FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

ERIK SUNDQUIST and RENÉE SUNDQUIST, Plaintiffs, v. BANK OF AMERICA, N.A.; RECONTRUST COMPANY, N.A.; BAC HOME LOANS SERVICING, LP, Defendants.	Adv. Pro. No. 14-02278
In re: ERIK SUNDQUIST and RENÉE SUNDQUIST, Debtors.	Case No. 10-35624-B-13J

OPINION

Before: Christopher M. Klein, Bankruptcy Judge

Dennise Henderson, Sacramento, California, for Plaintiffs.

John S. Siamas, Jonathan R. Doolittle, Reed Smith LLP, San Francisco, California, for all Defendants.[1]

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Franz Kafka lives. This automatic stay violation case reveals that he works at Bank of America.

The mirage of promised mortgage modification lured the

kept secret for months, home looted while the debtors were dispossessed, emotional distress, lost income, apparent heart attack, suicide attempt, and post-traumatic stress disorder, for all of which Bank of America disclaims responsibility.

The case migrated to federal court after a state appellate court ruled that the federal damages remedy for stay violations, 11 U.S.C. § 362(k)(1), preempts state wrongful foreclosure damage actions that are based solely on such violations. Although that appeal established, as a matter of nonbankruptcy law, that the plaintiffs' state-court complaint stated actionable claims against Bank of America for deceit, promissory estoppel, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability of mortgage brokers, unfair competition, and negligence, the plaintiffs focus here on the § 362(k)(1) remedy.

The plaintiffs filed a civil action in the United States District Court in this district (No. 2:14-cv-01151), which action was referred to this bankruptcy court as a core proceeding to be heard and determined by a bankruptcy judge.

The stay violations being undeniable, the key questions of law are whether, and for how long, "actual damages" under § 362(k)(1) continue to accrue after the automatic stay expires? The answer has two facets. First, damages continue to accrue until full restitution is made. Second, applicable tort concepts

problem of how to vindicate the societal norm implicit in punitive damages without creating an excessive windfall.

Facts[2]

In 2008, plaintiffs Erik and Renée Sundquist recognized that they needed to downsize by 50 percent.[3] They sold their home in a "short sale" and bought a less expensive home in Lincoln, California, also through a short sale. They made a down payment of $125,000.00 and executed a $587,250.00 note at 6 percent fixed interest. The note and deed of trust were promptly purchased by Countrywide Home Loans, which soon merged into defendant Bank of America, N.A. The loan has been serviced at all relevant times by Bank of America as successor by merger to BAC Home Loans Servicing, LP.

The Sundquists were reluctant to agree to the new loan

---

[2]Some procedural facts are derived from the decision of the Court of Appeal of the State of California, Third Appellate District, in Sundquist v. Bank of America, N.A., et al., No. C070291, filed Sep. 5, 2013, of which this court took judicial notice (as to authenticity) at the request of the parties. As the issue in that appeal was whether the complaint stated various state-law claims, some facts assumed in that decision varied from the evidence adduced at trial in this court, which is using only facts consistent with evidence actually adduced at trial.

[3]An important source of evidence is the testimony of Renée Sundquist, whom the court found to be a credible witness. She began "Journaling as a way to deal with the insanity of the

because monthly payments on the loan were higher than what they had been seeking, but they were stampeded into closing the transaction by the threat of a sale to an all-cash buyer and by the promise of their loan broker (whom they trusted based on his work for them on two prior refinances and a business loan) that they could refinance or modify the loan immediately.

Bank of America owns for its own account the beneficial interest in the mortgage note.[4]

The Sundquists, who were current on their $4,557.72 ($3,520.86 principal and interest) mortgage payments (and able to remain current indefinitely with assistance from Mrs. Sundquist's mother) but struggling financially, defaulted on loan payments in March 2009 because Bank of America said that it would not consider any loan modification request (and would not send application forms) unless and until they ceased making payments.[5]

Their sole reason for defaulting, which they did with considerable reluctance (their credit score had been above 800), was acquiescence in Bank of America's demand that they default as

---

[4]When Bank of America foreclosed, it purchased the property for the full amount of the debt, and there was no third party investor to notify. Its post-foreclosure notes reflect: "Results of Sale: Prop Reverted to Plaintiff; Successful Bidder: BAC; Sale Amount: $652,217.20; Notify Investor of Sales Results: N/A." B of A Ex. II-001.

[5]"I began to call and send letters to Bank of America asking

a precondition for loan modification discussions with Bank of America.[6]

The Sundquists expected to be able to cure (with Renée Sundquist's mother's assistance) any default once a loan-modification was achieved. They further expected that Bank of America would deal with them in good faith and make a reasonably prompt decision.

Those expectations of prompt and good-faith dealings turned out to be improvident.

Bank of America started a multi-year "dual-tracking" game of cat-and-mouse. With one paw, Bank of America batted the debtors between about twenty loan modification requests or supplements that routinely were either "lost"[7] or declared insufficient, or

---

[6]From the Renée Sundquist Journal:

"I called and finally was able to have them send me a packet if I promised not to make a payment for three months. The struggle to make the decision to agree to not make payments was excruciating. We are not people who walk away from debt nor supported it."

Renée Sundquist Decl. ¶¶ 23-24. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

[7]Example from the Renée Sundquist Journal:

"First part of February 2009, calling to ask for modification for the fourth time; now we are two months behind. Finally received

incomplete, or stale[8] and in need of re-submission, or denied without comprehensible explanation[9] but without prejudice to yet another request.[10] With the other paw, Bank of America

---

and they still had not sent it. Bank said they lost the original documents after signing for them."

Renée Sundquist Decl. ¶¶ 33-42. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

[8]Example from the Renée Sundquist Journal:

"March 2009 received the loan modification documents filled them out quickly took it to UPS. Confirmed they received packet. Confirmed they did not need anything more. After several weeks we received a request for pay stubs. They had been sent with the first and second packets. This time I was told I could fax them which I did previously this was not allowed therefore overnight fees. Bank calls requesting 2009 taxes which were already sent twice. I sent them again. Called to confirm that they received the faxed confidential documents and no one could find them. We were told to call the HOPE department. Received another call from the Bank that they did not receive our taxes. They were sent twice by mail and twice by fax."

Renée Sundquist Decl. ¶¶ 43-50. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1). The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

[9]Example from the Renée Sundquist Journal:

"In May still have not been advised as to status of the modification. When I call bank now they just hang up on me. Today when I called I was lectured by the bank that I should know

repeatedly scheduled foreclosures.[11]

It was of no consequence to Bank of America that Renée Sundquist's mother, who held a second deed of trust on the residence, advised that she had funds sufficient to enable the Sundquists to cure the arrearage once the loan was modified.[12]

Bank of America actually told Renée Sundquist that mortgage modification was "not real."[13]

"Early August 2009 the bank does not have our modification after all this time. Another call to them and they admit we are now too past due we are not eligible for a modification. September 2009 the bank tells us that the modification is under review."

