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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-16-1229-FLTi
) NV-16-1238-FLTi
CHRISTOPHER MICHAEL MARINO) (Cross-Appeals)
and VALERIE MARGARET MARINO,)
) Bk. No. 3:13-bk-50461-BTB
Debtors.)

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

v.)

OPINION

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

Argued and submitted on December 1, 2017
at Reno, Nevada

Filed - December 22, 2017

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Christopher A.J. Smith of Wright, Finlay & Zak,
LLP argued for appellant/cross-appellee Ocwen Loan
Servicing, LLC; Christopher P. Burke argued for
appellees/cross-appellants Christopher Michael
Marino and Valerie Margaret Marino.

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

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

1 FARIS, Bankruptcy Judge:

2
3 **INTRODUCTION**

4 Chapter 7¹ debtors Christopher Michael Marino and Valerie
5 Margaret Marino sought sanctions against creditor Ocwen Loan
6 Servicing, LLC ("Ocwen") for its violation of the discharge
7 injunction. The bankruptcy court held a trial and awarded the
8 Marinos \$119,000 - one thousand dollars for each improper
9 contact.

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

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

25
26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 district court.

2 **FACTUAL BACKGROUND**

3 **A. The Marinos' chapter 7 petition**

4 The Marinos filed a chapter 7 bankruptcy petition in March
5 2013 in the United States Bankruptcy Court for the District of
6 Nevada. They scheduled real property located in Verdi,
7 California (the "Property") and noted, "DEBTOR TO SURRENDER."²
8 GMAC Mortgage held a secured claim arising from a second mortgage
9 on the Property.

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

15 **B. Written correspondence and telephone calls from Ocwen**

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

21 Some of the items of correspondence contained disclaimers
22 that were located at the bottom of a page or end of the letter in
23 small font. A typical disclaimer read: "If you have filed for
24 bankruptcy and your case is still active and/or if you received a
25

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

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

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

8 **C. The motion for contempt**

9 In November 2015, the Marinos filed a motion to reopen their
10 case and to hold Ocwen in contempt for its alleged violation of
11 the discharge injunction ("Motion for Contempt"). They argued
12 that Ocwen knowingly and willfully violated the discharge
13 injunction by sending the written correspondence after the
14 Marinos' discharge. They identified twenty-two instances of
15 allegedly improper correspondence³ whereby Ocwen sought to
16 collect from the Marinos personally.

17 In opposition to the Motion for Contempt, Ocwen argued that
18 sanctions were not warranted because the letters were not meant
19 to collect any debt against the Marinos personally and complied
20 with federal and state law. It said that fourteen of the twenty-
21 two letters contained disclaimer language stating that the
22 letters were intended for informational purposes only, not to
23 collect any debt. It argued that billing statements did not
24 violate the discharge injunction under California law because
25 they sought only voluntary payments. It contended that the
26

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

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

3 **D. Evidentiary hearing**

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

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

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

25 Mr. Marino said that the notices from Ocwen took a toll on
26 his marriage and caused him to fight with his wife. He said that
27 he suffered from anxiety attacks and felt humiliated, tormented,
28 and harassed. He testified that the stress eventually made them

1 contemplate divorce, although they managed to preserve their
2 marriage.

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

12 Q Okay. I don't want to go -- it sounds like you got
13 anywhere from 60 to 100 calls. Does that sound --

14 A It was a lot of calls, yes.

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

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

26 Ms. O'Kane said that, following the discharge, the Marinos
27 were not able to move on with their lives, because "the calls
28 [from creditors] did not stop." She said that the calls made

1 Mrs. Marino cry; when Ms. O'Kane on occasion picked up such
2 calls, the caller would assume that she was Mrs. Marino and
3 repeatedly ask for payment.

