

§ 521
§ 524(a)(2)
Contempt
Discharge Injunction

David Liston Culpepper and Linda Marie Culpepper,
Case No. 09-38599-rld7

11/05/12

RLD

Pub.

After her chapter 7 discharge was entered, debtor received more than 100 telephone calls from mortgage creditor, purportedly for the purpose of advising debtor of her rights in the foreclosure process of her residence ("Residence").

On debtor's motion to hold creditor in contempt for violating the discharge injunction set forth in 11 U.S.C. § 524(a)(2), the bankruptcy court held that the creditor's course of conduct effectively constituted efforts to collect on its debt, where the calls commenced after the creditor had obtained possession of the Residence by locking debtor out. Applying In re Feldmeier, 335 B.R. 807 (Bankr. D. Or. 2005), the bankruptcy court found that debtor had established, through four transcribed telephone calls, emotional distress to support an award of actual damages in the amount of \$1,000 per transcribed call. The bankruptcy court declined to impose punitive damages, because, after her discharge was entered and before the offending calls began, debtor had applied to creditor for three loan modifications despite having represented in her § 521 statement of intent that she would surrender the Residence.

P12-9(20)

Below is an Opinion of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 09-38599-rld7
DAVID LISTON CULPEPPER)
LINDA MARIE CULPEPPER,)
) MEMORANDUM OPINION
Debtors.)

On October 5, 2012, I received evidence and heard testimony and argument at the hearing ("Hearing") on debtor Linda Marie Culpepper's ("Ms. Culpepper") Motion for Order of Contempt ("Contempt Motion") against Wells Fargo Bank, N.A. ("Wells Fargo"), and Wells Fargo's related motion for summary judgment ("Summary Judgment Motion").¹ At the conclusion of the Hearing, I took the matters under advisement.

In deciding the matters before me, I have considered carefully the testimony presented and the exhibits admitted at the hearing, as well as arguments presented, both in legal memoranda and orally. I further

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 have taken judicial notice of the docket and documents filed in Ms.
2 Culpepper's main chapter 7 case, Case No. 09-38599-rld7 ("Main Case"),
3 for the purpose of confirming and ascertaining facts not reasonably in
4 dispute. Federal Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1
5 (Bankr. E.D. Pa. 2006). In addition, I have reviewed relevant legal
6 authorities, both as cited to me by the parties and as located through my
7 own research.

8 In light of that consideration and review, this Memorandum
9 Opinion sets forth the court's findings of fact and conclusions of law
10 under Civil Rule 52(a), applicable with respect to this contested matter
11 under Rules 7052 and 9014.

12 Factual Background

13 "What we've got here is failure to communicate." Spoken by
14 Strother Martin as Captain, Road Prison 36 in the movie Cool Hand Luke.

15 Ms. Culpepper filed the Contempt Motion seeking declaratory and
16 injunctive relief; damages; sanctions; and attorneys fees for Wells
17 Fargo's alleged violations of the injunction against efforts to collect
18 discharged debts in § 524(a)(2). The subject debt was Ms. Culpepper's
19 obligation to pay a promissory note ("Note"), dated September 20, 2005,
20 in the original principal amount of \$448,000 and secured by a deed of
21 trust ("Trust Deed") on Ms. Culpepper's residence property ("Residence
22 Property") in Bend, Oregon. See Exhibits A and B. The Note identified
23 the Lender as World Savings Bank, FSB ("World Savings Bank"). Through a
24 series of transactions, the details of which are not relevant to
25 resolution of the matters before me, World Savings Bank has been
26

1 integrated into Wells Fargo.²

2 Contrary to my assumptions going into the Hearing, the loan
3 ("Loan") documented by the Note was originated as a "portfolio loan."
4 That is, the Loan was made by World Savings Bank for its own account with
5 the intent that it would be retained in its loan portfolio rather than
6 being securitized and sold in the secondary investment market.
7 Accordingly, the Note was never sold or assigned. Mr. Michael Dolan, a
8 litigation support manager for Wells Fargo who worked for World Savings
9 Bank from 1984 until 2007, when its name was changed to Wachovia,
10 testified that the Loan was made to combine and refinance a first trust
11 deed home finance loan and a home equity loan that Ms. Culpepper had
12 borrowed from World Savings Bank. Mr. Dolan further testified that at
13 the time the Loan was made, Ms. Culpepper had always paid her obligations
14 to World Savings Bank on time and had an exceptionally good FICO score.

