APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-60005, 18-60006,
18-60040, 18-60041

In re CHRISTOPHER MICHAEL MARINO;
VALERIE MARGARET MARINO,
Debtors,

OCWEN LOAN SERVICING, LLC,
Appellant/Appellee,

v.

CHRISTOPHER MICHAEL MARINO; VALERIE
MARGARET MARINO,
Appellees/Appellants.

Filed: February 10, 2020

Appeal from the United States Bankruptcy Appellate
Panel of the Ninth Circuit

Before J. CLIFFORD WALLACE and MARY H. MURGUIA, Circuit Judges, and ROBERT S. LASNIK,[*] District Judge.

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[*] The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

LASNIK, District Judge:

After the bankruptcy court entered a chapter 7 discharge injunction in June 2013, Debtors, Christopher and Valerie Marino, continued to receive letters and telephone calls from Ocwen Loan Servicing LLC ("Ocwen") about the home they had abandoned to foreclosure before filing for bankruptcy. Following an evidentiary hearing, the bankruptcy court found Ocwen in contempt of the discharge injunction and imposed a $119,000 civil contempt sanction.

Ocwen appeals from that order, as well as from the bankruptcy court's order denying its motion for reconsideration. Ocwen also appeals from the Bankruptcy Appellate Panel's ("BAP") conclusion that it was "error for the bankruptcy court to preclude itself from considering an award of punitive damages" under 11 U.S.C. § 105(a).[1] For their part, the Marinos appeal from the BAP's denial of their motion for attorney's fees incurred on appeal.

We dismiss Ocwen's appeals for lack of jurisdiction and affirm the BAP's denial of the Marinos' motion for attorney's fees.

I.

The Marinos purchased a home in Verdi, California, with a loan that was later serviced by Ocwen. The Marinos fell behind on their mortgage payments and decided to leave their home and allow Ocwen to foreclose on it.

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[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Civil Procedure.

The Marinos then filed for chapter 7 bankruptcy and received a discharge injunction a few months later.

Despite the discharge injunction, the Marinos continued to receive letters and telephone calls from Ocwen about their former home. The Marinos presented evidence at a hearing showing that they had received letters and calls from Ocwen, causing them severe emotional distress.

The bankruptcy court concluded that Ocwen violated the discharge injunction and imposed a civil contempt sanction of $1,000 for every violation, totaling $119,000. The bankruptcy court also concluded that it lacked the inherent authority to award punitive damages for a violation of a discharge injunction. Finally, the bankruptcy court denied Ocwen's motion for reconsideration.

The BAP affirmed the bankruptcy court's contempt and reconsideration orders but reversed and remanded on the issue of punitive damages. The BAP also denied the Marinos' motion for appellate attorney's fees.

Ocwen appeals from the bankruptcy court's contempt and reconsideration orders. Ocwen also appeals from the BAP's decision reversing the bankruptcy court on the scope of its inherent authority to award punitive damages for a discharge injunction violation. The Marinos appeal the BAP's decision on attorney's fees.

II.

A.

Under 28 U.S.C. § 158(d)(1), our jurisdiction is limited to "decisions, judgments, orders, and decrees that are 'final' [for] we have no authority . . . to consider interlocutory orders and decrees." *In re Gugliuzza*, 852 F.3d 884, 891 (9th Cir. 2017) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 252 (1992)). Because bankruptcy cases are often complex and litigated in various discrete proceedings, BAP orders may be immediately appealed only if they "finally dispose of discrete disputes within the larger case." *Id.* at 892 (quoting *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015)). "Correct delineation of the dimensions of a bankruptcy 'proceeding' is a matter of considerable importance" for "[a]n erroneous identification of an interlocutory as a final decision may yield an appeal over which the appellate forum lacks jurisdiction." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. ____ (slip op. at 3) (2020). An order in a bankruptcy proceeding is final and thus appealable if it "alters the status quo and fixes the rights and obligations of the parties . . . [or] alters the legal relationships among the parties." *In re Gugliuzza*, 852 F.3d at 893 (quoting *Bullard*, 135 S. Ct. at 1692, 1695).

However, an order from the BAP is not final if it "remands for factual determinations on a central issue[.]" *Id.* at 895 (quoting *In re Vylene Enters.*, 968 F.2d 887, 895 (9th Cir. 1992)). We have departed from this rule only when the BAP remands for "purely mechanical or computational task[s] such that the proceedings on remand are highly unlikely to generate a new appeal." *In re Landmark Fence Co., Inc.*, 801 F.3d 1099, 1103 (9th Cir. 2015) (alteration in original) (quoting *In re Saxman*, 325 F.3d 1168, 1172 (9th Cir. 2003)). We limit the exception to our general rule against exercising appellate jurisdiction when the BAP remands to the bankruptcy court for good reason. When the BAP "remands a case to the bankruptcy court, 'the appellate process likely will be much shorter if we decline jurisdiction and await ultimate review on all the combined issues.' " *In re Lakeshore Vill. Resort, Ltd.*, 81 F.3d 103, 106 (9th Cir. 1996) (quoting *In re Stanton*, 766 F.2d 1283, 1287–88 (9th Cir. 1985)).

We apply a four-part test to determine if we have jurisdiction over an appeal from a BAP decision that remands to the bankruptcy court. We consider "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the bankruptcy court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." *In re Gugliuzza*, 852 F.3d at 894 (quoting *In re Perl*, 811 F.3d 1120, 1126 (9th Cir. 2016)). We conclude that all four factors compel dismissal of Ocwen's appeals.

As to the first two factors, dismissal serves judicial efficiency and avoids piecemeal litigation by allowing the bankruptcy court to make additional findings of fact and conclusions of law before we exercise our jurisdiction. If we were to resolve Ocwen's appeals now, the parties would almost certainly climb back up the appellate ladder, asking us to consider the bankruptcy court's decision on punitive damages. The Supreme Court has discouraged this type of piecemeal litigation for its inefficiency. *See Bullard*, 135 S. Ct. at 1693 (explaining that the "rule of finality" exists to avoid "climb[s] up the appellate ladder and slide[s] down the chute" and the "delays and inefficiencies" that result).

As to the third factor, the BAP's decision expressly left open the possibility for the bankruptcy court to engage in additional fact-finding after remand. Although the BAP did not "hold that the bankruptcy court must award a fine or punitive damages," it remanded the case for the bankruptcy court to "consider whether to do so."

The BAP explained that the bankruptcy court "might choose to *issue proposed findings* and a recommended judgment on punitive damages to the district court or refer the matter to the district court for criminal contempt proceedings." (emphasis added). Dismissal preserves the bankruptcy court's fact-finding role where, as here, the BAP's decision remands to the bankruptcy court to determine whether punitive damages are appropriate.

Finally, as to the fourth factor, other than protracted litigation costs, neither party would be irreparably harmed if we declined jurisdiction over Ocwen's appeals. Litigation costs generally do not qualify as irreparable harm. *Cf. In re Excel Innovations, Inc.*, 502 F.3d 1086, 1099 (9th Cir. 2007).