Renée Sundquist Decl. ¶¶ 72-74. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

[11]Example from the Renée Sundquist Journal:

"I was told that by the bank 'when the property forecloses that is when you will know you did not get a modification.'" Renée Sundquist Decl. ¶ 56. The court believes, and so finds as fact, this testimony. The statements attributed to Bank of America are non-hearsay statements by an opposing party. Fed. R. Evid. 802(d)(1).

[12]From the Renée Sundquist Journal:

"My mother sent a letter to the bank advising them she was an investor and wanted to make sure she did not lose her investment. She advised she had funds to pay for the foreclosure. I called to confirm that the bank had received the letter from my mother and they said they were converting their system and all documents were lost."

The Sundquists filed a chapter 7 bankruptcy case that operated to clear away debt following the closure of Mr. Sundquist's construction and development businesses due to the Great Recession, which filing delayed a scheduled foreclosure sale. They made clear in that chapter 7 case that they intended to retain their residence and pay Bank of America.[14]

They reasonably believed that shedding unsecured debt by way of the chapter 7 discharge would enhance their ability to pay Bank of America on a modified loan. But, upon the completion of that chapter 7 case, Bank of America gave the Sundquists no credit for their improved debt profile and resumed its dual-tracking strategy of using mortgage modification applications to distract borrowers from the bank's march to foreclosure.

Faced with imminent foreclosure, the Sundquists filed chapter 13 case no. 10-35624 in this court on June 14, 2010, at 5:17 p.m., thereby triggering the automatic stay under 11 U.S.C. § 362. They intended to use a chapter 13 plan to cure the Bank of America default and move forward with the loan modification that they were still expecting to occur.

Bank of America concedes that it received notice of the

---

modifications were not real. When I told her my mother could pay it off the representative advised against because the modification doesn't mean anything and it is just a way to create funds for the banks before foreclosure."

bankruptcy on June 14, 2010, and concedes that on June 14 it transferred the loan to its Bankruptcy Department.[15]

Despite knowing of the bankruptcy case, Bank of America did not stop the trustee's sale on June 15, 2010, at which it purchased the property for its own account by credit bidding the full amount of the debt ($652,217.20).

Bank of America on June 16, 2010, further adjusted its records to reflect that the bankruptcy case was filed June 14.[16]

Bank of America has a written procedure for dealing with situations when a foreclosure occurs in violation of the automatic stay in ignorance of a bankruptcy case filing. Upon discovery of the problem, the procedure requires "immediate" rescission.[17]

---

[15]In addition to the concession during trial, Bank of America's Loss Mitigation Home Base Work Action History database has the entry: "06/14/2010 ... Daphne English ... Customer Claims Bankruptcy." B of A Ex. KK & Sundquist Ex. 71. And, its Loss Mitigation Home Base II database has the entry: "transfer[r]ed to bk dept ... 06/14/2010 ... Daphne English." B of A Ex. JJ & Sundquist Ex. 71.

[16]Bank of America Representative Deloney testified that Bank of America personnel did not code the loan in its computer system as being "in bankruptcy" (code 03) until June 16, 2010.

Servicing Activities History: "HO filed for BK on 06/14/10, chapter 13, case # 201035624 Submitted BK Notification. Information has been changed on June 16, 2010." Sundquist Ex. 59.

Bank of America did not follow its own procedure and, instead, treated the foreclosure as valid. Nor did it offer an excuse for not "immediately" following its rescission mandate to correct its mistaken foreclosure once the loan was coded in its computer system as being in bankruptcy.

The automatic stay-violating foreclosure was thereafter apparent to anyone at Bank of America who cared to look. Nobody at Bank of America cared to look.

Bank of America committed at least six further automatic stay violations by the end of August 2010 as it bulled forward.

On June 16, with knowledge of the automatic stay, Bank of America ordered that eviction proceedings be commenced.[18]

On June 23, 2010, with knowledge of the automatic stay, Bank of America permitted its wholly-owned subsidiary and foreclosure trustee, ReconTrust, to execute the Trustee's Deed Upon Sale and to record it with the Placer County Recorder on June 25.

On multiple occasions between June 14 and September 7, 2010, Bank of America, with knowledge of the automatic stay, caused its agents to enter the Sundquists' gated community, sometimes on

---

Deed document and send it to the title company for recordation, and restart the file at the next appropriate task."

false pretenses, and lurk about the Sundquist home.[19] Without identifying themselves, they staked out the premises, tailed the Sundquists, knocked on doors, knocked on windows, and rang doorbells, all to the terror of the Sundquist family.[20]

On July 8, with knowledge of the automatic stay, Bank of

---

[19]Orders directed by Bank of America to Countrywide Field Service Corporation to inspect the Sundquist property ("Monthly Bankruptcy") were dated July 7, 2010; July 26, 2010; and August 24, 2010. B of A Ex. FF-001.

[20]From the Renée Sundquist Journal:

"[July 2010] A very strange man walked around our house and banged on our sliding glass door while [10 yr-old twin son] was playing piano. [Son] was so scared, he came running down the hall screaming and crying. The man was yelling at him to open the glass door. I called our development security. Can't sleep. I bet this man is bank related. Security said he was sitting on our street for over two hours." Renée Sundquist Decl. ¶¶ 113-18.

"[July or August 2010] Returned home with the boys after school pick up. [10 yr-old twin son] noticed someone across the street and said 'someone is casing the joint' Where did he hear that. First I wanted to laugh then I ran upstairs to my closet and sobbed. I hate being so scared, but I can't show that to my children." Renée Sundquist Decl. ¶¶ 124-127.

"[August 2010] Today someone tailgated us right to our driveway and then sped off. [10 yr-old twin sons] were really nervous, I tried to make it like a car chase scene. They circled around and parked outside our house until I called security. I bet this is Bank of America." Renée Sundquist Decl. ¶¶ 129-31.

"[August 2010] Came home again today to someone stalking our home. I am so scared to step out of my car sometimes. I now

America caused its agent to serve a Notice to Quit (the premises) by leaving a copy at the premises and by mail.

On July 23, with knowledge of the automatic stay, Bank of America commenced an unlawful detainer action, BAC Home Loans v. Sundquist, No. M-CV-47015, Superior Court of California, County of Placer, in which complaint Bank of America asserted that it had valid and perfected title due to the June 15 trustee's sale, which plainly had violated the automatic stay.

Although Bank of America's counsel, Miles, Bauer, Bergstrom & Winters, LLP, had an affirmative duty under California Code of Civil Procedure § 128.7 to confirm, after an inquiry reasonable under the circumstances, that an unlawful detainer action was warranted in law and in fact, that law firm (which commonly appears in this bankruptcy court) did not conduct a reasonable inquiry. A reasonable inquiry under the circumstances required checking public, free computer databases that show the pendency of bankruptcy cases. That check, if it had been performed, would have revealed that the filing of an unlawful detainer action would violate the automatic stay and that the foreclosure sale was void as having offended the automatic stay.[21]

Upon learning that some type of lawsuit was pending in state court, the Sundquists unsuccessfully tried between August 10 and 12, 2010, to find out from the state court what was going on.[22]

On or about August 19, with knowledge of the automatic stay, Bank of America caused its agent to serve on the debtors a Three-Day Notice To Quit (by throwing the papers against the door so hard that they ricocheted some feet from the door[23]) creating the impression in the minds of the Sundquists that they must move within three days or the sheriff would physically remove them and their property from the premises.[24]

Their bankruptcy attorney called Bank of America on August 20, 2010, and asked why the Sundquists were being evicted after their home had been sold in violation of the automatic stay.