15 Unfortunately, due to economic reverses resulting from the
16 recession and health issues impacting her husband,³ hard times ensued for
17 Ms. Culpepper. At some point, Ms. Culpepper ceased making payments on
18 the Note obligation, and on October 19, 2009, she filed a petition for
19 relief under chapter 7.

20 In her schedules, Ms. Culpepper valued the Residence Property
21 at \$300,000 on the date of her bankruptcy filing and stated that she owed

23 ² References to "Wells Fargo" herein include "Wachovia" and
24 "Wachovia Mortgage" to the extent those names are relevant to
25 communications received or initiated by Ms. Culpepper after her
26 bankruptcy filing.

³ Mr. Culpepper experienced kidney failure and ultimately had a
kidney transplant, from which he has recovered.

1 \$496,508 on the secured Note. See Exhibit C. Her schedules reflected a
2 substantial decrease in income. See Schedule I and Statement of
3 Financial Affairs, Item 1, Main Case Docket No. 1. In her Statement of
4 Intention(s) ("Statement of Intent"), Ms. Culpepper indicated that she
5 intended to surrender the Residence Property. See Main Case Docket
6 No. 1. Mr. Dolan testified that Wells Fargo has written down and taken a
7 loss on the Loan since Ms. Culpepper's bankruptcy filing.

8 However, at about the time of her bankruptcy filing,
9 Ms. Culpepper apparently applied for approval of a modification ("First
10 Modification Application") of the Loan. See Exhibit D. No evidence was
11 submitted at the Hearing as to the disposition of the First Modification
12 Application, but apparently, it was not approved and implemented.
13 Ms. Culpepper's counsel provided her with a letter authorizing direct
14 contact to her regarding any proposal "to modify/refinance [her] home
15 mortgage" dated January 10, 2010. See Exhibit 2.

16 Ms. Culpepper received her chapter 7 discharge by order entered
17 on February 19, 2010. See Exhibit E. Wells Fargo learned of her
18 discharge on February 23, 2010. See Exhibit 21, p.31, at lines 20-23.
19 Her bankruptcy case was closed by order entered on July 2, 2010. See
20 Main Case Docket No. 28.

21 In the meantime, in May 2010, Ms. Culpepper applied for
22 approval of a modification ("Second Modification Application") of the
23 Loan under the HAMP program. See Exhibit F. The Second Modification
24 Application was approved (see Exhibit G), but because she determined that
25 she could not afford the modified Loan payments, and the HAMP
26 modification did not provide for any principal reduction of the Loan,

1 Ms. Culpepper did not move forward with the approved Loan modification.
2 Wells Fargo acknowledged that Ms. Culpepper did not want to proceed with
3 a HAMP modification of the Loan on July 12, 2010. See Exhibit 16.

4 Ms. Culpepper made one final application for a modification
5 ("Third Modification Application") of the Loan in August 2010. See
6 Exhibit H. No evidence was submitted at the Hearing as to the
7 disposition of the Third Loan Modification, but apparently, it was not
8 approved and implemented. By the end of 2010, Ms. Culpepper and her
9 husband had been locked out of the Residence Property. See Exhibit 4.

10 In January 2011, Ms. Culpepper began receiving a series of
11 telephone calls from Wells Fargo. The precise number of calls is not
12 clear, but she received calls most days, sometimes twice a day, until
13 they finally ceased in January 2012, after the Contempt Motion was filed.
14 Mr. Dolan testified at his deposition that he believed "over a hundred"
15 calls were made to Ms. Culpepper after the Loan modification process
16 stopped. See Exhibit 21, p.18, at lines 23-25. Ms. Culpepper did not
17 pick up most of the calls, but she knew that Wells Fargo was making the
18 calls because they were reflected on her "caller ID."