In short, the BAP remanded to the bankruptcy court for more factual findings on punitive damages. The bankruptcy court's decision whether punitive damages are appropriate is not a "ministerial task[.]" *In re Gugliuzza*, 852 F.3d at 897 (stating that "[a] decision that remands a case for further fact-finding will rarely have this degree of finality, unless the remand order is limited to ministerial tasks" (citation omitted)).

In addition, the bankruptcy court's punitive damages calculus was part of the same "discrete proceeding" in which the bankruptcy court imposed sanctions against Ocwen for violating the discharge injunction. *Id.* at 899 (quoting *Bullard*, 135 S. Ct. at 1692). The BAP's decision did not "terminate[] a procedural unit separate from the remaining case" or "conclusively resolve[] the [Marinos'] entitlement to the requested relief." *Ritzen Grp., Inc.*, 589 U.S. at ____ (slip op. at 6). The relevant "procedural unit" in Ocwen's appeals is the contempt proceedings, in which the Marinos sought *both* monetary sanctions and punitive damages. The BAP remanded to the bankruptcy court to assess whether to award the Marinos punitive damages, relief that the Marinos diligently pursued. This is therefore not a case in which the BAP's decision "ended the [contempt proceeding] adjudication and left nothing more for the Bankruptcy Court to do in that proceeding." *Id.* at ____ (slip op. at 12). We dismiss Ocwen's appeals for lack of appellate jurisdiction.

B.

The Marinos appeal from the BAP's denial of their motion for attorney's fees incurred defending against the appeal before the BAP. Unlike Ocwen's appeals, the Marinos' appeal only raises the frivolousness of Ocwen's appeal to the BAP, an issue that is both final and discrete. We have jurisdiction over the Marinos' appeal and review it for abuse of discretion. *See Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 374 F.3d 857, 861 (9th Cir. 2004) (citing *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1005 (9th Cir. 2002)).

The Marinos point to three sources that they believe entitle them to attorney's fees: (1) Federal Rule of Appellate Procedure 38,[2] (2) the attorney's fees provision in the deed of trust with Ocwen, and (3) section 105(a) of the Bankruptcy Code. We address each purported basis for an award of attorney's fees in turn.

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[2] More precisely, the BAP may award just damages and single or double costs to an appellee as a sanction for a frivolous appeal from a bankruptcy court's judgment under Federal Rule of Bankruptcy Procedure 8020(a). The standard applied is the same as under Federal Rule of Appellate Procedure 38.

First, under Federal Rule of Appellate Procedure 38, we may award damages and single or double costs to an appellee if we determine that an appeal is frivolous. *See* Fed. R. App. P. 38. "An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit." *Maisano v. United States*, 908 F.2d 408, 411 (9th Cir. 1990) (per curiam) (citing *Wilcox v. C.I.R.*, 848 F.2d 1007, 1009 (9th Cir. 1988)). The BAP did not clearly err in finding that the appeal was not frivolous and did not abuse its discretion by declining to sanction Ocwen under Rule 38. The Marinos are not entitled to attorney's fees under Rule 38.

Second, the attorney's fees provision in the Marino's deed of trust with Ocwen only allows Ocwen to receive attorney's fees for "a legal proceeding that might significantly affect [its] interest in the Property and/or rights under [the deed]," including bankruptcy. That provision is reciprocal pursuant to California Civil Code Section 1717(a) when either party seeks to enforce or avoid enforcement of the deed. *See In re Penrod*, 802 F.3d 1084, 1088 (9th Cir. 2015) (citations omitted).

The BAP did not err in concluding that the deed of trust did not entitle the Marinos to appellate attorney's fees. The Marinos seek to enforce the discharge injunction, not the deed of trust. Accordingly, we will not award fees under the deed of trust.

Third, and finally, the Marinos argue that they should be awarded attorney's fees under section 105(a) of the Bankruptcy Code. But that would require us to overturn our decision, *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996), in which we held that section 105(a) does not authorize an award of attorney's fees. *See id.* at 1153–54. We cannot do so. *See United States v. Belgarde*, 300 F.3d

1177, 1181 (9th Cir. 2002) ("[A] panel not sitting *en banc* has no authority to overturn Ninth Circuit precedent[.]"). The Marinos are not entitled to appellate attorney's fees under section 105(a).

III.

We dismiss Ocwen's appeals for lack of appellate jurisdiction.[3] However, we have jurisdiction over the Marinos' appeal and affirm the BAP's conclusion that they were not entitled to attorney's fees for their appeal to the BAP.

AFFIRMED IN PART, DISMISSED FOR LACK OF JURISDICTION IN PART.

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[3] The Marinos filed motions to strike and supplements to these motions in each of Ocwen's pending appeals. Because we dismiss Ocwen's appeals for lack of jurisdiction, we decline to reach the Marinos' motions to strike and deny them without prejudice.

APPENDIX B

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. NV-16-1229-FLTi
BAP No. NV-16-1238-FLTi
(Cross-Appeals)

In re: CHRISTOPHER MICHAEL MARINO and VALERIE MARGARET MARINO,
Debtors.

OCWEN LOAN SERVICING, LLC,
Appellant/Cross-Appellee,

v.

CHRISTOPHER MICHAEL MARINO; VALERIE MARGARET MARINO,
Appellees/Cross-Appellants.

Filed: July 3, 2018

ORDER

Before FARIS, LAFFERTY, and TIGHE,[1] Bankruptcy Judges.

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[1] The Honorable Maureen A. Tighe, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

The Panel received and considered the Marinos' motion for an award of appellate attorney's fees and costs,[2] the opposition filed by Ocwen Loan Servicing, LLC (Ocwen), and the Marinos' reply thereto.

The Panel's decision in these cross-appeals is currently on appeal to the Ninth Circuit Court of Appeals (No. 18-60005). The pendency of the Circuit appeal is no impediment to a ruling on the fee request. See Moore v. Permanente Med. Grp., Inc., 981 F.2d 443, 445 (9th Cir. 1992); Masalosalo by Masalosalo v. Stonewall Ins. Co., 718 F.2d 955, 957 (9th Cir. 1983) ("The district court retained the power to award attorneys' fees after the notice of appeal from the decision on the merits had been filed.").

The Marinos seek attorney's fees of $16,950 under three theories: 1) that Ocwen's appeal was frivolous in whole or in part; 2) that attorney's fees are due under the terms of the loan and deed of trust pursuant to California Civil Code § 1717; and 3) that appellate attorney's fees should be awarded under 11 U.S.C. § 105 to avoid diluting the bankruptcy court's award—the purpose of which was to make the Marinos whole from the damage caused by Ocwen's violations of the discharge injunction.

Frivolous

Federal Rule of Bankruptcy Procedure 8020 allows the Panel to award attorney's fees as damages for frivolous appeals. See First Fed. Bank of Cal. v. Weinstein (In

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[2] Both sides agree that costs of $322.10 are payable by Ocwen Loan Servicing, LLC, to the Marinos as the prevailing parties under Federal Rule of Bankruptcy Procedure 8021(a)(4). Costs are taxed at the bankruptcy court.

re Weinstein), 227 B.R. 284, 297 (9th Cir. BAP 1998). "An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit." Maisano v. United States, 908 F.2d 408, 411 (9th Cir. 1990).

