge. Under Section
7 524(a)(2), the discharge operates as an injunction against any act by a creditor to recover a debt
8 as a personal liability of the debtor, not just successful acts. Thus, whether a creditor could
9 actually subject a debtor to personal liability for a discharged debt or a non-recourse debt is
10 immaterial to whether the threat of such liability violates the Discharge Injunction. The fresh
11 start intended by the discharge would be meaningless if a debtor has to continue fending off
12 legally unenforceable claims. Compare In re Nordlund, 507 B.R. 507, 523 (Bankr. E.D. Cal.
13 2011)(“One of the benefits an individual receives from a discharge is peace of mind. The
14 individual need no longer be concerned that a discharged debt will be enforced against him or
15 her. When a creditor disregards the discharge and attempts to collect a debt, it is certainly within
16 the realm of possibility that the debtor will be harmed emotionally. When such occurs, the harm
17 may be remedied.”).

18 Moreover, while McPherson was correct about the California anti-deficiency law
19 applicable to foreclosure of CMC’s first deed of trust against the 36th Street Property, see Cal.
20 Code Civ. Proc. § 580d, he did not recall the name of the trust that held the loan. He presumably
21 did not contact the trust to determine whether it also had attempted to contact the Debtors to
22 collect any unpaid balance of the Adjustable Note or the allowed secured claim. McPherson
23 credibly testified that he does not know who may have attempted to call the Debtors.

24 McPherson also testified that CMC’s loan records do not reflect that CMC ever explained
25 to the Debtors why or how it recalculated the monthly payments, and he further testified that,
26 according to the call log or comment history, CMC never spoke to the Debtors by telephone. Of
27 the calls for which he was aware, however, McPherson testified that he never reviewed any of
28 the auto-dialed phone calls and could testify only about his general belief as to the outbound

1 language of typical CMC auto-dialed calls. In other words, McPherson has no personal
2 knowledge of what actually occurred in connection with any phone calls made to the Debtors
3 before or after August 8, 2013, but he must rely on the call logs and comment history generated
4 by CMC. His testimony is the only evidence offered by CMC to contradict the testimony of
5 Martinez and Flores as to the calls they received from CMC after the Discharge Order was
6 entered.

7 Having considered the testimony of Martinez and Flores, as well as the testimony of
8 McPherson, the court finds that calls were received by the Debtors from, or on behalf of, CMC
9 seeking to collect at least portions of CMC's claim that was discharged in this case. The court
10 also finds that the NOD and the Notice of Sale represented the culmination of CMC's efforts to
11 collect at least the balance of the allowed secured claim as a personal liability of the Debtors.
12 The court generally finds McPherson to be a credible and at times reluctant witness but limited
13 by his lack of personal knowledge and saddled with records generated and maintained by CMC
14 that appear to be incomplete, inaccurate, or both. Thus, notwithstanding the contrary testimony
15 offered by CMC's only witness, the court finds the Debtors' testimony to more credibly explain
16 the actions taken by, or on behalf of, CMC in this case.

17 Having concluded that CMC intended the actions that violated the Discharge Injunction,
18 the second prong of the Ninth Circuit standard has been met. Therefore, the court also concludes
19 that CMC's violation of the Discharge Injunction was willful.

20 **B. Actual Damages.**

21 Debtors' pecuniary losses from CMC's violation of the Discharge Injunction were
22 minimal. Martinez did not miss work or suffer any wage loss, and Flores did not either.
23 Martinez did not seek medical treatment, but Flores testified that since May 2014, he spends
24 \$25.00 each month for his antidepressants. Flores testified that he spends over \$200.00 each
25 month for health insurance, but did not specify when those health insurance payments
26 commenced.

27 Debtors' non-pecuniary losses consist of any emotional distress caused by the violation
28 of the Discharge Injunction. Individual Chapter 11 cases and Chapter 13 adjustment proceedings

1 are different from non-individual Chapter 11 cases and individual Chapter 7 proceedings because
2 the debtor must obtain confirmation of a plan, and is not eligible for a discharge until plan
3 payments are completed. Additionally, once plan payments are completed, the individual
4 Chapter 11 debtor's discharge is not entered until approved by the bankruptcy court. Only after
5 the discharge is entered does the individual debtor receive relief from the anxiety and pressures
6 inherent from the bankruptcy process, and only then can the "honest but unfortunate" debtor
7 begin his or her fresh start. Thus, for the Debtors, violation of the Discharge Injunction had
8 distinct emotional costs that were not "inherent in the bankruptcy process" at all. Instead, they
9 had completed the bankruptcy process and were entitled to the full protection of the Discharge
10 Injunction.⁴⁶