19 Transcripts of a return call that Ms. Culpepper made to Wells
20 Fargo and three other calls that she took (collectively, the "Transcribed
21 Calls") were admitted as exhibits. See Exhibits 8, 9, 10 and 12. I
22 listened to recordings of the four Transcribed Calls during the Hearing.
23 (A "CD" of the Transcribed Calls was admitted as Exhibit P.) While the
24 representatives of Wells Fargo in the Transcribed Calls generally advised
25 Ms. Culpepper that they might be "attempting to collect a debt," they
26 also stated that if the debt had been discharged in bankruptcy, they were

1 only advising as to rights against the Residence Property. See Exhibit
2 8, p.4; Exhibit 9, p.1; Exhibit 12, p.1. The substance of the message
3 from Wells Fargo's representatives to Ms. Culpepper in the Transcribed
4 Calls was that the Residence Property was in foreclosure, and were there
5 other options Ms. Culpepper would like to discuss? See Exhibit 8, p.2;
6 Exhibit 9, p.1; Exhibit 10, pp.1-3; Exhibit 12, pp.1-3.

7 Mr. Dolan testified that the repeated telephone calls that
8 Ms. Culpepper was receiving were part of a program developed by Wells
9 Fargo to respond to concerns by the federal Office of the Comptroller of
10 the Currency ("OCC") that too many foreclosures were occurring and a
11 specific directive from the OCC to larger banks to keep borrowers
12 informed as to the status of foreclosure proceedings and available
13 alternatives. Available alternatives included loan modifications, "short
14 sales," granting deeds in lieu of foreclosure or accepting cash in
15 exchange for consenting to foreclosure ("cash for keys"). Although all
16 four Wells Fargo representatives in the Transcribed Calls were
17 knowledgeable, professional and courteous in their communications to
18 Ms. Culpepper, none of them offered her any of the possible alternatives
19 to foreclosure. In fact, "Rene" advised Ms. Culpepper that she did not
20 qualify for a loan modification. See Exhibit 9, p.1.

21 During each Transcribed Call, Ms. Culpepper tried to be
22 understanding with each of Wells Fargo's representatives, but she clearly
23 was frustrated and anguished by the continuing telephone calls to her.
24 She advised Wells Fargo's representatives that she considered their calls
25 to be harassing (see Exhibit 8, p.3; Exhibit 10, p.4; Exhibit 12, p.4),
26 and she wanted the calls to stop. See Exhibit 8, pp.2-3; Exhibit 9,

1 pp.4-6; Exhibit 10, pp.2, 4-8; and Exhibit 12, pp.2-5. In the first
2 Transcribed Call, the following exchange took place between Ms. Culpepper
3 and Wells Fargo's representative, "Laudio:"

4 LAUDIO: "If you would like phone calls to stop you can
5 send that in writing otherwise the phone calls are
going to continue."

6 MS. CULPEPPER: "I'm not sending anything in, I tried
7 writing, writing does not work either with you guys."

8 LAUDIO: "Unless it is in writing, phone calls will
continue."

9 Exhibit 8, p.2.

10 In the three subsequent Transcribed Calls, the message from
11 Wells Fargo was the same: If Ms. Culpepper wanted the continuing calls to
12 terminate, she would need to communicate to Wells Fargo in writing. On
13 November 30, 2011, "Armando" advised Ms. Culpepper that she should write
14 and send a "cease & desist" letter, and on December 6, 2011, "CJ" did the
15 same. See Exhibit 10, pp.2-3, 6-8; Exhibit 12, p.5. In fact, Armando
16 provided Ms. Culpepper with a fax number ("Fax Number") to which she
17 could send the cease & desist letter. See Exhibit 10, p.8.

18 Unfortunately, from the record presented, there is no evidence that
19 Ms. Culpepper or her counsel ever sent a "cease & desist" letter to the
20 Fax Number.