While ultimately unpersuasive, the Panel does not find Ocwen's appeal was so wholly without merit as to be frivolous.

California Civil Code § 1717

One of the three conditions for reciprocal attorney's fees under California Civil Code § 1717 outlined in Bos v. Bd. of Trustees, 818 F.3d 486, 489 (9th Cir. 2016), requires that the underlying action be "on the contract." In determining whether the discharge injunction had been violated and the damages for that contempt, the terms of the loan and the deed of trust were collateral to the matter rather than an integral part. See Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1216 (9th Cir. 2009). Therefore, the Marinos cannot meet an essential condition for obtaining attorney's fees under California Civil Code § 1717.

11 U.S.C. § 105

Unlike 11 U.S.C. § 362(k), the discharge injunction does not contain a fee-shifting provision. The Circuit has clearly said that discretionary appellate attorney's fees may not be awarded under 11 U.S.C. § 105 and must be awarded under the relevant rule. In re Del Mission Ltd., 98 F.3d 1147, 1154 & n.7 (9th Cir. 1996); see also Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 709 n.3 (9th Cir. 2004). Del Mission is the controlling authority on this issue in this Circuit and we will follow it. Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) (binding circuit precedent can only be overturned by statute, the Circuit ruling en banc, or the Supreme Court).

Therefore, because the Panel does not find Ocwen's appeal was frivolous, because the Marinos cannot meet one of the essential conditions of obtaining attorney's fees under California Civil Code § 1717, and because discretionary appellate attorney's fees may not be awarded under 11 U.S.C. § 105, the Marinos' motion for attorney's fees on appeal is ORDERED DENIED.

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. NV-16-1229-FLTi
BAP No. NV-16-1238-FLTi
(Cross-Appeals)

In re: CHRISTOPHER MICHAEL MARINO and VALERIE MARGARET MARINO,
Debtors.

OCWEN LOAN SERVICING, LLC,
Appellant/Cross-Appellee,

v.

CHRISTOPHER MICHAEL MARINO; VALERIE MARGARET MARINO,
Appellees/Cross-Appellants.

Filed: December 22, 2017

OPINION

Before FARIS, LAFFERTY, and TIGHE,* Bankruptcy Judges.

FARIS, Bankruptcy Judge:

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* The Honorable Maureen A. Tighe, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

INTRODUCTION

Chapter 7[1] debtors Christopher Michael Marino and Valerie Margaret Marino sought sanctions against creditor Ocwen Loan Servicing, LLC ("Ocwen") for its violation of the discharge injunction. The bankruptcy court held a trial and awarded the Marinos $119,000—one thousand dollars for each improper contact.

On appeal, Ocwen argues that the bankruptcy court erred because its correspondence with the Marinos was in compliance with state or federal law. It also contends that the court improperly considered telephone calls, which were not the subject of the motion and not supported by evidence, and that there was no evidence of injury to the Marinos. We discern no error and AFFIRM.

The Marinos cross-appeal, correctly arguing that the bankruptcy court erred in holding that it lacked the authority to award punitive damages. On this point, we VACATE and REMAND so the bankruptcy court can consider whether it would be appropriate to (a) enter a final judgment for "relatively mild noncompensatory fines," (b) issue, for the district court's consideration, proposed findings and a recommended judgment for punitive damages, or (c) refer the issue of contempt to the district court.

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[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

A. The Marinos' chapter 7 petition

The Marinos filed a chapter 7 bankruptcy petition in March 2013 in the United States Bankruptcy Court for the District of Nevada. They scheduled real property located in Verdi, California (the "Property") and noted, "DEBTOR TO SURRENDER."[2] GMAC Mortgage held a secured claim arising from a second mortgage on the Property.

The Marinos received their discharge on June 18, 2013. The bankruptcy court subsequently granted Deutsche Bank National Trust Company, as Trustee for GMACM Mortgage Loan Trust 2005–AR6 ("Deutsche Bank") relief from the automatic stay. The court closed the case on September 23, 2013.

B. Written correspondence and telephone calls from Ocwen

Following the Marinos' discharge, Ocwen, as the servicer for Deutsche Bank, began sending the Marinos mailed correspondence in June 2013 and continued to do so through April 2015. The letters included account statements, notices regarding force-placed insurance, escrow statements, and other matters.

Some of the items of correspondence contained disclaimers that were located at the bottom of a page or end of the letter in small font. A typical disclaimer read: "If you have filed for bankruptcy and your case is still active

[2] Mr. Marino later attested that they had moved out of the Property in late 2011. When they filed their bankruptcy petition in 2013, the Marinos were living in Reno, Nevada. They have since moved to Auburn, California.

and/or if you received a discharge, please be advised that this notice is for information purposes only and is not an attempt to collect a pre-petition or discharged debt." Often, the disclaimers were preceded by demands for payment by a certain date or information about the amount that "you must pay" in a much more conspicuous font.

Ocwen also called the Marinos numerous times post-discharge to request payment on their mortgage loan.

C. The motion for contempt

In November 2015, the Marinos filed a motion to reopen their case and to hold Ocwen in contempt for its alleged violation of the discharge injunction ("Motion for Contempt"). They argued that Ocwen knowingly and willfully violated the discharge injunction by sending the written correspondence after the Marinos' discharge. They identified twenty-two instances of allegedly improper correspondence[3] whereby Ocwen sought to collect from the Marinos personally.

In opposition to the Motion for Contempt, Ocwen argued that sanctions were not warranted because the letters were not meant to collect any debt against the Marinos personally and complied with federal and state law. It said that fourteen of the twenty-two letters contained disclaimer language stating that the letters were intended for informational purposes only, not to collect any debt. It argued that billing statements did not violate the discharge injunction under California law because they sought only voluntary payments. It contended that the

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[3] In their moving papers, the Marinos only mentioned the written correspondence, not telephone calls.

remaining correspondence concerned force-placed insurance, escrow information, or debt validation, not collection of a debt.

D. Evidentiary hearing

The bankruptcy court reopened the case and held an evidentiary hearing on the Motion for Contempt. At the outset, and by agreement of the parties, the court found "that Ocwen was aware of the bankruptcy, was aware of the discharge, got stay relief, and sent the various letters." The only remaining issues were Ocwen's intent and damages.

Mr. Marino testified that the Property was their "dream house," but they faced financial difficulty starting in 2010. They unsuccessfully tried to work with GMAC and Ocwen to modify their mortgage payments, but eventually moved out in 2011.

After they filed for chapter 7 bankruptcy and received their discharge in mid–2013, the Marinos began to receive letters from Ocwen "stating that there was money due." The correspondence included account statements with attached payment stubs and demands for payment. Mr. Marino testified that the payment stubs indicated that he had to remit payment on the discharged debt, that he was responsible for the interest payments, and that payments were due by the stated dates. Ocwen also sent notices of force-placed insurance, which made Mr. Marino think that he had to pay for the insurance on the Property, even though they had surrendered and vacated it.