Bank of America's notes of that August 20 phone call (Ex. GG) reflect that it notified its agent ReconTrust that "this is

---

And on August 12: "I waited for some time this morning attempting to get copies of the case file, ha! The judge has sealed the file and they don't have access to give me copies." Sundquist Ex. 100; B of A Ex. KKK.

[23]From the Renée Sundquist Journal:

"[August, 2010] Today a letter was thrown at our front door. It was such a loud bang I could hear it in the kitchen. I opened the door slowly, couldn't see anything from our peep hole. A random envelope on the cement the force of the throw caused the letter to fly far away from the doorstep. Having to step outside and find it was an 'unlawful detainer' not even sure what the document is stating. I just stood shaking and could barely call Erik. One thing for sure the document looks court official and the worst option was to leave our house in three days. Erik sent the document to our bk attorney. B of A steals another night from my family. Horrid night topped off by some weird car across

an active bk and any sale date is invalid."[25]

Although Bank of America recognized on August 20 that "immediate" corrective action was required because the trustee's sale was invalid and had to be rescinded pursuant to its written procedure regarding sales that offended the bankruptcy automatic stay,[26] it did not inform the Sundquists that they could ignore the Three-Day Notice to Quit, it did not dismiss the eviction action, and it did not tell the Sundquists or their counsel that it would rescind the invalid sale and that they need not move.

The failure by Bank of America to inform the Sundquists or their counsel on August 20, 2010, that it would be rescinding the foreclosure and not pursuing the unlawful detainer action led to a further human toll, especially on Renée Sundquist.[27]

---

[25]Bank of America computer record:

"DT-08202010 Advised Kristin Warner from Recon that this is an active bk and any sale date is invalid. Per Yassin, Ivonne, H/O called and stated that they received 3 day notice and notification that house sold in June."

B of A Ex. GG.

[26]B of A Ex. QQ.

[27]From the Renée Sundquist Journal:

"[August 20, 2010] I will never forget today it is etched in my being. I received a call at 5:10 p.m., I stepped out of the pros room at the rin[k]. I was just about to go teach on the ice when our attorney called. She said you won't believe this b of a

Driven to their wits' end and fearing the traumatic effect that an actual eviction would have on their 10-year-old twins and unaware that Bank of America would be rescinding the trustee's sale and unaware that the unlawful detainer action had to be withdrawn,[28] the Sundquists responded to the Three-Day Notice To Quit by leasing other premises for $4,000.00 per month with the help of Renée Sundquist's mother as co-lessee (their monthly

---

whirling around me in a maze. I do remember throwing up in the garbage can on the other side of the ice. The embarrassment, one of my little 5 year olds asked if I was ok. Will not be sleeping tonight. So sad, we can't even stay if the bank made a mistake, if the sheriff comes and throws us out that would be even more horrifying for my children to experience. We are going to have to switch schools again. Erik is going to be so upset, how are we going to make it through this mess. I feel like dying."

Renée Sundquist Decl. ¶¶ 155-70. The court believes, and so finds as fact, this testimony regarding her reaction.

[28]From the Renée Sundquist Journal:

"Last night [10 yr-old son] was scared again. Tonight I was just obsessing if a knock on the door would result in us getting kicked out of our house. I realized at 2 am this morning that the letter that our attorney received and the modification packet sent out was when they had sold the house and we no longer owned it. How can they do a modification[?] I need professional help to get past this. What a horrid pit [in] my stomach and my head hurts so badly too." Renée Sundquist Decl. ¶¶ 173-77.

mortgage payment was $4,557.72).[29]

They moved to the rental during Labor Day Weekend (September 4-6, 2010),[30] leaving the premises, including all major appliances, window coverings, and carpets, in good order and locked the doors. In Renée Sundquist's words while testifying, the lawn and shrubbery were "beautiful." As Erik Sundquist testified, they "felt evicted."

Until this point, the Sundquists had been making on-going requests for loan modification, (with frequent follow-up calls from the debtors), but Bank of America did not give them coherent explanations of reasons for denials or for the long intervals of apparent inaction by the bank on loan modification applications. Often, after Bank of America sat on requests for months, it

---

[29]Bank of America obtained from the lessor a copy of a one-year lease for $3,900.00 per month. The Sundquist testimony is that they paid $4,000.00 per month, had an agreement to stay for three years with a lessor they found on the internet in a transaction that was inexpertly documented, and ultimately had to renegotiate the term down to eighteen months. This court believed the Sundquist testimony. The $4,000.00 payment is consistent with paying $100.00 in miscellaneous costs in addition to the nominal monthly rent.

[30]From the Renée Sundquist Journal:

"September we just threw everything we could in boxes, we needed to move quickly. We found a place to lease for $4000 a month. How stupid we can't get loan modification but we can't pay that amount to B of A. I am so sick, and I have such a headache, threw up again today from my head. Moving is rough, so

declared their information stale and sent them back to square one. Catch 22.

Ultimately, Bank of America, ignoring the Sundquists' representations that they would be able to cure the default as soon as the mortgage was modified, took the position that the arrearage was too great to consider a loan modification. Yet, Bank of America still dangled more loan modification applications in front of them.

On September 7, 2010, Bank of America's notes reflect that purportedly "immediate" rescission of the trustee's sale was in process.[31] The Sundquists were not so advised.

Although Bank of America's written procedures require that rescission be "immediate," the bank took 18 days after August 20 to start the rescission process and another 114 days until the rescission was recorded on December 30, 2010.

Bank of America, however, did not inform the Sundquists or their bankruptcy attorney that rescission was in process.[32]

Although Bank of America knew on August 20, 2010, and beyond cavil by September 7, 2010, that the foreclosure would be

---

[31]Bank of America computer record:

"DT-09072010 Received response from Paredes, Beatrice F @ Recontrust that rescission process started and will advise once the rescission has been sent to record."

rescinded, it did not withdraw the unlawful detainer action or tell the Sundquists the action would be dismissed. The state-court docket of the action reflects zero activity between August 12, 2010, and February 7, 2011, when counsel for Bank of America filed a voluntary dismissal without prejudice.[33]

The Sundquists, having given up and moved, assumed that the nightmare was over, that they were finished with their now-former residence, that they could forget (but not forgive) Bank of America's loan modification run-around, and that they were moving on to a new life. Hence, they directed that their chapter 13 case be voluntarily dismissed because its primary object of saving their house had come to naught.

The chapter 13 case was dismissed on September 20, 2010, at which time the § 362 automatic stay expired as a matter of law pursuant to 11 U.S.C. § 362(c)(2).