21 However, on November 30, 2011, Ms. Culpepper's counsel sent a
22 letter ("Stop Calling Letter"), with a copy of Ms. Culpepper's bankruptcy
23 discharge order enclosed, to three different Wells Fargo addresses
24 demanding that "harassment and collection" calls stop and advising that
25 if communications did not stop, counsel would advise the Culpeppers to
26 move to reopen their bankruptcy case and further move for the imposition

1 of contempt sanctions. See Exhibit 20. The Stop Calling Letter was not
2 sent to the address specified for notice to the lender in the Note and
3 Trust Deed. See Exhibit A, pp.2,4; Exhibit B, pp.1, 11, 13.
4 Thereafter, the Wells Fargo calls to Ms. Culpepper continued and in fact,
5 did not terminate until after the Contempt Motion was filed, in January
6 2012.

7 The Culpeppers filed a motion to reopen their bankruptcy case
8 on December 9, 2011, and their motion was granted by order entered on
9 December 16, 2011. Main Case Docket Nos. 29 and 31. The Culpeppers
10 filed the Contempt Motion on that same day, December 16, 2011.⁴

11 In the Contempt Motion, Ms. Culpepper requested actual damages
12 of \$20,000. The evidence presented at the Hearing indicated that
13 Ms. Culpepper was subjected to considerable stress just from seeing the
14 repeated notices on her caller ID that Wells Fargo was calling during
15 2011 and early 2012 (see, e.g., Exhibit R, pp.2-4). The pressure and
16 stress she was feeling were clearly evident from her communications to
17 Wells Fargo's representatives documented in the Transcribed Calls and
18 could be heard when the "CD" of the Transcribed Calls was played during
19 the Hearing. James Boehnlein, a professor of psychiatry at Oregon Health
20 Sciences University who interviewed Ms. Culpepper, testified that in his
21 opinion, Ms. Culpepper exhibited symptoms of moderate to severe
22 depression and anxiety resulting from her communications with Wells
23 Fargo. He also opined that her "adjustment disorder" was discrete rather

24
25 ⁴ The Contempt Motion originally was filed in the names of both Mr.
26 and Ms. Culpepper, but Mr. Culpepper later was withdrawn from the
Contempt Motion because he did not sign the Note and had no personal
obligation under the Loan. See Main Case Docket No. 64.

1 than chronic and that her emotional distress was easily treated.
2 However, he further testified that her stress was continuing as a result
3 of the unresolved litigation with Wells Fargo. Following her interview,
4 Ms. Culpepper did not initiate a program of treatment for her emotional
5 distress with Professor Boehnlein. Ms. Culpepper testified that she had
6 not sought medical treatment for her stress. The amount of her actual
7 damages was not quantified in the evidence presented.

8 The evidence submitted at the Hearing also indicated that
9 Ms. Culpepper was subject to considerable stress and suffered depression
10 at times from 2006 forward as a result of her husband's health issues
11 resulting from his kidney failure and kidney transplant, and the
12 financial/economic problems that culminated in her bankruptcy filing and
13 continued thereafter. See, e.g., Exhibit R, pp.1-2.

14 The court scheduled a status hearing on the Contempt Motion for
15 January 27, 2012. At the status hearing, the court determined that it
16 was appropriate to issue an Order to Show Cause ("Show Cause Order") and
17 scheduled an evidentiary hearing to cover liability and damages issues
18 for March 30, 2012. See Main Case Docket No. 41. The Order to Show
19 Cause was issued on February 2, 2012. Main Case Docket No. 47.
20 Thereafter, the evidentiary hearing was continued several times to allow
21 the parties to conduct discovery and engage in settlement discussions.
22 However, the matter was not settled, and in granting the third motion for
23 a continuance, the court scheduled the Hearing for October 5, 2012. See
24 Main Case Docket Nos. 72 and 74.

25 Wells Fargo filed the Summary Judgment Motion and supporting
26 documents on August 23, 2012. See Main Case Docket Nos. 77-80. At a

1 further status hearing on August 28, 2012, the court granted Wells
2 Fargo's motion to allow filing of the Summary Judgment Motion but advised
3 the parties that, other than allowing Ms. Culpepper to file her response
4 to the Summary Judgment Motion in conjunction with, or as part of, her
5 Hearing memorandum and allowing Wells Fargo to file any reply on
6 September 28, 2012, the Final Scheduling Order entered on July 19, 2012,
7 would remain in place, and the Hearing would proceed on October 5, 2012.
8 See Main Case Docket Nos. 83 and 84. Thereafter, the Hearing proceeded
9 as scheduled on October 5, 2012, and following the presentation of
10 evidence and argument, I took the matters under advisement. See Main
11 Case Docket No. 91.