Mr. Marino said that the notices from Ocwen took a toll on his marriage and caused him to fight with his wife. He said that he suffered from anxiety attacks and felt humiliated, tormented, and harassed. He testified that the stress eventually made them contemplate divorce, although they managed to preserve their marriage.

Mrs. Marino testified that the letters and calls from Ocwen caused distress to the point that she and her husband considered divorce. She stated that she began having severe stomach pains when they tried to modify the mortgage loan; those pains disappeared when they filed for bankruptcy, but reemerged when they began receiving calls post-discharge. In June 2014, she noted in writing that Ocwen was "calling me three to five times a day" for approximately a year. At trial, she did not provide an exact number of calls that she received, but testified:

> Q Okay. I don't want to go—it sounds like you got anywhere from 60 to 100 calls. Does that sound—
>
> A It was a lot of calls, yes.

She also stated, "I probably answered maybe a handful of phone calls, probably maybe—it's hard to think of a number in that time. I mean, 20, I don't know. It seems to me that after a while, I was just—I couldn't take it anymore."

A friend of the Marinos, Bernadette O'Kane, testified about her observations of the Marinos during their financial distress. Ms. O'Kane stated that Mrs. Marino became sad and upset due to dealing with creditors, started suffering stomach pains, and told Ms. O'Kane that her marital relationship had become strained. Ms. O'Kane said that Mr. Marino was previously fun-loving but became agitated and angry.

Ms. O'Kane said that, following the discharge, the Marinos were not able to move on with their lives, because "the calls [from creditors] did not stop." She said that the calls made Mrs. Marino cry; when Ms. O'Kane on occasion picked up such calls, the caller would assume that she was Mrs. Marino and repeatedly ask for payment.

Sony Prudent, a senior loan analyst for Ocwen, testified as to Ocwen's loan servicing procedure. He stated that Ocwen keeps a comment log of all contacts with a borrower and that Owen might still send notices post-discharge pursuant to federal or state regulation, but that there would be a bankruptcy disclaimer stating that the letter was not an attempt to collect a debt "if you've been discharged or in active bankruptcy."

Mr. Prudent stated that he reviewed the Marinos' file before testifying, including the transaction history and comment logs. He testified that the comment logs reflect that Ocwen called the Marinos post-discharge but that it did not make any calls to the Marinos after the Property was foreclosed (approximately two years after the court granted Ocwen stay relief).

The court repeatedly questioned Mr. Prudent as to why post-discharge letters might still say, "you must pay." Mr. Prudent had no direct answer but stated, "[b]est answer, Your Honor, is it would be a generic letter." He later said, "[i]t is an internal policy, Your Honor." He also admitted that "[m]ost of [the letters] are generated by our system" and were never reviewed by a human being.

The bankruptcy court ordered additional briefing regarding the correspondence, asking Ocwen to cite the specific statute or regulation authorizing each document. Ocwen cited the applicable regulatory or statutory basis that allegedly applied to some of its correspondence: 12

C.F.R. § 1024.37(c) (required notice of force-placed insurance),[4] 12 U.S.C. §§ 2605 and 2609 (required notice of escrow account balance),[5] 15 U.S.C. § 1692g (required notice of debt validation information),[6] and California Civil

[4] Before charging for force-placed insurance, a servicer must:

> (i) Deliver to a borrower or place in the mail a written notice containing the information required by paragraph (c)(2) of this section at least 45 days before a servicer assesses on a borrower such charge or fee;
>
> (ii) Deliver to the borrower or place in the mail a written notice in accordance with paragraph (d)(1) of this section . . . .

[5] 12 U.S.C. § 2609(b) states:

> Notification of shortage in escrow account. If the terms of any federally related mortgage loan require the borrower to make payments to the servicer . . . of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.

[6] A debt collector shall send the consumer a written notice stating:

> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
>
> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the

Code §§ 2924(a)(1)(A) (required notice of default),[7] 2923.5 (required contact prior to notice of default),[8] and 2924.9 (required contact post-default).[9]

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consumer with the name and address of the original creditor, if different from the current creditor.

[7] A mortgagee shall file a notice of default that includes the following information:

(A) A statement identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page, or instrument number, if applicable, where the mortgage or deed of trust is recorded or a description of the mortgaged or trust property.

(B) A statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.

(C) A statement setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation and any other obligation secured by the deed of trust or mortgage that is in default.

[8] "A mortgage servicer shall contact the borrower in person or by telephone" prior to recording a notice of default or, if not possible, it must send written correspondence.

[9] A mortgage servicer that offers foreclosure prevention alternatives shall send a written communication to the borrower that includes:

(1) That the borrower may be evaluated for a foreclosure prevention alternative or, if applicable, foreclosure prevention alternatives.

(2) Whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative.

(3) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative.

On June 20, 2016, the bankruptcy court announced its ruling in favor of the Marinos. The court rejected Ocwen's defense that the correspondence was authorized by state or federal law, stating that, "I think if all they sent was what was required by the notice [sic], they would be fine. But in each of those cases, they included additional language, which indicated that they were trying to collect money from the debtor."

The bankruptcy court held that the letters and phone calls indicated that Ocwen was trying to get the Marinos to make payments on their mortgage loan: "Ocwen could not have been doing anything but trying to get the debtor to give them some more money, either for insurance or agree to be responsible for the house that was vacant, even after they had . . . received stay relief." The court said that Ocwen purposefully waited two years to foreclose on the Property, "hoping that if they sent enough letters and gave enough calls, that the debtor would ultimately pay them some money for something."

The court found the disclaimer language ineffective. It said that the disclaimers stated, "if you have filed for bankruptcy" and "if you have received a discharge," even though Ocwen knew that the Marinos had filed for bankruptcy and received a discharge. It said that creditors that know that a debtor has filed for bankruptcy, received a discharge, and surrendered their home do not have "the right to have their computer gen out [sic] these various letters, which do comply, at least in some of the provisions, with the various notification statutes, but all of which include language which is not included in those statutes, which, to varying degrees of urgency, want the debtor to undertake a new obligation or pay them money."

The court also found that Ocwen had called approximately a hundred times following the discharge to ask the Marinos to pay the discharged debt. It noted that Ocwen failed to rebut the Marinos' testimony and failed to produce any records or evidence to the contrary.

The bankruptcy court awarded the Marinos damages for emotional distress, actual damages, and attorneys' fees and costs. It stated that the Marinos had established that they had suffered emotional distress as a result of Ocwen's harassing calls and letters. The court found that Ocwen had sent nineteen offending letters and made one hundred phone calls, and it awarded $1,000 per letter and call as emotional distress damages. The court entered an order ("Sanctions Order") awarding the Marinos $119,000 in emotional distress damages.

Regarding an award of punitive damages, the court stated: "The issue of damages, I—as I understand the law of the Ninth Circuit, I do not have authority to impose punitive damages. If I did, I probably would, but I don't."

Ocwen timely appealed the Sanctions Order.