11 But that protection was lost when CMC sent the demand letters and notices to the
12 Debtors that led to the NOD and Notice of Sale threatening the assertion of personal liability. It
13 was lost when phone calls hectoring the Debtors to pay amounts not required by the confirmed
14 plan, and threatening to seek the balances of the allowed secured claim or the Adjustable Note,
15 were made by, or on behalf of, CMC. That both Martinez and Flores would suffer significant
16 emotional distress is not unexpected.

17 In this circuit, a bankruptcy court may award, in addition to actual damages, mildly
18 punitive fines for a violation of the Discharge Injunction. See discussion at 32, supra. Beyond
19 that, the contempt sanction becomes criminal in nature, and a bankruptcy court has no authority
20 to impose such a measure. In their written and oral argument, Debtors suggest that the court
21 should consider the \$1,000 per violation figure authorized under the FDCPA, 15 U.S.C. §
22 1692k(a)(1)(B). See Debtors' Closing Brief at 20:6 & n.3. For several reasons, reference to the
23 FDCPA is problematic at best, particularly in this case.

24 First, the court already ordered at the evidentiary hearing that claims under the FDCPA
25

26 ⁴⁶ In this respect, an individual who suffers a violation of the Discharge Injunction is very
27 different from an individual injured by a violation of the automatic stay or a violation of a plan
28 confirmation order. In the latter two situations, the bankruptcy process typically has not been
completed and the anxieties and pressures continue. For the individual whose goal is to obtain a
discharge, the anxieties and pressures should be relieved after the discharge is entered.

1 and the Nevada consumer protection statutes, belatedly raised by the Debtors, would not be
2 considered in connection with the instant motion. Debtors' suggestion in their post-trial brief
3 that the court should be guided by the FDCPA damage provisions appears to be an end-run on
4 the court's previous ruling. Second, applying a \$1,000 per violation figure retrospectively serves
5 none of the purposes that are at the core of a civil contempt sanction. Unlike a criminal
6 contempt sanction that is designed to punish, a civil contempt sanction is designed to
7 compensate the victim of the contemnor's misconduct and, if necessary, to coerce future
8 compliance. See Dyer, 322 F.3d at 1192. Adopting a \$1,000 per violation figure can be
9 arbitrary as it does not take into account the circumstances of the individual victim, and
10 therefore, would not compensate for the actual damages suffered.⁴⁷ By contrast, a prospective
11 application of a \$1,000 per violation figure, or some other meaningful amount, would have the
12 coercive effect of encouraging compliance with the court's order while also providing the notice
13 required to comport with due process. Imposing a \$1,000 per violation sanction on CMC for its
14 past conduct may be convenient, but it serves none of the purposes of a civil contempt remedy.

15 Finally, applying the statutory damage amount permitted by the FDCPA⁴⁸ under the guise
16

17 ⁴⁷ A \$1,000 per violation figure can be too high in some cases, but too low in others.
18 Repeated attempts by a creditor to collect a discharged debt may cause little concern to an
19 individual who is represented by effective bankruptcy counsel, but may be gut wrenching to a
20 pro se debtor who thought he had received a fresh start.

21 ⁴⁸ 15 U.S.C. § 1692k is the damage provision for violations of the FDCPA. Debt
22 collectors who violate the statute are liable for "any actual damages" sustained by any individual
23 person as well as "any additional damages as the court may allow" not exceeding \$1,000. 15
24 U.S.C. §§ 1692k(1) and 1692k(2)(A). 12 U.S.C. § 2605(f) is the damage provision for violation
25 of the Real Estate Settlement Procedures Act ("RESPA"). Parties who violate the statute are
26 liable for each violation in an amount equal to "any actual damages" sustained as well as "any
27 additional damages, as the court may allow, in the case of a pattern or practice of noncompliance
28 with the requirements of this section, in an amount not to exceed \$2,000." 12 U.S.C. §§
2605(f)(1)(A and B). Unlike RESPA, the damage provision of the FDCPA does not refer to
liability for "each such failure" to comply with the statute. Both statutes, however, distinguish
between "actual damages" and "additional damages," with the latter being capped. Under this
statutory scheme, it may be inappropriate to refer to the statutory caps for guidance because
those figures appear to have been intended by Congress for a type of damages that serve a non-
compensatory purpose. The distinction should be carefully considered by a court in awarding
actual damages under RESPA. See, e.g., Lucero v. Cenlar FSB, 2016 WL 337221, at *4