12 Jurisdiction

13 I have jurisdiction to decide the Contempt Motion and the
14 Summary Judgment Motion under 28 U.S.C. §§ 1334, 157(b)(1) and
15 157(b)(2)(O).

16 Discussion

17 A. Summary judgment standards

18 Under Civil Rule 56(a), applicable under Rule 7056, summary
19 judgment is appropriate when "the movant shows that there is no genuine
20 dispute as to any material fact and the movant is entitled to judgment as
21 a matter of law." Summary judgment should not be entered when there are
22 disputes over facts that may affect the outcome of the dispute under
23 governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249
24 (1986).

25 B. Alleged violations of the discharge injunction

26 The question to be decided is whether Wells Fargo violated the

1 discharge injunction provided for in § 524(a) (2) by repeatedly calling
2 Ms. Culpepper throughout 2011 and into 2012, long after her chapter 7
3 discharge had been entered and she and her husband had been locked out of
4 the Residence Property. Section 524(a) (2) provides that,

5 A discharge in a case under this title - (2) operates
6 as an injunction against the commencement or
7 continuation of an action, the employment of process,
8 or an act to collect, recover or offset any such debt
9 as a personal liability of the debtor, whether or not
10 discharge of such debt is waived

11 "The discharge injunction survives the bankruptcy case and applies
12 permanently with respect to every debt that is discharged." Garske v.
13 Arcadia Financ., Ltd. (In re Garske), 287 B.R. 537, 542 (9th Cir. BAP
14 2002).

15 Procedurally, an alleged violation of the discharge injunction
16 is pursued by a motion invoking the contempt remedies allowed for in
17 § 105(a). See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509-10 (9th
18 Cir. 2002). In order to be subject to sanctions for violating the
19 discharge injunction, a party's violation must be "willful." The Ninth
20 Circuit has adopted a two-part test to determine whether the willfulness
21 standard has been met: 1) Did the alleged violating party know that the
22 discharge injunction applied? 2) Did such party intend the actions that
23 violated the discharge injunction? See Zilog, Inc. v. Corning (In re
24 Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006); Renwick v. Bennett, 298
25 F.3d 1059, 1069 (9th Cir. 2002). The burden of proof for the moving
26 party is clear and convincing evidence. See In re Zilog, Inc., 450 F.3d
 at 1007; Renwick v. Bennett, 298 F.3d at 1069 ("The moving party has the
 burden of showing by clear and convincing evidence that the contemnors

1 violated a specific and definite order of the court.”). “[W]here the
2 creditor holds a secured interest in property subject to a scheduled
3 debt, a discharge extinguishes only the personal liability of the
4 debtor,” and the creditor can pursue recovery of the debt by realizing on
5 its collateral. In re Garske, 287 B.R. at 542.

6 C. Summary Judgment is not appropriate

7 Wells Fargo has moved for summary judgment on the Contempt
8 Motion, arguing that as a matter of law, it cannot be liable for
9 violating Ms. Culpepper’s discharge injunction where the evidence is
10 undisputed that Wells Fargo representatives never demanded payment of the
11 Loan from Ms. Culpepper during postdischarge telephone calls. Wells
12 Fargo further argues that since Wells Fargo retained its lien interest in
13 the Residence Property, it was entirely appropriate for Wells Fargo to
14 communicate to Ms. Culpepper as to the status of foreclosure and to
15 discuss her potential interest in avoiding foreclosure by means of a
16 possible loan modification. However, based on the record from the
17 Hearing, there are genuine issues of material fact as to the purpose and
18 effects of the postdischarge telephone calls to Ms. Culpepper starting in
19 2011, based on the facts that by that time, after three fruitless
20 attempts to obtain a Loan modification that she could work with,
21 Ms. Culpepper had ceased applying for a Loan modification and had been
22 locked out of the Residence Property. In fact, in one of the Transcribed
23 Calls (see Exhibit 9, p.1), Ms. Culpepper was informed that she did not
24 qualify for a Loan modification. In these circumstances, granting
25 summary judgment in favor of Wells Fargo is not consistent with the
26 requirements of Civil Rule 56(a), and I will enter an order denying the