E. The motion for reconsideration

Ocwen filed a motion for reconsideration of the Sanctions Order ("Motion for Reconsideration") under Civil Rule 59(e), made applicable in bankruptcy through Rule 9023. It argued that it made far fewer calls to the Marinos than the one hundred calls that the court had found and that it did not provide any rebuttal evidence at trial because the Marinos did not raise the issue of telephone calls until late in the proceedings.

Ocwen contended that it had "newly discovered" evidence in the form of Ocwen's call logs. It provided the affidavit of a loan analyst for Ocwen who testified that Ocwen made thirty-five calls to the Marinos post-discharge.

The bankruptcy court denied the Motion for Reconsideration by form order ("Reconsideration Order") without any detailed reasoning. Although the court apparently held a hearing on the Motion for Reconsideration, a transcript of the hearing is not in the record on appeal.

Ocwen amended its notice of appeal to include the Reconsideration Order.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

(1) Whether the bankruptcy court erred in awarding the Marinos $119,000 for violations of the discharge injunction.

(2) Whether the bankruptcy court erred in holding that it lacked the authority to award punitive damages.

STANDARDS OF REVIEW

We review de novo questions of law, including whether the bankruptcy court applied the correct legal standard. See Drummond v. Welsh (In re Welsh), 465 B.R. 843, 847 (9th Cir. BAP 2012), aff'd, 711 F.3d 1120 (9th Cir. 2013). De novo review requires that we consider a matter anew, as if no decision had been rendered previously. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

The bankruptcy court's finding of a willful violation of § 524 is a factual finding reviewed for clear error. Emmert v. Taggart (In re Taggart), 548 B.R. 275, 286 (9th Cir. BAP 2016). A finding of fact is clearly erroneous if it is illogical, implausible, or without support in the record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). The bankruptcy court's choice among multiple plausible views of the evidence cannot be clear error. United States v. Elliott, 322 F.3d 710, 715 (9th Cir. 2003).

We review for abuse of discretion the bankruptcy court's decision to impose sanctions for contempt. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003); Nash v. Clark Cty. Dist. Atty's Office (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012). Similarly, we review the bankruptcy court's denial of a motion for reconsideration for abuse of discretion. Cruz v. Stein Strauss Tr. # 1361, PDQ Invs., LLC (In re Cruz), 516 B.R. 594, 601 (9th Cir. BAP 2014) (citing Tracht Gut, LLC v. Cty. of L.A. Treasurer & Tax Collector (In re Tracht Gut, LLC), 503 B.R. 804, 810 (9th Cir. BAP 2014)). To determine whether the bankruptcy court has abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, whether the bankruptcy court's application of the legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. United States v. Hinkson, 585 F.3d 1247, 1262–63 & n.21 (9th Cir. 2009) (en banc).

DISCUSSION

A. Ocwen's appeal

1. The bankruptcy court may sanction a creditor that knowingly and willfully violates the discharge injunction.

Section 727(a) provides that, absent certain exceptions, "[t]he [bankruptcy] court shall grant the debtor a discharge." The discharge order "discharges the debtor from all debts that arose before the date of the [bankruptcy filing]." § 727(b). More specifically, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]" § 524(a)(2).

"A party who knowingly violates the discharge injunction under § 524(a)(2) can be held in contempt under § 105(a)." In re Taggart, 548 B.R. at 286. The Ninth Circuit follows a two-part test to determine whether the contemnor knowingly and willfully committed a violation of the discharge injunction: "the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006) (quoting Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)).

First, the movant must prove that the contemnor knew that the discharge injunction was applicable to his claim:

> [T]he Ninth Circuit has crafted a strict standard for the actual knowledge requirement in the context of contempt before a finding of willfulness can be made. This standard requires evidence showing the alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one.

In re Taggart, 548 B.R. at 288.

Second, the contemnor must have intended the action that violated the injunction. "The focus is on whether the creditor's conduct violated the injunction and whether that conduct was intentional; it does not require a specific intent to violate the injunction." Desert Pine Villas Homeowners Ass'n v. Kabiling (In re Kabiling), 551 B.R. 440, 445 (9th Cir. BAP 2016). We have stated:

> the analysis concerning a "willful" violation of the discharge injunction is the same as a finding of willfulness in connection with violation of the automatic stay under § 365(k). In connection with the second prong's intent requirement, we have previously observed that "the bankruptcy court's focus is not on the offending party's subjective beliefs or intent, but on whether the party's conduct in fact complied with the order at issue."

In re Taggart, 548 B.R. at 288 (quoting Rosales v. Wallace (In re Wallace), BAP No. NV–11–1681–KiPaD, 2012 WL 2401871, at *5 (9th Cir. BAP June 26, 2012)).

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." Id. at 286 (quoting In re Bennett, 298 F.3d at 1069). "[E]ach prong of the Ninth Circuit's two-part test for a finding of contempt in the context of a discharge violation requires a different analysis, and distinct, clear, and convincing evidence supporting that analysis, before a finding of willfulness can be made. This is consistent with the Ninth Circuit's reluctance to hold an unwitting creditor in contempt." Id. at 288 (citation and internal quotation marks omitted).

2. The bankruptcy court did not err in finding that Ocwen's communication with the Marinos knowingly and willfully violated the discharge injunction.

In the present case, there is no dispute that Ocwen knew that the discharge injunction was applicable to its claim and that it intentionally sent the letters and placed the phone calls. Rather, Ocwen argues that its contacts with the Marinos did not violate the discharge injunction. We hold that both the written correspondence and the telephone calls were knowing and willful violations.

a. The bankruptcy court properly found that the written correspondence violated the discharge injunction.

The discharge has long been an important feature of American bankruptcy law. Over eighty years ago, the Supreme Court described its purpose and importance:

> One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start

> afresh free from the obligations and responsibilities consequent upon business misfortunes. This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act.

Local Loan Co. v. Hunt, 292 U.S. 234, 244–45 (1934) (citations and internal quotation marks omitted).

The discharge is automatic and self-effectuating. Creditors must obey it, even if debtors do not assert it. Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLP (In re Pavelich), 229 B.R. 777, 781–82 (9th Cir. BAP 1999).

The discharge prohibits not just litigation, but also informal collection activities, such as dunning notices and telephone calls. See In re Feldmeier, 335 B.R. 807, 813 (Bankr. D. Or. 2005) ("Among the collection activity prohibited by the discharge injunction are 'telephone calls, letters, and personal contacts.'" (citation omitted)).

The discharge has one important limit: it bars only efforts to collect debts "as a personal liability of the debtor." § 524(a)(2). This means that secured creditors can foreclose their liens after the discharge is entered. Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) (explaining that a discharge extinguishes only the personal liability of the debtor, and that a creditor's right to foreclose on a mortgage securing the debt survives or passes through the bankruptcy).

This creates some tension. While the discharge generally prohibits creditors from communicating with discharged debtors in an effort to extract payment, lienholders usually must communicate with debtors in order to enforce their liens. For example, a foreclosure of a mortgage without notice to the mortgagor would likely be invalid even if the mortgagor were not personally liable for the mortgage debt.