The Sundquists had no reason to suspect that they would secretly be placed back in title on their residence as of December 30, 2010, and that the Bank of America loan modification process would again rear its head. As noted, the Notice of Rescission of Trustee's Deed Upon Sale pursuant to Civil Code Section 1058.5 was recorded December 30, 2010.[34]

---

[33]Bank of America's Request for Judicial Notice of Filed

Neither the Sundquists nor their bankruptcy counsel were informed of the rescission. They had no inkling, and no reason to suspect, that they were back in title on their residence as of then.

On February 7, 2011, also without notice to the Sundquists, Bank of America obtained dismissal without prejudice of its unlawful detainer action.[35]

Nevertheless, on February 10, 2011, despite the rescission of the trustee sale, Bank of America (BAC Field Services Corporation) was on the premises removing the trees it had allowed to die, removing personal property, and capping exposed wires and gas and water lines.[36]

After the undisclosed rescission, Bank of America started sending the Sundquists monthly mortgage statements and related notices dunning them for defaults. They were not only puzzled by the statements, they were stimulated to seek counsel to work with them to seek redress from Bank of America.

On March 21, 2011, Erik Sundquist discovered in the Placer County records the rescission of the foreclosure sale deed, which

---

occur on 06/15/10;"

Notice of Rescission of Trustee's Deed Upon Sale pursuant to Civil Code Section 1058.5 ¶ 5; Sundquist Ex.53.

rescission had been recorded on December 30, 2010.

The Sundquists, in the presence of counsel, called Bank of America in early April 2011 and asked about the status of the property. For the first time, Bank of America told the Sundquists that it had rescinded the foreclosure sale three months earlier. Counsel asked if they could have the keys. The keys were delivered to the Sundquists on April 5, 2011.[37]

When the Sundquists re-entered the premises, they discovered that major appliances (cooktop, oven, built-in refrigerator, washer, dryer), window coverings, and carpet had been removed. The front lawn and shrubbery were dead. Verdera Homeowners Association (HOA) had made a $20,000.00 assessment on account of the dead landscaping. Bank of America disclaimed responsibility.

Further, Bank of America demanded that the Sundquists pay all mortgage expenses and maintenance fees for the six-month period during which Bank of America was in title on the property.

Bank of America rebuffed the Sundquists' requests for compensation for the lost property and for adjustments to reflect Bank of America's ownership and the rental expenses incurred in consequence of the unlawful foreclosure and the unlawful detainer action in violation of the bankruptcy automatic stay.

One particularly vexing issue for the Sundquists related to the failure by Bank of America to have paid all the Homeowners

Association Fees during the period that it was in title to the property. The bank made one payment to the HOA for $562.50 and, contemporaneous with its decision to rescind the sale, ceased making HOA payments.[38] In addition, the bank let the front yard landscaping die, which triggered a $20,000.00 assessment by the HOA that the Sundquists say is Bank of America's problem.[39]

Nor did Bank of America inform the HOA that it was rescinding the trustee's sale and restoring the Sundquists to title. In April 2011, the HOA was still sending monthly bills to BAC Home Loans Servicing.[40]

The HOA issue has festered ever since, with the incidental consequence that the HOA, which consists of individual neighbors in the community, is angry at the Sundquists. The landscaping is dead. The Sundquists question the $20,000.00 as an unwarranted penalty and contend that, if owed, Bank of America should pay.[41]

The Sundquists have insisted that Bank of America should

---

[38]Sundquist Exs. 76 & 81 & 89. Internal Bank of America payment request dated 9/17/2010 to pay $562.50 HOA invoice dated 8/11/2010.

[39]Sundquist Ex. 89. Bank of America Servicing Activities History entry dated 11/19/2010: "Received correspondence from Verdera community assoc regarding Bal due $20498.50 dated Oct 19, 2010."

[40]On April 22, 2011, Bank of America received a $22,633.50 HOA bill for assessments for April and May 2011 ($235.00/mo) plus late fee ($15.50) plus balance carried forward ($22,168.00).

hold them harmless and compensate for the losses directly attributable to the period that the bank was in title and for the three months after December 30, 2010, during which Bank of America failed to disclose rescission of the foreclosure sale.

They have been asking, and still are asking, what the correct payoff amount of the loan is after the adjustments that they believe are appropriate. This court believes their testimony (and finds as fact) that they still intend to pay their mortgage debt once the legitimate amount is determined.

In June 2011, at loggerheads with Bank of America over the correct loan balance, the Sundquists filed a lawsuit in a California superior court naming as defendants the original loan broker, his loan brokerage, the original lender, its loan officer, Bank of America, ReconTrust (foreclosure agent for Bank of America), and BAC Home Loans Servicing, LP ("BAC"). As against the Bank of America entities, the complaint alleged causes of action for deceit, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligence, assumed liability, civil conspiracy, promissory estoppel, wrongful foreclosure, and unfair competition in violation of California Business and Professions Code § 17200.[42]

In November 2011, the state trial court dismissed the action as to all counts on the motion of Bank of America (acting for

ended their tenancy in the leasehold premises and re-occupied their residence in January 2012. They did so because their leasehold was expiring and their attorney advised them that they should mitigate damages by not incurring unnecessary rent.

Returning to the house was a difficult experience for Mrs. Sundquist.[43] The personal items that she came across after returning triggered even more trauma.[44]

---

[43]From the Renée Sundquist Journal:

"January 2012 the attorney told us to move back into the home since our lease is ending soon. I can't even imagine returning to that house with all the pain I suffered. I took medicine just to get to our driveway in Lincoln. Erik helped me walk in the front door. I couldn't even look at the yard it is al[l] dead. The front door is ruined. The antique door knocker was still hanging on the door. We had to move so fast. They damaged the door and the locks when they changed the locks. I just started shaking. Next it turned into anger when I saw that our appliances, window coverings carpet [are missing] that is after walking past everything dead in our front yard. All that sadness came flooding back all that pain of leaving, losing, sickness and pain. I am stuck and my life will never be the same. My head hurts so bad, I am so sick."

Renée Sundquist Decl. ¶¶ 269-83. The court believes, and so finds as fact, the events and reactions related in this testimony.

[44]From the Renée Sundquist Journal:

"[On finding personal items that had been left behind when they moved in September 2010] Sometimes it is like I am living outside my body, I can't pull it together to be a wife or mother or daughter! How can I let a bank steal my life? I am too smart for this. I am crying so hard right now, I keep trying to

The return to the house led to frustrating discussions with Bank of America, which refused to take responsibility for the damage and missing property. The Sundquists wanted the missing property restored, including appliances, and a determination of what the correct adjusted amount of the mortgage should be after adjusting for all the stay violation damages. And, Bank of America still was threatening foreclosure.

Bank of America's hard-line stance in February 2012 denying responsibility for damages resulting from its stay violations came at a particularly fragile moment in Mrs. Sundquist's life. Her mother lay dying.[45]

---

stuff, I didn't notice that either. I actually though I checked the house when we left, guess not well enough! OMG ... I won't sleep tonight."

B of A Ex. RRR; accord, Renée Sundquist Decl. ¶¶ 292-97.

[45]From the Renée Sundquist Journal:

"[February 2012] I hate that any second of my life is spent thinking about a lawsuit or the bank right now when my Mother is dying! What a horrid waste of time. The fact that one second is spent worrying about the bank horridness and unethical behavior is not why I am on earth. My Mom is so certain I need to fight the bank, but, what if I can't. Bad, bad, bad, day! More stupid letters that make no sense from the bank of holy hell. Like does anyone read in that bank office? More importantly, do they hire anyone that can read?"