1 Summary Judgment Motion.

2 D. Resolving the Contempt Motion based on the evidence

3 The legislative history of § 524(a)(2) makes clear that the
4 discharge injunction is intended to be very broad in its application:

5 Subsection (a) specifies that a discharge in a
6 bankruptcy case voids any judgment to the extent that
7 it is a determination of the personal liability of the
8 debtor with respect to a prepetition debt, and
9 operates as an injunction against the commencement or
10 continuation of an action, the employment of process,
11 or any act, including telephone calls, letters, and
12 personal contacts, to collect, recover, or offset any
13 discharged debt as a personal liability of the debtor,
14 or from property of the debtor, whether or not the
15 debtor has waived discharge of the debt involved. The
16 injunction is to give complete effect to the discharge
17 and to eliminate any doubt concerning the effect of
18 the discharge as a total prohibition on debt
collection efforts. This paragraph has been expanded
over a comparable provision in Bankruptcy Act § 14f to
cover any act to collect, such as dunning by telephone
or letter, or indirectly through friends, relatives,
or employers, harassment, threats of repossession, and
the like. The change is consonant with the new policy
forbidding binding reaffirmation agreements under
proposed 11 U.S.C. 524(d), and is intended to insure
that once a debt is discharged, the debtor will not be
pressured in any way to repay it. In effect, the
discharge extinguishes the debt, and creditors may not
attempt to avoid that. . . .

19 H. Rept No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977),
20 at pp.365-66. "Section 524(a)(2) provides for a broad injunction against
21 not only legal proceedings, but also any other acts to collect a
22 discharged debt as a personal liability of the debtor . . . It extends to
23 all forms of collection activity, including letters, phone calls, threats
24 of criminal proceedings or other adverse actions intended to bring about
25 repayment. . . . In enforcing the injunction, courts have encountered a
26 wide variety of methods used by creditors to attempt to collect

1 discharged debts.” 4 Collier on Bankruptcy ¶ 524.02[2] (Alan N. Resnick
2 & Henry J. Sommer eds., 16th ed. 2012) (“Collier on Bankruptcy”). “When
3 a secured creditor retains a lien on the debtor’s property after the
4 discharge, courts have held that it is not per se improper for the
5 secured creditor to contact a debtor to send payment coupons, determine
6 whether payments will be made on the secured debt, or inform the debtor
7 of a possible foreclosure or repossession, as long as it is clear the
8 creditor is not attempting to collect the debt as a personal liability.”
9 4 Collier on Bankruptcy ¶ 524.02[2][b].

10 Because of the variety of situations in which alleged
11 violations of the discharge injunction can arise, such cases are very
12 fact dependent. In that regard, this case is no exception.

13 When Ms. Culpepper filed her bankruptcy case, she declared in
14 her Statement of Intent that she intended to surrender the Residence
15 Property. If she had held to that intent, we probably would not be here.
16 Yet, virtually in conjunction with her bankruptcy filing, Ms. Culpepper
17 initiated efforts to obtain a modification of the Loan and retain the
18 Residence Property. In fact, she filed three different applications with
19 Wells Fargo in attempts to obtain a Loan modification, twice after her
20 discharge had been entered. In so doing, she opened the door to further
21 communications with Wells Fargo. However, by the end of 2010, her
22 efforts seeking to obtain a modification of the Loan had ceased, and she
23 and her husband had been locked out of the Residence Property.

24 Thereafter, Ms. Culpepper received over a hundred calls from
25 Wells Fargo. Unlike the court in Henry v. Assoc. Home Equity Serv., Inc.
26 (In re Henry), 266 B.R. 457, 470 (Bankr. C.D. Cal. 2001), I am not

1 prepared to find that "[the volume of telephone calls alone compels a
2 finding that [the concerned mortgage lien creditor] was harassing the
3 debtors in violation of the . . . discharge injunction." However, I do
4 find the history and volume of calls to be relevant to deciding the
5 Contempt Motion. In particular, I find that the evidence provided by the
6 Transcribed Calls is critical.