1 of enforcing the Discharge Injunction would be a judicial end-run on the Ninth Circuit's
2 established view that civil contempt, rather than a claim under the FDCPA, is the sole remedy
3 for violation of Section 524. See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 511 (9th Cir.
4 2002)("Because [debtor's] remedy for violation of § 524 no matter how cast lies in the
5 Bankruptcy Code, her simultaneous FDCPA claim is precluded."). The circuit's decision in
6 Walls does not prohibit a bankruptcy court from considering the damages that are permitted
7 under various non-bankruptcy statutes, but the court's use of a particular figure or determination
8 of a particular amount should be based on the evidence presented and the record in the case
9 rather than simply judicial instinct. Compare Nilsen v. York County, 400 F.Supp.2d 266, 277
10 (D. Me. 2005)(district court rejected multi-factor approaches to fee awards as not being a "rule
11 of law or even a principle," but merely an award of fees based on the judge's instinct, "a fee
12 'Gestalt,' as it were."). The court therefore rejects the Debtors' suggestion that a standardized
13 amount per violation is an appropriate measure of their actual damages.

14 Based on the evidence presented, the court finds that Martinez did not suffer any
15 monetary losses caused by CMC's violation of the Discharge Injunction. The court finds that
16 Flores incurred monetary losses in the amount of \$25.00 per month for his antidepressant
17 medication beginning in May 2014. The total amount through the date of the evidentiary hearing
18 on the Sanctions Motion is \$650.00. The court does not include the \$200.00 or more that Flores
19 spends each month on health insurance because there was no evidence establishing that he
20 started purchasing health insurance only after the Discharge Injunction was violated. In other
21 words, the health insurance premiums may have been an ongoing expense that were not caused
22 by the discharge violation.

23 Based on the evidence presented, the court finds that Martinez suffered significant
24 emotional distress caused by CMC's violation of the Discharge Injunction. The court has found
25 that letters and notices were sent by CMC, and that calls were made by, or on behalf of, CMC, in
26 _____
27 (W.D.Wash. Jan. 28, 2016)(applying \$500.00 and \$100.00 daily emotional distress damages
28 based on loan servicer's failure to respond to a RESPA demand). The same care should be taken
when awarding actual damages for a violation of the FDCPA as well as in awarding actual
damages for a violation of the discharge injunction.

1 violation of the Discharge Injunction. Applying a fixed dollar amount to each letter, each notice
2 or each call,⁴⁹ however, would be arbitrary because it assumes that each individual responds in
3 the same way each time. The evidence presented does not support a per violation approach in
4 this case inasmuch as, while both Debtors suffered emotional distress, only Flores sought
5 medical attention and only Flores was prescribed, and continues to take, antidepressant
6 medication. Absent a particular formula, the court concludes that the amount of \$25,000
7 appropriately compensates Martinez for the emotional distress caused by CMC's willful
8 violation of the Discharge Injunction. This amount is based on the cumulative effect of the
9 actions attributable to CMC, including the impact on Martinez's sleep and job performance, the
10 creation of discord in his personal relationship with Flores, the destruction of the peace of mind
11 intended by the discharge, and the credibility of Martinez's testimony presented at the
12 evidentiary hearing.

13 The court also concludes that the amount of \$35,000 appropriately compensates Flores
14 for the emotional distress caused by CMC's willful violation of the Discharge Injunction. This
15 amount is based on the cumulative effect of CMC's actions, which also takes into account: (1)
16 Flores's testimony that he answered only one out of the three calls from CMC after the discharge
17 was entered, (2) Flores's testimony that he was not familiar with the language of the NOD until
18 presented a copy at trial, and (3) Flores's testimony that his occupation as a therapist is an
19 independent source of stress. Those considerations serve to limit the amount of the emotional
20 distress award. However, the amount awarded also is based on Flores's uncontroverted
21 testimony that he sought professional assistance for the additional stress, that he was prescribed
22 antidepressant medication after CMC had commenced steps leading to the foreclosure of the
23 36th Street Property, and that he still takes such medication. Additionally, the amount awarded
24 takes into account the impact of CMC's action on Flores's domestic relationship with Martinez,
25 the destruction of the peace of mind intended by the discharge, and the credibility of Flores's

26
27 ⁴⁹ Debtors have not requested an award of actual damages on a daily basis, e.g., a fixed
28 amount for each day between the August 8, 2013, letter when CMC considered the Debtors to be
in default, and August 14, 2014, when the foreclosure sale was rescinded. Compare Lucero v.
Cenlar FSB, cited at note 48, supra, awarding daily fines for a continuing violation of RESPA.