"Today I spent the day watching my Mom labor every breath, I can barely write tonight. Some b/a jerk CEO representative tells me I need to list the items stolen from my home. I am thinking

At trial, counsel for Bank of America asked Mrs. Sundquist why, if this was so upsetting, did she not just walk away and let the house be foreclosed. She stammered incoherent. Her real answer lies in Bank of America's Exhibit RRR-001 - it was her mother's dying wish that she not give in to Bank of America.[46]

For a brief moment after their return, there was a glimmer that the bank was willing to pay for the stolen items. But that

---

taken from our house after we moved out. She actually had a moment of clarity, and got really mad when she figured out what I was doing. I started to cry so hard, even when she is dying I can't hide anything from her. I hope I can be as great as her someday. She touched my face, and said she was going to miss me. OMG! I wonder why my mom is dying and the bank goes on! I need my Mom, I can't do this without her. She was clear to say she didn't want me to lose my inheritance that went into the house. Ugh! This is what we are going to think about during her last days? NO, it can't beeeeeeeeeeeee!!!"

"The wors[t] day of my life, I watch for hours my Mom barely breathing. I can barely write, or breathe myself, she is dead. I will never get back all the hours, days, years I have spent fighting this f'ing bank, all the time wasted where I couldn't even think straight to not waste time with my Mom. No one cares. No one cares. I promised her I wouldn't quit fighting the bank, I might not make it! She was so strong always, and it is so very dark now. My life will never be the same. How does one journal their Mother has died. I feel so sick. Please God take care of my mother, let her fly free and have no more pain. Speechless gratitude for her, she was the bone of my spine, keeping me straight and true. My Mother is irreplaceable."

B of A Exs. RRR & SSS; accord, Renée Sundquist Decl. ¶¶ 301-05.

was too good to be true. The offer was quickly withdrawn.[47]

The reality is that Bank of America did not intend to negotiate with the Sundquists in good faith. The evidence includes an internal Bank of America document in which it concedes that its loan modification process dating back to before the filing of their chapter 13 case had been a charade in which Bank of America sent loan modification request packages to the Sundquists intending to deny them when submitted.[48]

---

[47]From the Renée Sundquist Journal:

"Not even a day has passed since my Mom died, and more stupid letters from the bank. I ripped the asinine letter up in so many pieces today, it stated that the bank would pay for my lost house items. Like that will ever happen! Better chance of my Mom coming back! I had this amazing thought today, my Mom is somewhere where she doesn't have to worry about our family and what the bank is doing any longer. That makes me quiet. Some b/a CEO, managers, and representatives are going home tonight, overlooking their dishonesty when they look in the mirror, clearly, they didn't have a great mother like mine to teach them right from wrong. The dishonesty makes me crazy, but I WIN, cause I don't lie like the bank of holy hell! The world is upside down. I am trying to plan a funeral, I mean really? Go to hell b/a!."

"A call today from the bank's CEO office, they are retracting their offer for our lost items, they told us to 'file an insurance claim and to replace our own yard'. In years past I would have tried to reason, today I just write another letter and hope they rot in hell. I hate them. If I could I would spit on them. I hate them. I am not a daughter, I am not a wife, I am not a mother, and I am invisible with pain, pain, pain! A house, not really, it is so much more, it is our lives they took! Rot in hell, rot in hell, rot in hell. And ... who ever stole my

In September 2013, the California Third District Court of Appeal ruled in favor of the Sundquists, holding that their complaint stated claims against Bank of America for deceit, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability, promissory estoppel, and unfair competition (but not negligence and conspiracy).[49]

As to the claim for wrongful foreclosure, however, the appellate court invoked what is known in federal practice as "conflict preemption."[50] It ruled that Bankruptcy Code § 362(k)(1) preempts state-law wrongful foreclosure claims that are based solely on violation of the automatic stay, which it

---

was 6/15/2010 we didnt [sic] get the bky till 6/16/2010 and foreclosed on the home. It was recinded [sic] and the bky was dismissed 9/25/2010. [C]ustomer is stating that we illegally foreclosed on the home. [T]he customer says that the amount that is due is incorrect. [A]nd state they have a lawsuit in process with litegations [sic]. [T]hey want to try a modification but the loan is fha and becuase [sic] its over 12 months due no mha is available."

"Note ID: 88
11/2009 declined mod Surplus income will not support a repayment plan and a mod will not get approved becuase [sic] the amount has gotten larger with no payment and will agin [sic] be declined but we are more than happy to resubmit but it will be declined."

Sundquist Ex. 73 (emphasis supplied).

[49] Sundquist v. Bank of America, N.A., Memorandum Opinion, No. C070291 (Cal. App. 3d Dist. 9/5/13); the Ninth Circuit has likewise held that a loan modification charade can yield a viable

deemed to be a matter of exclusive federal jurisdiction. Hence, the state court sent the Sundquists to federal court for relief on that count.

Accordingly, the Sundquists filed this § 362(k)(1) proceeding as a civil action in the United States District Court, which referred the matter to this bankruptcy court.

The Sundquists continued to attempt to negotiate and reason with Bank of America, even while the litigation was pending. They complained to the Office of the Comptroller of the Currency (OCC), which declined to intervene. And they complained to the federal Consumer Financial Protection Bureau (CFPB).

The Bank of America response to CFPB is noteworthy for two false statements made by the Office of the Bank of America CEO and President. It falsely asserts that there was no foreclosure of the Sundquist residence.[51] And, it falsely asserts that the

---

[51]Bank of America's CEO's office wrote in response to the Consumer Financial Protection Bureau inquiry:

"According to our records, on June 14, 2010, the borrower filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code in the United States Bankruptcy Court. The account was flagged for bankruptcy and any foreclosure proceedings were placed on hold."

Bank of America Office of the CEO and President, Executive Customer Relations, ltr to CFPB in CFPB case no. 130304-000049

Sundquists are not in active litigation with Bank of America.[52] Both statements were materially false.[53]

Throughout the dispute between the Sundquists and Bank of America, interest has been continuing to accrue on the $584,893.97 principal balance at the contract rate of 6 percent, or $35,093.64 per year ($96.15 per day).

The Sundquists entered their ordeal with Bank of America as physically strong people. Throughout the chapter 13 phase of the ordeal, a significant emotional and physical toll debilitated them. They had been elite athletes. He had been a member of a NCAA National Championship Soccer Team. She was an ice skater on Italy's Olympic team and was teaching ice skating. He emerged from the ordeal restricted to exercising only on an elliptical trainer and had attempted suicide. She was hospitalized with

---

[52]Bank of America's CEO's office wrote:

"Additional research shows that the borrower's [sic] are not in active litigation therefore we cannot supply you with the requested documents from the courts."

Bank of America Office of the CEO and President, Executive Customer Relations, ltr to CFPB in CFPB case no. 130304-000049 (Erik and Renée Sundquist), May 23, 2013. Sundquist Ex. 84.