7 Mr. Dolan testified that the calls Ms. Culpepper received were
8 part of Wells Fargo's program to advise its customers facing foreclosure
9 as to the status of foreclosure proceedings and offer them the
10 opportunity to discuss available alternatives. So far, so good. But
11 what "alternatives to foreclosure" actually were available to Ms.
12 Culpepper? There is no evidence in the record that Wells Fargo
13 considered a "short sale" of the Residence Property or that a "short
14 sale" option was available to Ms. Culpepper. If a Wells Fargo
15 representative had advised Ms. Culpepper that the calls would stop if she
16 would sign a deed in lieu of foreclosure for the Residence Property,
17 based on the evidence presented at the Hearing, I find that Ms. Culpepper
18 would have accepted that offer. No such offer was made to her. She
19 would have been even more willing to accept a "cash for keys" offer, but
20 again, no such offer was made to her. Ultimately, based on the evidence
21 presented, I find that the only alternative to foreclosure that Wells
22 Fargo wanted to discuss with Ms. Culpepper was a further attempt(s) to
23 obtain a modification of the Loan. If Ms. Culpepper entered into a Loan
24 modification agreement with Wells Fargo, its effect would be to revive
25 all, or at least a portion, of her discharged debt to the bank.

26 The Transcribed Calls are important for a number of reasons:

1 First, they establish that the Wells Fargo representatives with whom
2 Ms. Culpepper spoke (Laudio, Rene, Armando and CJ) were all
3 knowledgeable, intelligent and professional. They were not
4 "robocallers," with neither the authority nor the capacity to do anything
5 other than speak the words of Wells Fargo's "mini-Miranda" script. In
6 fact, Armando advised Ms. Culpepper that he was a specialist in
7 foreclosure and bankruptcy. See Exhibit 10, pp.2-3. I note that Armando
8 also stated initially that "the purpose of this call is to give you a
9 status of your loan modification." See id. at p.1. (Previously, Rene
10 had advised Ms. Culpepper that she did not qualify for a loan
11 modification, for which she previously had applied. See Exhibit 9, p.1.)
12 I find that there had to be a purpose to the calls other than to recite
13 mindlessly to Ms. Culpepper that the Loan was in active foreclosure but
14 that no foreclosure sale date had yet been scheduled. I further find
15 that the purpose of the calls was to engage her in discussion about the
16 process for modifying the Loan with the objective of encouraging her to
17 make a further Loan modification application.

18 Second, in each of the Transcribed Calls, Ms. Culpepper clearly
19 advised Wells Fargo's representatives that she was not interested in
20 pursuing a Loan modification, and she wanted the calls to stop. Her
21 anguish and frustration during the Transcribed Calls were palpable.

22 Third, in response, Wells Fargo's representatives told
23 Ms. Culpepper that if she wanted the calls to stop, she needed to send a
24 written request. Laudio advised Ms. Culpepper that if she wanted the
25 calls to stop, she would need to make that request in writing. See
26 Exhibit 8, p.4. Rene "noted here that you specified during the

1 conversation that you don't want us to call you any more" (see Exhibit 9,
2 p.6), but he could not guarantee that calls would not continue. Armando
3 advised Ms. Culpepper that if she wanted the calls to end, she would need
4 to send a "cease & desist" letter, and he provided her with the Fax
5 Number. See Exhibit 10, pp. 2, 8. Finally, C.J. advised Ms. Culpepper
6 that if she wanted the calls to stop, she would need to send a letter to
7 that effect, and "we will take you out of the auto-dialing system." See
8 Exhibit 12, p. 5.

9 Arguably, in the greatest "Series of Unfortunate Events" since
10 Lemony Snicket, apparently neither Ms. Culpepper nor her counsel sent a
11 cease and desist letter to the Fax Number. Her counsel did send a cease
12 and desist letter to three different Wells Fargo addresses on November
13 30, 2011, but he did not send it to the notice address specified in the
14 Note and Trust Deed. However, since Ms. Culpepper's personal obligations
15 under the Note and Trust Deed had been discharged in her bankruptcy, I
16 find it difficult to fault her counsel for not using that World Savings
17 Bank address over two years after her bankruptcy filing. Wells Fargo did
18 receive counsel's cease and desist letter no later than early December
19 2011. See Exhibit 14, pp.2-6. Yet, the calls did not finally stop until
20 after the Contempt Motion was filed, over a month later.