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

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

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

24 The bankruptcy court ordered additional briefing regarding
25 the correspondence, asking Ocwen to cite the specific statute or
26 regulation authorizing each document. Ocwen cited the applicable
27 regulatory or statutory basis that allegedly applied to some of
28 its correspondence: 12 C.F.R. § 1024.37(c) (required notice of

1 force-placed insurance),⁴ 12 U.S.C. §§ 2605 and 2609 (required
2 notice of escrow account balance),⁵ 15 U.S.C. § 1692g (required
3 notice of debt validation information),⁶ and California Civil

4
5 ⁴ Before charging for force-placed insurance, a servicer
6 must:

7 (i) Deliver to a borrower or place in the mail a
8 written notice containing the information required by
9 paragraph (c)(2) of this section at least 45 days
before a servicer assesses on a borrower such charge or
fee;

10 (ii) Deliver to the borrower or place in the mail a
11 written notice in accordance with paragraph (d)(1) of
12 this section

13 ⁵ 12 U.S.C. § 2609(b) states:

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

19 ⁶ A debt collector shall send the consumer a written notice
20 stating:

21 (1) the amount of the debt;

22 (2) the name of the creditor to whom the debt is owed;

23 (3) a statement that unless the consumer, within thirty
24 days after receipt of the notice, disputes the validity
25 of the debt, or any portion thereof, the debt will be
assumed to be valid by the debt collector;

26 (4) a statement that if the consumer notifies the debt
27 collector in writing within the thirty-day period that
28 the debt, or any portion thereof, is disputed, the debt

(continued...)

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

⁶(...continued)

collector will obtain verification of the debt or a
copy of a judgment against the consumer and a copy of
such verification or judgment will be mailed to the
consumer by the debt collector; and

(5) a statement that, upon the consumer's written
request within the thirty-day period, the debt
collector will provide the consumer with the name and
address of the original creditor, if different from the
current creditor.

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

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

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

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

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

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

(continued...)

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

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

18 The court found the disclaimer language ineffective. It
19 said that the disclaimers stated, "if you have filed for
20 bankruptcy" and "if you have received a discharge," even though

21 ⁹(...continued)

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

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

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

1 Ocwen knew that the Marinos had filed for bankruptcy and received
2 a discharge. It said that creditors that know that a debtor has
3 filed for bankruptcy, received a discharge, and surrendered their
4 home do not have "the right to have their computer gen out [sic]
5 these various letters, which do comply, at least in some of the
6 provisions, with the various notification statutes, but all of
7 which include language which is not included in those statutes,
8 which, to varying degrees of urgency, want the debtor to
9 undertake a new obligation or pay them money."

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

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

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

28 Ocwen timely appealed the Sanctions Order.

1 **E. The motion for reconsideration**

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

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

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

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

20 **JURISDICTION**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
23 § 158.

24 **ISSUES**

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

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

STANDARDS OF REVIEW

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

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

We review for abuse of discretion the bankruptcy court's decision to impose sanctions for contempt. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003); Nash v. Clark Cty. Dist. Atty's Office (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP 2012). Similarly, we review the bankruptcy court's denial of a motion for reconsideration for abuse of discretion. Cruz v. Stein Strauss Tr. #1361, PDQ Invs., LLC (In re Cruz), 516 B.R. 594, 601 (9th Cir. BAP 2014) (citing Tracht Gut, LLC v. Cty. of L.A. Treasurer & Tax Collector (In re Tracht Gut, LLC), 503 B.R. 804, 810 (9th Cir. BAP 2014)). To determine whether the bankruptcy court has abused its discretion, we conduct a two-step

1 inquiry: (1) we review de novo whether the bankruptcy court
2 “identified the correct legal rule to apply to the relief
3 requested” and (2) if it did, whether the bankruptcy court’s
4 application of the legal standard was illogical, implausible, or
5 without support in inferences that may be drawn from the facts in
6 the record. United States v. Hinkson, 585 F.3d 1247, 1262-63 &
7 n.21 (9th Cir. 2009) (en banc).