At the time that Bank of America made that statement to CFPB on May 23, 2013, there was pending in the Court of Appeal of the State of California, Third Appellate District, case no. C070291, Sundquist v. Bank of America, N.A., which was not decided until

heart attack symptoms that were found to be stress-related, has been diagnosed with post-traumatic stress disorder, and was left with near-daily debilitating migraine headaches that persist into the present and that constrain her ability to engage in a wide range of activities.

Throughout, the conduct of Bank of America has been intentional.

Further findings of fact are stated in the ensuing analysis of the violations of the automatic stay.

Jurisdiction

Federal subject-matter jurisdiction is founded on 28 U.S.C. § 1334. Enforcement of the automatic stay arises under Bankruptcy Code § 362 and is a core proceeding that may be heard and determined by a bankruptcy judge. 28 U.S.C. § 157(b)(1)(G).[54]

---

[54]There is also federal subject-matter jurisdiction by way of 28 U.S.C. § 1367 over the state-law causes of action (deceit, promissory estoppel, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, assumed liability of mortgage brokers, unfair competition, and negligence) as to which the California Third District Court of Appeal ruled that the Sundquists had stated claims and remanded to the trial court. The state-court action was dismissed without prejudice. Such causes of action, if they were to be alleged in this federal civil action in an amended complaint (which could happen if this litigation were to become prolonged as a result of being vacated

Jurisdiction over automatic stay violation remedies survives dismissal or closing of the case. Carraher v. Morgan Elecs., Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992); Davis v. Carrington (In re Davis), 177 B.R. 907, 911-12 (9th Cir. BAP 1995). Hence, the bankruptcy case has not been reopened.

To the extent that this proceeding may ever be determined to be a matter that cannot be heard and determined of right by a bankruptcy judge, the parties are nevertheless agreed that it may be heard and determined by a bankruptcy judge. 28 U.S.C. § 158(c)(2).

Discussion

First, the law. Then, application of the facts to the law. The Second Amended Complaint alleges two counts: automatic stay violation on account of foreclosure and automatic stay violation on account of unlawful detainer action.

I

The legal effect of an act in violation of the automatic stay is well-understood in this circuit.

A

The fundamental rule is that any act done in violation of

Schwartz, 954 F.2d at 572-73. Rather, the offending act is void from the outset for all purposes unless and until annulled. Id.

Subsequent dismissal of the case does not vitiate a stay violation. 40235 Washington St. Corp., 329 F.3d at 1080 n.2 (tax sale in violation of automatic stay remains void despite subsequent dismissal of chapter 11 case as bad faith filing).

Nor is § 549(c) an exception to the rule that the act in violation of the stay is void ab initio. 40235 Washington St. Corp. 329 F.3d at 1080.

The automatic stay arose with the filing of the Sundquist chapter 13 case on June 14, 2010. The conclusion is inescapable that, under Schwartz and 40235 Washington St. Corp., the foreclosure by Bank of America on June 15, 2010, violated the automatic stay and was void ab initio.

B

Cognizable effects of a violation of the automatic stay may linger after the formal expiration of the stay. For example, the stay with respect to an individual debtor expires upon entry of discharge or dismissal of the case. 11 U.S.C. § 362(c)(2).

Nevertheless, consequences directly attributable to the violation of the stay before its expiration may continue to be visited upon a debtor for an additional period of time. Snowden

Snowden, 769 F.3d at 659 & 662 (ambiguous settlement offer does not terminate accrual of liability for stay violation).

II

The consequences for violating the automatic stay are, first, contempt, and, second, statutory damages for individuals injured by any willful violation of the automatic stay. Havelock v. Taxel (In re Pace), 67 F.3d 187, 191-94 (9th Cir. 1995).

General civil contempt remedies are available to all victims of stay violations, individuals and non-individuals alike. Pace, 67 F.3d at 193-94.

Concurrent with the restructuring of bankruptcy courts in 1984 to resolve Constitutional issues,[55] Congress supplemented the automatic stay provision by adding a new subsection § 362(h) providing that any individual victim of a willful stay violation may recover actual damages, including costs and attorneys' fees, as well as punitive damages:

> [A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(k)(1), first enacted as § 362, Pub. L. 98-353, § 304, 98 Stat. 333 (July 10, 1984); Pace, 67 F.3d at 191-92.

This case primarily implicates the § 362(k)(1) damages remedy and its boundaries.

A

A settled body of the law of this circuit covers the key elements of the § 362(k)(1) (formerly § 362(h)) damages remedy.

1

A "willful violation" does not require specific intent to violate the automatic stay. Rather, the "willfulness" question is whether Bank of America knew of the automatic stay and whether actions in violation of the stay were intentional actions. Pace, 67 F.3d at 191; Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989).

Willfulness is a question of fact, reviewed for clear error. Eskanos & Adler, P.C. v. Leetien (In re Leetien), 309 F.3d 1210, 1213 (9th Cir. 2002).

2

A good faith belief that an actor has a right to the disputed property is (with an exception not pertinent here[56]) not relevant to whether an act offending the stay is "willful" or whether compensation should be awarded. Bloom, 875 F.2d at 227; 11 U.S.C. § 362(k).

B

Actual damages under § 362(k)(1) include both physical damages and economic damages. Dawson v. Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004).

There are numerous examples of items of damages that have been awarded on account of automatic stay violations. See generally, Remedies and Damages for Violation of the Automatic Stay Provisions of the Bankruptcy Code by Parties Other Than the Federal Government, 153 ALR Fed. 463 (1999 & 2016 Supp.).

Readily ascertainable damages items commonly include value of personal property lost, payment improperly taken, cost of towing, cost of replacement vehicle, lost wages, lost vacation, travel expenses, value of inventory and fixtures sold, alternative transportation expense, alternative housing expense, value of items stolen while dispossessed, mileage to and from attorney's office, and state-court litigation expenses. Id.

More speculative damages have included lost business, loss of promotion in business workplace, and loss of business opportunity. Id.

Emotional distress damages are also commonly the subject of awards of actual damages. E.g., Dawson, 390 F.3d at 1146.

The common element in actual damages awards appears to be the "but for" analysis familiar in tort law. If a consequence

damages under § 362(k)(1), regardless of whether there are financial damages. Dawson, 390 F.3d at 1149.

Three elements are required for emotional distress damages: (1) significant harm; (2) clearly established; and (3) with a causal connection between the stay violation and the harm (as distinct from anxiety and pressures inherent in the bankruptcy process). Snowden, 769 F.3d at 656-57; Dawson, 390 F.3d at 1149.

Evidence probative of the elements of emotional distress damages may come from a wide variety of sources assessed on a case-by-case basis, limited only by the genius of counsel and the Federal Rules of Evidence.

There is the testimony of the individual victims. Medical evidence may be helpful. In addition to experts, family members, friends, or coworkers may testify to manifestations of mental anguish consistent with significant emotional harm. Egregious conduct (such as a gun held to one's head) that logically triggers mental anguish may speak for itself. Or, less-than-egregious circumstances may nevertheless make it obvious that a reasonable person would suffer significant emotional harm. Dawson, 390 F.3d at 1149-50.