The way to reconcile this tension is to hold that a lienholder may communicate with a discharged debtor only to the extent necessary to preserve or enforce its lien rights, and may not attempt to induce the debtor to pay the debt. As we have held, "the creditor may not use a contact to 'coerce' or 'harass' the debtor." In re Nash, 464 B.R. at 881; see United States v. Holmes (In re Holmes), BAP No. CC-94-2001-HMV, 76 A.F.T.R.2d 95-7925, 1995 WL 800102 (9th Cir. BAP 1995) ("A secured creditor cannot, under the guise of enforcing an unavoided lien, attempt to coerce the debtor into paying a discharged debt. . . . Even if a creditor threatens only to enforce its surviving lien, that threat will violate the discharge injunction if the evidence shows that the threat is really an effort to coerce payment of the underlying discharged debt." (citations omitted)).

We agree with the bankruptcy court that Ocwen's communications went far beyond what was necessary to protect or enforce Ocwen's lien rights and that they also were meant to induce the Marinos to make payments post-discharge. The notices and statements gave the impression that the Marinos were still liable for the mortgage payments, taxes, and force-placed insurance premiums. Even if some of the notices may not have violated the discharge injunction, the bankruptcy court correctly noted that the cumulative effect of all of the letters demanding money created the perception that the Marinos needed to pay Ocwen. See In re Nordlund, 494 B.R. 507, 519 (Bankr. E.D. Cal. 2011) ("Even though some of [the bank's] written communications to the debtors seem innocuous, when [the bank's] 24 written communications over a 10–month period are considered in context and as a whole, a more disturbing picture is painted. Even if each letter from [the bank] had acknowledged the debtors' discharge and stated that [the bank] would take no action against the debtors personally to collect its three home loans, the sheer volume and repetitiveness of [the bank's] letters communicated just the opposite."). Therefore, the letters violated the discharge injunction.

Ocwen argues that the disclaimer language contained in some of the notices protects it from liability. We disagree.

First, Ocwen does not attempt to explain the fact that, of the twenty-two letters it sent to the Marinos, seven had no disclaimer language whatsoever.

Second, although Ocwen knew that the Marinos had filed for bankruptcy protection and received a discharge, thirteen of the fifteen letters with disclaimers spoke of bankruptcy as a hypothetical possibility (e.g., "if you filed for bankruptcy and your case is still active, or if you have received an order of discharge, please be advised that this is not an attempt to collect a prepetition or discharged debt"). Ocwen makes no attempt to explain why it was proper for Ocwen to obscure the fact (known to Ocwen) that the Marinos had already received a discharge.

Third, even the small number of letters that acknowledged (as Ocwen admittedly knew) that the Marinos had obtained a discharge were internally contradictory. The body of these letters asserts that the Marinos must pay the debt, but the disclaimer placed at the end of the same documents told them that they need not pay the debt. This contradiction confused the Marinos and would likely confuse many similarly situated debtors. Cf. In re Anderson, 348 B.R. 652, 661 (Bankr. D. Del. 2006) (finding a violation of the discharge injunction where the letter with disclaimer language also stated confusingly that the debtors would be liable for any deficiency).

Fourth, Ocwen makes no effort to explain why it sent admittedly "generic" notices to the Marinos. In this modern age of information technology, Ocwen could and should prepare notices that are consistent with the known legal status of its borrowers. Ocwen's failure to do so must reflect either incompetence (which we doubt) or a deliberate effort to induce confused borrowers to pay discharged debts. Similarly, it was probably no accident that the improper demands for payment appear near the beginning of each letter and the disclaimers appear near the end.

Ocwen also argues that state or federal law required it to send some of the correspondence. If it were true that state or federal law required Ocwen to send all of the various letters as a condition to the preservation or enforcement of its lien rights, we might agree. But the premise is not valid.

First, Ocwen could not cite any law that authorized some of its correspondence.

Second, some of the statutes and regulations cited by Ocwen simply do not apply to its correspondence. For example, Ocwen cites 15 U.S.C. § 1692g(a) to excuse the debt validation notices sent by Western Progressive (on Ocwen's behalf), but the Fair Debt Collection Practices Act generally does not apply to mortgage foreclosures. See Ho v. ReconTrust Co., NA, 858 F.3d 568, 572 (9th Cir. 2017) ("actions taken to facilitate a non-judicial foreclosure, such as sending the notice of default and notice of sale, are not attempts to collect 'debt' as that term is defined by the FDCPA").

Third, even when Ocwen sent legally required notices, it routinely embellished those notices with demands for payment that the applicable statutes and regulations do not require. For example, 12 C.F.R. § 1024.37(c) requires that a mortgage lender give notice of force-placed insurance; Ocwen added a demand for payment of the insurance premiums. Similarly, the escrow account notices not only provided information as to account balances in accordance with 12 U.S.C. §§ 2605 and 2609, but also informed the Marinos that, if the they did not pay the shortage, their escrow shortfall would increase. Additionally, the debt validation notices allegedly sent pursuant to 15 U.S.C. § 1692g provided information of the "total delinquency owed" and stated in large type that "WE ARE ATTEMPTING TO COLLECT A DEBT[.]" As the bankruptcy court aptly stated, Ocwen's notices may have been proper had they been limited to the required information mandated by the statutes and regulations; however, Ocwen invariably included a demand for payment that the Marinos were not legally obligated to make.

Ocwen's inclusion of additional language not prescribed by the relevant statutes or regulations violated the discharge injunction.

Ocwen cites California Civil Code §§ 2924(a)(1)(A), 2923.5(a)(2), and 2924.9, which require it to contact borrowers before and after filing a notice of default. These notices were sent amidst the improper collection notices that demanded payment, so it was not unreasonable for the Marinos to believe that the letters were further attempts to collect on the debt. Cf. In re Nordlund, 494 B.R. at 519 ("Taken together, and in context, the court construes the 24 letters as a deliberate attempt by [the bank] to sow confusion and doubt as to whether it would recognize the debtors' discharge. Its goal seems to have been to convince the debtors to pay the bank despite their discharge.").

In sum, the bankruptcy court did not clearly err in finding that "Ocwen could not have been doing anything but trying to get the debtor to give them some more money . . . ." Ocwen's repeated dunning deprived the Marinos of a fresh start "unhampered by the pressure and discouragement of pre-existing debt." See Local Loan Co., 292 U.S. at 244.

b. The bankruptcy court properly considered the telephone calls in its award of damages.

Ocwen also argues that the bankruptcy court should not have considered the telephone calls that it made to the Marinos, because (1) the issue of calls was not raised in the Motion for Contempt, and (2) the evidence provided on reconsideration shows that Ocwen made only thirty-five post-discharge calls, rather than the one hundred calls found by the court. We reject both arguments.[10]

Ocwen is correct that the Motion for Contempt focused exclusively on the written correspondence. However, Ocwen was on notice that the Marinos sought sanctions for violation of the discharge injunction; it should reasonably have known that the trial could span all instances of improper contact with the Marinos. Indeed, Ocwen's representative, Sony Prudent, testified that he had reviewed the contact logs, including telephone calls, in preparation for trial.