8 DISCUSSION

9 A. Ocwen’s appeal

10 1. The bankruptcy court may sanction a creditor that 11 knowingly and willfully violates the discharge injunction.

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

21 “A party who knowingly violates the discharge injunction
22 under § 524(a)(2) can be held in contempt under § 105(a).” In re
23 Taggart, 548 B.R. at 286. The Ninth Circuit follows a two-part
24 test to determine whether the contemnor knowingly and willfully
25 committed a violation of the discharge injunction: “the movant
26 must prove that the creditor (1) knew the discharge injunction
27 was applicable and (2) intended the actions which violated the
28 injunction.” Zilog, Inc. v. Corning (In re Zilog, Inc.), 450

1 F.3d 996, 1007 (9th Cir. 2006) (quoting Renwick v. Bennett (In re
2 Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)).

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

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

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

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

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

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

32 "The standard for finding a party in civil contempt is well
33 settled: The moving party has the burden of showing by clear and

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

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

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

22 **a. The bankruptcy court properly found that the**
23 **written correspondence violated the discharge**
24 **injunction.**

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

28 One of the primary purposes of the Bankruptcy Act is to
relieve the honest debtor from the weight of oppressive
indebtedness, and permit him to start afresh free from
the obligations and responsibilities consequent upon
business misfortunes. This purpose of the act has been

1 again and again emphasized by the courts as being of
2 public as well as private interest, in that it gives to
3 the honest but unfortunate debtor who surrenders for
4 distribution the property which he owns at the time of
5 bankruptcy, a new opportunity in life and a clear field
6 for future effort, unhampered by the pressure and
discouragement of pre-existing debt. The various
provisions of the Bankruptcy Act were adopted in the
light of that view and are to be construed when
reasonably possible in harmony with it so as to
effectuate the general purpose and policy of the act.

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

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

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

19 The discharge has one important limit: it bars only efforts
20 to collect debts "as a personal liability of the debtor."
21 § 524(a)(2). This means that secured creditors can foreclose
22 their liens after the discharge is entered. Johnson v. Home
23 State Bank, 501 U.S. 78, 83 (1991) (explaining that a discharge
24 extinguishes only the personal liability of the debtor, and that
25 a creditor's right to foreclose on a mortgage securing the debt
26 survives or passes through the bankruptcy).

27 This creates some tension. While the discharge generally
28 prohibits creditors from communicating with discharged debtors in

1 an effort to extract payment, lienholders usually must
2 communicate with debtors in order to enforce their liens. For
3 example, a foreclosure of a mortgage without notice to the
4 mortgagor would likely be invalid even if the mortgagor were not
5 personally liable for the mortgage debt.

6 The way to reconcile this tension is to hold that a
7 lienholder may communicate with a discharged debtor only to the
8 extent necessary to preserve or enforce its lien rights, and may
9 not attempt to induce the debtor to pay the debt. As we have
10 held, "the creditor may not use a contact to 'coerce' or 'harass'
11 the debtor." In re Nash, 464 B.R. at 881; see United States v.
12 Holmes (In re Holmes), BAP No. CC-94-2001-HMV, 76 A.F.T.R.2d
13 95-7925 (9th Cir. BAP 1995) ("A secured creditor cannot, under
14 the guise of enforcing an unavowed lien, attempt to coerce the
15 debtor into paying a discharged debt. . . . Even if a creditor
16 threatens only to enforce its surviving lien, that threat will
17 violate the discharge injunction if the evidence shows that the
18 threat is really an effort to coerce payment of the underlying
19 discharged debt." (citations omitted)).