In the end, it all adds up to a question of proof for the trier of fact. If the court, in its capacity as trier of fact, is persuaded that significant harm has been clearly established

§ 362(k)(1) remedy and encompass fees reasonably incurred in prosecuting a damages action for automatic stay violation and defending it on appeal. America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1099-1101 (9th Cir. 2015) (en banc), overruling Sternberg v. Johnson (In re Johnson), 595 F.3d 937 (9th Cir. 2010).

The limiting principle is a rule of reason: the court has discretion to reject fees and costs not reasonably incurred. Schwartz-Tallard, 803 F.3d at 1101.

E

"Appropriate circumstances" for a punitive damages award, also assessed on a case-by-case basis, entail "some showing of reckless or callous disregard for the law or the rights of others." Bloom, 875 F.2d at 228.

This "reckless-or-callous-disregard" standard may be established by proof of conduct that is malicious, wanton, or oppressive. Snowden, 769 F.3d at 657.

Since the "reckless-or-callous-disregard" standard is a lesser degree of conduct than actual bad faith, it follows that proof of Bloom actual "bad faith" conduct suffices as "appropriate circumstances" for § 362(k)(1) punitive damages.

An award of punitive damages is a matter of discretion

A

As the Ninth Circuit explained in Dawson, the choice of Congress to limit the § 362(k)(1) damages remedy to individuals signals a special interest in "redressing harms that are unique to human beings." Dawson, 390 F.3d at 1146.

Harms that are unique to human beings are normally the subject of tort law. There is a rich body of primarily state common law regarding tort damages. But those common law principles merely inform the analysis of § 362(k)(1) damages, which are a creation of federal statute and, hence, a matter of federal law.

Where, as here, damages are a question of federal law and there is not controlling formal precedent as to fine points, federal courts commonly find influential the tort damages principles articulated in the American Law Institute's Restatements of Torts.

Thus, for example, the Supreme Court in addressing the question of punitive damages in the context of 42 U.S.C. § 1983 looked to the Restatement (Second) of Torts and to Professor Prosser's treatise on torts to note that punitive damages are intended to punish the wrongdoer for intentional or malicious acts and to deter that wrongdoer and others from similar extreme conduct. Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67

B

Emotional harm refers to impairment or injury to a person's emotional tranquility. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 45 (2012).

Emotional harm covers a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, and depression. Id. cmt a. As will be seen, the evidence in this case clearly establishes all seven of those mental states in each of the plaintiffs.

Emotional harm that produces bodily harm may lead to compensable physical injury. Id. cmt b. Bodily harm resulting from emotional harm is implicated in this case.

C

One of the risks that a willful stay violator assumes is that an individual victim will be abnormally vulnerable to emotional distress and to abnormal consequences.

The tort-like nature of damages provided by Congress for injured individuals under § 362(k)(1) means that the so-called "thin-skull" or "eggshell plaintiff" rule applies. That rule means that the willful stay violator takes the victim as found.

This concept is in the mainstream of the law of torts. Formally stated, when an actor's conduct causes harm to a person

Here, the stay violations were visited upon individuals who had already endured eighteen months of trying to deal with Bank of America in an effort to obtain a mortgage modification. Throughout that period, Bank of America was playing, in bad faith, a "dual tracking" game of talking loan modification while actually moving towards foreclosure. That process was so trying that it produced in the Sundquists a state of battle-fatigued demoralization.

The battle fatigue existing at the time of the stay violation is relevant to assessing the magnitude of the emotional distress inflicted by Bank of America after the stay violations occurred. While the cause of the Sundquists' preexisting conditions are not relevant, there is irony and justice inherent in the fact that Bank of America itself caused those fragile states of mind that did not respond well to the bank's stay violations.

D

The nature of the evidence adduced at the trial of this adversary proceeding is worthy of separate comment.

Although there are medical aspects to the plaintiffs' case regarding their physical and mental condition as to which one ordinarily would expect corroborating expert medical opinion

maintained in which she articulated deeply personal thoughts,[57] introspections, and embarrassing facts, as they were occurring.[58]

The medical aspects are but one example of thin evidence regarding damages. Another example of sparse evidence relates to lost business.

While experienced litigation lawyers would regard the incomplete evidentiary presentation as risky, Dawson unambiguously permits proof of significant harm to be established by testimony alone and by reference to egregious conduct. Dawson, 390 F.3d at 1149-50. In such circumstances, everything turns on the degree to which the trier of fact is persuaded by the evidence that is presented.

Here, the court, in its capacity as trier of fact, found Renée Sundquist to be an exceptionally credible witness. She displayed considerable courage in revealing her very private

---

[57]If this case ultimately needs to be re-tried following an appeal, the evidentiary presentation regarding damages likely would be more thorough.

[58]The 494-paragraph Renée Sundquist Declaration, which the court has in its discretion made part of the record, is presented in a more complete and readable form in Defendant's exhibits OOO-VVV, because it is in the format in which it was originally written on a computer. Before oral argument commenced, the court noted that those exhibits had not been admitted and proposed admitting them and offered Bank of America an opportunity to cross examine her further. Bank of America's counsel agreed to

journal and exposing herself to cross-examination and public exposure of her all-too-human traits. The journal, which squares with other objectively ascertainable facts in a manner that confirms its veracity, corroborates her testimony in a manner that permits one to follow her state of physical and emotional distress as the relevant events transpired.[59] The court believed her testimony.

Likewise, the court believed the testimony of Erik Sundquist regarding his physical and mental state.

Bank of America did not, with the exception of testimony about the term and rate of the lease executed when they moved, call into question the credibility of the Sundquists' testimony and did not present evidence to counter their testimony.

In short, although the evidence is lacking in specifics as to such special damages as medical bills and legal bills, the evidence is adequate to enable resolution of the overall stay violation dispute, albeit that some components of actual damages will be less than what might have been proved with more precise evidence.

E

Why on Earth would Bank of America be so passive aggressive with the Sundquists and so reluctant to reach closure with them?

an annual pace of $35,093.64 on the $584,893.97 principal balance is higher than what would result if the note were to be paid in full and the funds lent to another borrower.

Second, the collateral is in a premium location in a gated community and is likely to be sufficient to cover the full debt indefinitely. When Bank of America foreclosed in 2010, it bid the full amount of the debt as if it believed the residence was worth at least $584,893.97; property values have since rebounded to a level that likely is greater than the debt.

Bank of America has little financial incentive to kill a goose that keeps laying 6 percent golden eggs when the federal funds rate is 0.39 percent[60] and the average mortgage rate is 3.45 percent for a 30-year fixed rate.[61]

IV

The "willful violation" predicate for an award of actual damages under § 362(k)(1) has been satisfied. This court is persuaded by the preponderance of evidence that Bank of America acted willfully in all of its actions, beginning June 15, 2010, and also is persuaded that all such actions were intentional.

A

Every act by Bank of America taken after June 14, 2010, was

taken with notice of the chapter 13 case. Bank of America concedes that it received verbal notification of the case on June 14. Its computer records reflect that on June 16 it coded the loan as in bankruptcy as of June 14. It even filed in the case a Request for Service of Notice. Dkt. # 14 (July 1, 2010).