Moreover, Ocwen never objected during trial to any testimony regarding telephone calls. Thus, it waived any such objection. Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007) ("A party who fails to object to evidence at trial waives the right to raise admissibility issues on appeal." (citing Price v. Kramer, 200 F.3d 1237, 1251–52 (9th Cir. 2000))).

The Marinos introduced evidence at trial that Ocwen repeatedly called them to request payment, even though

[10] Ocwen does not argue on appeal that the court erred in finding that the calls violated the discharge injunction. While we note that California state law requires the creditor to attempt to contact the debtor concerning the default, see Cal. Civ. Code § 2923.5, the only evidence in the record about the content of the phone calls is the Marinos' and Ms. O'Kane's testimony about repeated demands for payment. There is no evidence that the content of the calls complied with the state statutes. Ocwen did not offer a script that it requires its staff to use or any other evidence of what its staff said during the calls. Rather, it appears that the calls simply and repeatedly demanded payment post-discharge. Nor does it appear that a so-called "mini-Miranda warning," if given, would bring Ocwen's telephone calls into compliance, inasmuch as the FDCPA generally does not apply to foreclosure proceedings.

they understandably could not offer a definite number of calls. Mrs. Marino testified that Ocwen called three to five times a day for a year; that she did not pick up all of Ocwen's calls because she did not want to be harassed; that she may have answered twenty of the calls; and that she may have received between sixty to one hundred calls. Mr. Marino's and Ms. O'Kane's testimony also mentioned numerous calls. At trial, Ocwen did not produce any evidence regarding the number of telephone calls, other than to acknowledge that it made calls to the Marinos. The court's finding that Ocwen called the Marinos one hundred times was not clearly erroneous.

In its Motion for Reconsideration, Ocwen provided the call log from the Marinos' file that purported to show that Ocwen only called the Marinos thirty-five times during the applicable period. But "'a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.' A [Civil] Rule 59(e) motion may **not** be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (quoting 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999)). The call logs were available to Ocwen prior to trial and were referenced by Ocwen's witness; the bankruptcy court even expressed its displeasure that Ocwen did not introduce the call logs into evidence but only relied on Mr. Prudent's testimony about their contents. The logs were not "newly discovered evidence" within the meaning of Civil Rule 59(e). See Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) ("Evidence 'in the possession of the party before the judgment was rendered is not newly discovered.'" (citation omitted)).

There is another independently sufficient reason to affirm. Ocwen failed to provide us with a transcript of the hearing on the Motion for Reconsideration. See Clinton v. Deutsche Bank Nat'l Tr. Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP 2011) ("Without a transcript, it is impossible to determine why the bankruptcy court ruled as it did. Therefore, we have little choice but to exercise our discretion and summarily affirm the bankruptcy court's decision[.]").

3. The damages were reasonable and supported by the evidence.

Ocwen argues that the $119,000 award is not reasonable, because the award was arbitrary and the court ignored other causes of the Marinos' emotional distress. We disagree.

The Ninth Circuit has allowed emotional distress damages for automatic stay violations when the debtor "(1) suffer[s] significant harm, (2) clearly establish[es] the significant harm, and (3) demonstrate[s] a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process)." Snowden v. Check Into Cash of Wash. Inc. (In re Snowden), 769 F.3d 651, 657 (9th Cir. 2014) (quoting Dawson v. Wash. Mutual Bank, F.A. (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004)) (discussing violation of the automatic stay). The same rule should apply to violations of the discharge injunction. See In re Nordlund, 494 B.R. at 523 (applying Dawson's three-part test to violations of the discharge injunction); C & W Asset Acquisition, LLC v. Feagins (In re Feagins), 439 B.R. 165, 178 (Bankr. D. Haw. 2010) ("Although Dawson considered the remedy for violations of the automatic stay under section 362(k)(1), the same reasoning applies to willful violations of the discharge injunction.").

Ocwen contends that the bankruptcy court's award of $1,000 per contact was arbitrary and that the total award should not have exceeded "several thousand dollars" in accordance with Dyer. But Ocwen ignores the fact that the bankruptcy court awarded compensatory damages for emotional distress, not punitive sanctions. The limit on punitive sanctions discussed in Dyer[11] does not apply to a compensatory award.

Ocwen also argues that the Marinos' emotional distress predated the post-discharge communications and was not caused by its violation of the discharge injunction. But the Marinos and Ms. O'Kane testified that the Marinos' health and relationship improved after they filed for bankruptcy but deteriorated again when Ocwen began contacting them post-discharge. The bankruptcy

[11] Ocwen cites In re Martinez, 561 B.R. 132, 173 (Bankr. D. Nev. 2016), for the proposition that a "$1,000 per violation figure can be arbitrary as it does not take into account the circumstances of the individual victim, and therefore, would not compensate for the actual damages suffered." But the Martinez court also stated that "[a] $1,000 per violation figure can be too high in some cases, but too low in others. Repeated attempts by a creditor to collect a discharged debt may cause little concern to an individual who is represented by effective bankruptcy counsel, but may be gut wrenching to a pro se debtor who thought he had received a fresh start." Id. at 173 n.47. In this case, the bankruptcy court heard testimony from the Marinos about how Ocwen's violations affected them. The court's award did "take into account the circumstances of" the Marinos.

court weighed the evidence and determined that Ocwen's violation of the discharge injunction caused the Marinos' injury. The court did not clearly err in assigning blame to Ocwen.

B. The Marinos' cross-appeal

The Marinos argue that the court erred by failing to award punitive damages, because it erroneously believed that it lacked authority to do so. The bankruptcy court misstated the law.

While the Ninth Circuit has stated that the bankruptcy courts are prohibited from assessing any "serious" punitive damages, it has left open the possibility of "relatively mild noncompensatory fines." In re Dyer, 322 F.3d at 1193. We have previously stated that, "[i]f a bankruptcy court finds that a party has willfully violated the discharge injunction, the court may award actual damages, punitive damages and attorney's fees to the debtor." In re Nash, 464 B.R. at 880 (citing Espinosa v. United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008), aff'd, 559 U.S. 260 (2010)).

Ocwen concedes that the bankruptcy court may award sanctions and that relatively mild noncompensatory fines may be permissible under some circumstances, but it argues that the bankruptcy court may not award punitive damages.