1 testimony presented at the evidentiary hearing.

2 Based on the foregoing, the court concludes that Martinez suffered actual damages in the
3 total amount of \$25,000 as a result of the violation of the Discharge Injunction. The court also
4 concludes that Flores suffered actual damages in the total amount of \$35,650 as a result of the
5 violation of the Discharge Injunction.

6 **C. Punitive Damages.**

7 As previously discussed, this court has no authority to award punitive damages for a
8 violation of the Discharge Injunction, but it does have authority to award mildly, non-
9 compensatory fines in appropriate circumstances. In other circumstances, this court has awarded
10 non-compensatory fines not exceeding two percent of the total amount sought by a lender that
11 violated the Discharge Injunction by commencing a post-discharge lawsuit for the full balance of
12 the discharged obligation. See, e.g., In re Grihalva, 2013 WL 5311227, at *6 (Bankr. D. Nev.
13 Sept. 3, 2013)(imposing \$10,000 fine when lender filed post-discharge state court complaint
14 seeking personal judgment in the amount of \$584,857.06). In the instant case, the Notice of Sale
15 states, without limitation, that \$104,346.49 was owed by the Debtors and that debt collection was
16 being attempted.

17 A fine is appropriate in this case because of CMC's refusal to provide prior notice of its
18 change in the Debtors' monthly payment or notice of its retroactive application of the change.
19 Even after it made the unilateral decision to do so on August 17, 2012, and eventually treated the
20 Debtors to be in default as of August 1, 2013, CMC never explained its basis for doing so or
21 revealed its past decisions in the August 8, 2013, letter. CMC's argument that it can unilaterally
22 change a debtor's monthly payments after plan confirmation, and also retroactively apply that
23 amount without prior notice, is the policy equivalent of "shoot first and ask questions later." In
24 this case, however, CMC also argues that it was the victim's duty to ask questions later rather
25 than the shooter's. That untenable position is reflected in the August 8, 2013, letter, as well as
26 the testimony of CMC's officer establishing that CMC never informed the Debtors of its actions.
27 The court has no evidence indicating whether CMC has a policy of unilaterally adjusting
28 confirmed plan payments without notice in other bankruptcy cases, or retroactively applying

1 payment amounts without notice in other bankruptcy cases, or whether it has limited that
2 privilege to these Debtors. In either event, CMC's conduct supports, at the very least, a mildly,
3 non-compensatory fine of \$5,000.00 that must be paid to the Debtors.

4 **D. Attorneys' Fees.**

5 The court previously awarded attorneys' fees and costs to Debtors' counsel in the amount
6 of \$3,500, and also ordered reimbursement of the \$1,717.00 filing fee to reopen the bankruptcy
7 case. The Fee Motion filed on February 4, 2015, alleged that such attorneys' fees and costs had
8 been incurred to the date that motion was filed. The Fee Motion was not opposed by CMC, and
9 the requested amount was awarded.

10 Under these circumstances, the court will allow the Debtors to recover attorneys' fees
11 and costs incurred in connection with the Sanctions Motion after February 4, 2015, through the
12 date of the closing arguments presented on July 18, 2016. Debtors' counsel will be required to
13 submit an itemized billing statement by an appropriate date, and CMC will be allowed an
14 appropriate amount of time to submit objections to the billing statement. Thereafter, the court
15 will enter a supplemental order with regard to attorneys' fees and costs.

16 The attorneys' fees and costs shall be awarded under Section 105(a) in connection with
17 CMC's violation of the Confirmation Order and the Discharge Injunction. No attorneys' fees
18 and costs shall be awarded under Section 362(k).

19 **CONCLUSION**

20 For the reasons discussed in this Memorandum Decision, the Sanctions Motion will be
21 granted in part and denied in part. A separate order has been entered contemporaneously
22 herewith.

23 Copies sent to all parties via BNC and via CM/ECF ELECTRONIC FILING

24 Copies sent via BNC to:

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