Notice of the chapter 13 case filing equates with notice of the automatic stay. Leetien, 309 F.3d at 1215.

"Internal disorder" does not excuse noncompliance with the automatic stay. Leetien, 309 F.3d at 1215 (creditor blames its process server).

Bank of America's explanation that it took 48-hours for it to enter into its computer a code indicating that the Sundquists had filed a bankruptcy case is unavailing and not persuasive.

The my-computer-made-me-do-it excuse is merely a form of the sort of "internal disorder" that is no defense. Assoc. Credit Servs., Inc, v. Campion, 294 B.R. 313, 317 (9th Cir. BAP 2003).

A business organization that elects to use computers to control acts that are in the line of fire of the automatic stay is no less exposed to damages for "willful" stay violations than entities that rely on real people to direct action. In other words, Bank of America is responsible for (1) the structure of its software and procedures, (2) the accuracy and timeliness of data entry and implementation, and (3) the efficiency and

than six willful stay violations over a period of more than two months, each of which exacerbated its predecessors. There comes a point at which this case is reminiscent of Watergate: the denial and cover-up becomes worse than the crime.

1

The first stay violation - the June 15, 2010, trustee's sale the day after the June 14 chapter 13 bankruptcy case filing - might, if promptly and voluntarily reversed as a mere oversight or mistake, have yielded only negligible damages. But that is not what happened.

Everything that follows is the fruit of the poisoned foreclosure.

On June 16, 2010, Bank of America ordered counsel to initiate eviction proceedings in violation of the automatic stay.

On June 23, 2010, Bank of America's agent executed the trustee's deed effectuating the June 15 foreclosure sale to itself.

On June 25, 2010, Bank of America's agent recorded the trustee's deed in the Placer County records.

On July 8, 2010, Bank of America caused a Notice to Quit the premises to be sent to the Sundquists.

On July 23, 2010, Bank of America caused an unlawful

In addition, on multiple occasions throughout July, August, and September, Bank of America caused its agents to enter without permission the gated community in which the premises are located to trespass, surveil, and harass the Sundquists in a fashion that so thoroughly spooked them that they felt compelled to move.

In this respect, Bank of America crossed the line from passive "inspection" that does not ordinarily offend the automatic stay to active intimidation that does violate it.

The behavior of Bank of America's agents in overtly tailing the Sundquists' vehicle in a threatening manner and beating on a sliding door adjacent to a child who was practicing piano goes far beyond what is appropriate for the usual monthly "drive-by inspection" checks on properties in default.

Rather, Bank of America's agents were treating the Sundquists as criminals. That conduct is consistent with Bank of America acting as if it were the owner of the residence as a result of the June 15, 2010, foreclosure and that the Sundquists were illegal squatters who deserved to be intimidated.

Bank of America's program of intimidation and unlawful detainer succeeded in driving the Sundquists out of the property. Having been surveilled, tailed, and harassed, they were frightened into a precipitous move in fear that the sheriff

acts in furtherance of the June 15, 2010, foreclosure that helped frighten the Sundquists into moving into a rented residence.

These "willful" violations of the automatic stay were intentional and are separate and distinct from the six violations previously identified.

Thus, the stay violations were "willful" within the meaning of § 362(k)(1) so as to be eligible for a damages award, which subdivides into actual damages and punitive damages.

As a matter of procedure, the pleadings are amended to conform to the evidence adduced at trial in accordance with Federal Rule of Civil Procedure 15(b)(2).

The Second Amended Complaint alleges only two counts of stay violation - the foreclosure in violation of the automatic stay and the filing of the unlawful detainer action in violation of the automatic stay. But the evidence presented by both parties focused on the entire course of events that includes all of the other stay violations identified above.

While these other stay violations are arguably capable of being subsumed within the two counts in the Second Amended Complaint, the reality is that they are separate stay violations that deserve to be treated as such.

V

As noted above, actual damages include both physical damages and economic damages, all of which must be established by a preponderance of evidence persuasive to the trier of fact.

A

In light of the focus by Congress on damages to individuals, damages for individuals who are victims of automatic stay violations are assessed in accordance with tort damage principles, which primarily are addressed to injuries suffered by people. Here, one is looking for the fruit of the poisoned foreclosure. The useful shorthand is "but for" causation.

In the context of automatic stay violations, many of the harms compensable as actual damages are "economic" damages.

By "economic" damages this court applies the definition of "economic loss" adopted by the American Law Institute in its current project to revise the Restatement of Torts to address liability for economic harm: "'economic loss' is pecuniary damage not arising from injury to the plaintiff's person or from physical harm to the plaintiff's property." RESTATEMENT OF THE LAW (THIRD) TORTS: LIABILITY FOR ECONOMIC HARM, § 2 (Tentative Draft No. 1, approved 2012).

moved back into their home.

They testified that the term of the rental was hastily arranged over the internet, that the net rental expense exceeded $4,000.00,[62] that they agreed to stay for more than one year, and that they ultimately returned to their home out of a sense of a duty to mitigate damages.

Bank of America questions the accuracy of the testimony regarding rent. It unearthed a twelve-month lease for $3,900.00 per month. The lease included extension provisions for subsequent years with a 5 percent escalator (to $4,095.00).

The lease also required the Sundquists to maintain the pool and garden and have a professional do the work and required them to water garden, landscaping, trees, and shrubs. It reflects that the Sundquists also purchased a one-year home warranty. These items easily account for the difference between the nominal rent in the lease and the net rental expense asserted by the Sundquists.

Hence, the court (finding the Sundquist testimony credible) concludes that the net monthly rental expense was $4,000.00 for the first year and $4,200.00 thereafter.

Bank of America questions the extent to which the Sundquists mitigated damages. It argues that the one-year initial term of the lease means that they could have vacated the rental and moved

recognizes that it is not appropriate to exploit a stay-violation liability situation merely to pocket a higher recovery. Eskanos & Adler v. Roman (In re Roman), 283 B.R. 1, 12 (9th Cir. BAP 2002); cf. Dawson, 390 F.3d at 1152 (stay violation attorney's fees must be reasonable); Computer Commc'ns, Inc. v. Codex Corp. (In re Computer Commc'ns, Inc.), 824 F.2d 725, 731 (9th Cir. 1987) (stay violation contempt damages must be reasonable).

The § 362(k)(1) mitigation obligation is a duty to act reasonably under the circumstances. Roman, 283 B.R. at 12. The court determines what is reasonable as a matter of discretion. Dawson, 390 F.3d at 1145 & 1152; Roman, 283 B.R. at 7. It normally is not reasonable to exploit a stay violation primarily as a profit-making opportunity.

The relevant circumstances here include the on-going threats by Bank of America to foreclose, the unresolved arrearage with the HOA and the $20,000 penalty that the HOA imposed for events that occurred while Bank of America held title to the property, and Bank of America's unwillingness to provide any relief for the personal property stolen during its watch. These problems created a cloud of uncertainty about whether the Sundquists could prudently return to the house.

This court is persuaded that not returning to the premises until nine months after first learning that the foreclosure had