Some bankruptcy courts understand Dyer to mean that a bankruptcy court may not allow "punitive damages" for a violation of the discharge injunction but may award "relatively mild noncompensatory fines." See, e.g., In re Martinez, 561 B.R. at 175 ("this court has no authority to award punitive damages for a violation of the Discharge Injunction, but it does have authority to award mildly [sic], non-compensatory fines in appropriate circumstances"); In re Dickerson, 510 B.R. 289, 298 (Bankr. D. Idaho 2014) ("in general, punitive damages are not an appropriate remedy for § 105(a) contempt proceedings, [but] relatively mild noncompensatory fines may be acceptable in some circumstances"). Other courts have held that a bankruptcy court may award "punitive damages," so long as the amount is "relatively mild." See, e.g., Rosales v. Wallace (In re Wallace), BAP No. NV–11–1681–KiPaD, 2012 WL 2401871, at *8 (9th Cir. BAP June 26, 2012) (recognizing that, under Dyer, "such punitive sanctions cannot be 'serious'"). We do not see any meaningful difference between "punitive damages" and "non-compensatory fines." The Ninth Circuit has authorized "noncompensatory fines," which are simply punitive damages by another name. However labeled, any such award must be "relatively mild."[12]

It was thus an error for the bankruptcy court to preclude itself from considering an award of punitive damages. We do not hold that the bankruptcy court must award a fine or punitive damages, but we remand so that the bankruptcy court can consider whether to do so.

Alternatively, the bankruptcy court might choose to issue proposed findings and a recommended judgment on punitive damages to the district court or refer the matter to the district court for criminal contempt proceedings. See, e.g., Exec. Benefits Ins. Agency v. Arkison, 134

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[12] The Ninth Circuit left open the question of what is a "serious" punitive sanction but implied that any fine above $5,000 (presumably in 1989 dollars) would be considered "serious." In re Dyer, 322 F.3d at 1193 (citing F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1139 n.10 (9th Cir. 2001)).

S. Ct. 2165, 2173 (2014) (When faced with "core" claims that cannot be adjudicated by the bankruptcy court under Stern v. Marshall, 564 U.S. 462 (2011), "[t]he bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for de novo review and entry of judgment."); In re Dyer, 322 F.3d at 1194 n.17 ("We do not preclude the possibility that a bankruptcy court could initiate criminal contempt proceedings by referring alleged contempt to the district court. Nor do we address whether the district court could refer those proceedings back to the bankruptcy court if the parties so consented."). The restriction on the bankruptcy court's power to grant punitive damages and punish contempt stems from the fact that bankruptcy judges lack life tenure. District judges do not face that restriction. See In re Dyer, 322 F.3d at 1194.

CONCLUSION

For the foregoing reasons, the bankruptcy court did not err in awarding the Marinos damages for Ocwen's willful violations of the discharge injunction but erred when it held that it lacked the authority to award any punitive damages. We therefore AFFIRM IN PART and VACATE and REMAND IN PART the Sanctions Order and AFFIRM the Reconsideration Order.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

CASE NO. BK-N-13-50461-BTB

In re: CHRISTOPHER MICHAEL MARINO and
VALERIE MARGARET MARINO,
Debtors.

Filed: July 5, 2016

ORDER REGARDING MOTION TO REOPEN CHAPTER 7 UNDER 11 U.S.C. §350 AND F.R.B.P. 5010 AND HOLD CREDITOR, OCWEN LOAN SERVICING LLC IN CONTEMPT AND FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. §524(a)(2)

Before BRUCE T. BEESLEY, United States Bankruptcy Judge.

THIS MATTER having come before the Court on Debtors', CHRISTOPHER MICHAEL MARINO and VALERIE MARGARET MARINO ("Debtors" or "Marinos") Reopen Debtor's Chapter 7 under 11 U.S.C. §350 and F.R.B.P. 5010 and to Hold Creditor, Ocwen Loan Servicing, LLC ("Ocwen") in Contempt and for Sanction for its violation of the Discharge Injunction under 11 U.S.C. §524(a)(2) [Dkt. 27] filed by their counsel, Christopher P. Burke, Esq., ("Burke"), and Ocwen appearing through its counsel, and the Court having read the pleadings, with good cause appearing therefore;

IT IS THEREFORE THE ORDER OF THIS COURT, that Marinos' Motion for Contempt for Violation of the Discharge Injunction under 11 U.S.C. §524(a) and Damages Against Creditor, Ocwen, is hereby GRANTED as follows:

IT IS HEREBY ORDERED; Ocwen shall pay the $260 reopening fee and $500 in gas as actual damages to the Marinos;

IT IS FURTHER ORDERED; Ocwen shall pay $1,000 per letter, for the 19 letters sent to the Marinos, for a total of $19,000. In addition, Ocwen shall pay $1,000 for each of the 100 phone calls the Marinos received for a total of $100,000, together totaling $119,000 for emotional distress damages to the Marinos;

IT IS FURTHER ORDERED; that Christopher Burke, Esq. shall file a fee application for attorney fees and costs that Ocwen can object to if its chooses to, but Ocwen will have to pay the amount of attorney fees the Court approves;

IT IS SO ORDERED.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

CASE NO. BK-N-13-50461-BTB

In re: CHRISTOPHER MICHAEL MARINO and
VALERIE MARGARET MARINO,
Debtors.

Filed: September 15, 2016

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER REGARDING MOTION TO REOPEN CHAPTER 7 UNDER 11 U.S.C. §350 AND F.R.B.P. 5010 AND HOLD CREDITOR, OCWEN LOAN SERVICING, LLC, IN CONTEMPT AND FOR SANCTIONS FOR VIOLATION OF THE DISCHARGE INJUNCTION 11 U.S.C. §524(a)(2)

Before BRUCE T. BEESLEY, United States Bankruptcy Judge.

THIS MATTER having come before the Court on creditor, Ocwen Loan Servicing, LLC ("Ocwen") Motion for Reconsideration of Order Regarding Motion to Reopen Chapter 7 Under 11 U.S.C. §350 and F.R.B.P. 5010 and Hold Creditor, Ocwen Loan Servicing LLC, in Contempt and for Sanctions for Violation of the Discharge Injunction 11 U.S.C. §524(A)(2) [Dkt. 67], filed by its counsel, Christopher Swift, Esq. of Wright, Finlay & Zak, LLP, who appeared for Ocwen, and there being an opposition filed by Christopher and Valerie Marino, ("Marino") through their counsel, Christopher Burke, Esq. ("Burke"), who appeared for the Marinos; and the Court having read the pleadings, with good cause appearing therefore;

IT IS HEREBY ORDERED that Ocwen's Motion for Reconsideration of Order Regarding Motion to Reopen Chapter 7 Under 11 U.S.C. §350 and F.R.B.P. 5010 and Hold Creditor, Ocwen Loan Servicing LLC, in Contempt and for Sanctions for Violation of the Discharge Injunction 11 U.S.C. §524(A)(2) [Dkt. 67] is DENIED.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-60040 and 18-60041

In re CHRISTOPHER MICHAEL MARINO;
VALERIE MARGARET MARINO,
Debtors,

CHRISTOPHER MICHAEL MARINO; VALERIE
MARGARET MARINO,
Appellants,

v.

OCWEN LOAN SERVICING, LLC,
Appellee.

Filed: April 27, 2020

Appeal from the United States Bankruptcy Appellate
Panel of the Ninth Circuit

Before WALLACE and MURGUIA, Circuit Judges,
and LASNIK,* District Judge.

ORDER

* The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

The panel votes to deny the petition for rehearing. Judge Murguia votes to deny the petition for rehearing en banc and Judges Wallace and Lasnik so recommend.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.