21 In these circumstances, I find that Wells Fargo knew that the
22 discharge injunction applied with respect to Ms. Culpepper, and I find
23 that Wells Fargo intended to continue to route calls to Ms. Culpepper in
24 an effort to reinstate all of some of a discharged debt, i.e., the Loan,
25 through a loan modification, after Ms. Culpepper had clearly advised
26 knowledgeable, thinking Wells Fargo employees that she was not interested

1 in pursuing a modification of the Loan with Wells Fargo and wanted the
2 calls to stop. Accordingly, I conclude that Ms. Culpepper has
3 established by clear and convincing evidence that Wells Fargo violated
4 the discharge injunction under § 524(a)(2).

5 The question then moves to an appropriate measure of damages.
6 As I indicated in my tentative conclusions communicated at the Hearing, I
7 do not find this case appropriate for the imposition of punitive damages.
8 Ms. Culpepper opened the door to communications with Wells Fargo
9 postpetition and postdischarge through her pursuit of multiple
10 applications to modify the Loan. The specific communications from Wells
11 Fargo representatives consistently and overtly disclaimed any attempt to
12 collect a discharged debt from Ms. Culpepper. If the communications had
13 not persisted in the face of repeated, anguished communications from
14 Ms. Culpepper requesting that the calls stop, the decision could have
15 been different.

16 However, the calls did not stop, and there is a fundamental
17 problem with a program of calls where intelligent, knowledgeable Wells
18 Fargo employees cannot take the responsibility to cause such calls to
19 stop in the face of clear communications from a former customer that she
20 has no interest in further pursuing a loan modification and wants such
21 calls to cease. An award of actual damages is appropriate, but the
22 measure of such damages is problematic based on the record before me. In
23 a published decision, by which I am bound, In re Feldmeier, 335 B.R. 807
24 (Bank. D. Or. 2005), Judge Brown determined that it was appropriate to
25 award emotional distress damages as compensatory damages for willful
26 violations of the discharge injunction. Id. at 812-14. In this case,

1 Ms. Culpepper has testified and submitted evidence establishing that she
2 suffered considerably from stress and depression as a result, at least in
3 part, from the continuing calls from Wells Fargo in 2011 continuing into
4 early 2012. Professor Boehnlein gave his opinion after interviewing
5 Ms. Culpepper that the Wells Fargo calls produced a condition of moderate
6 to severe depression that was discrete rather than chronic and could be
7 treated. Ms. Culpepper testified that she had not sought treatment for
8 those effects. In these circumstances, I find it appropriate to award
9 Ms. Culpepper \$4,000 in emotional distress damages, \$1,000 for each of
10 the Transcribed Calls during which she clearly confirmed to Wells Fargo's
11 representatives that she had no interest in pursuing a Loan modification
12 and advised in no uncertain terms that she wanted the persistent calls to
13 cease.

14 In addition, since it took the filing and pursuit of the
15 Contempt Motion finally to stop the calls from Wells Fargo, I conclude
16 that it is appropriate to award Ms. Culpepper her reasonable attorneys
17 fees and costs for prosecuting the Contempt Motion. Mr. Fuller should
18 submit an itemization of fees and costs within twenty-one (21) days
19 following the entry of this Memorandum Opinion. Thereafter, Wells
20 Fargo's counsel shall have fourteen (14) days to object to the claimed
21 fees and costs, and if such an objection is filed, I will set the matter
22 for hearing.

23 Conclusion

24 Based on the foregoing findings of fact and conclusions of law,
25 I am denying the Summary Judgment Motion and granting the Contempt
26 Motion. Mr. Fuller should submit an order consistent with this

1 Memorandum Opinion within fourteen (14) days following the date of its
2 entry.

3 # # #

4 cc: Michael R. Fuller, Esq.
5 Robert J. Bocko, Esq.

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