20 We agree with the bankruptcy court that Ocwen's
21 communications went far beyond what was necessary to protect or
22 enforce Ocwen's lien rights and that they also were meant to
23 induce the Marinos to make payments post-discharge. The notices
24 and statements gave the impression that the Marinos were still
25 liable for the mortgage payments, taxes, and force-placed
26 insurance premiums. Even if some of the notices may not have
27 violated the discharge injunction, the bankruptcy court correctly
28 noted that the cumulative effect of all of the letters demanding

1 money created the perception that the Marinos needed to pay
2 Ocwen. See In re Nordlund, 494 B.R. 507, 519 (Bankr. E.D. Cal.
3 2011) ("Even though some of [the bank's] written communications
4 to the debtors seem innocuous, when [the bank's] 24 written
5 communications over a 10-month period are considered in context
6 and as a whole, a more disturbing picture is painted. Even if
7 each letter from [the bank] had acknowledged the debtors'
8 discharge and stated that [the bank] would take no action against
9 the debtors personally to collect its three home loans, the sheer
10 volume and repetitiveness of [the bank's] letters communicated
11 just the opposite."). Therefore, the letters violated the
12 discharge injunction.

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

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

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

28 Third, even the small number of letters that acknowledged

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

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

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

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

27 Second, some of the statutes and regulations cited by Ocwen
28 simply do not apply to its correspondence. For example, Ocwen

1 cites 15 U.S.C. § 1692g(a) to excuse the debt validation notices
2 sent by Western Progressive (on Ocwen's behalf), but the Fair
3 Debt Collection Practices Act generally does not apply to
4 mortgage foreclosures. See Ho v. ReconTrust Co., NA, 858 F.3d
5 568, 572 (9th Cir. 2017) ("actions taken to facilitate a
6 non-judicial foreclosure, such as sending the notice of default
7 and notice of sale, are not attempts to collect 'debt' as that
8 term is defined by the FDCPA").

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

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

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

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

21 Ocwen also argues that the bankruptcy court should not have
22 considered the telephone calls that it made to the Marinos,
23 because (1) the issue of calls was not raised in the Motion for
24 Contempt, and (2) the evidence provided on reconsideration shows
25 that Ocwen made only thirty-five post-discharge calls, rather
26 than the one hundred calls found by the court. We reject both
27
28

1 arguments.¹⁰

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

10 Moreover, Ocwen never objected during trial to any testimony
11 regarding telephone calls. Thus, it waived any such objection.
12 Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP
13 2007) ("A party who fails to object to evidence at trial waives
14 the right to raise admissibility issues on appeal." (citing Price
15 v. Kramer, 200 F.3d 1237, 1251-52 (9th Cir. 2000))).

16 The Marinos introduced evidence at trial that Ocwen
17 repeatedly called them to request payment, even though they
18 understandably could not offer a definite number of calls.

19
20 ¹⁰ Ocwen does not argue on appeal that the court erred in
21 finding that the calls violated the discharge injunction. While
22 we note that California state law requires the creditor to
23 attempt to contact the debtor concerning the default, see Cal.
24 Civ. Code § 2923.5, the only evidence in the record about the
25 content of the phone calls is the Marinos' and Ms. O'Kane's
26 testimony about repeated demands for payment. There is no
27 evidence that the content of the calls complied with the state
28 statutes. Ocwen did not offer a script that it requires its
staff to use or any other evidence of what its staff said during
the calls. Rather, it appears that the calls simply and
repeatedly demanded payment post-discharge. Nor does it appear
that a so-called "mini-Miranda warning," if given, would bring
Ocwen's telephone calls into compliance, inasmuch as the FDCPA
generally does not apply to foreclosure proceedings.

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

11 In its Motion for Reconsideration, Ocwen provided the call
12 log from the Marinos' file that purported to show that Ocwen only
13 called the Marinos thirty-five times during the applicable
14 period. But "a motion for reconsideration should not be
15 granted, absent highly unusual circumstances, unless the district
16 court is presented with newly discovered evidence, committed
17 clear error, or if there is an intervening change in the
18 controlling law." A [Civil] Rule 59(e) motion may **not** be used to
19 raise arguments or present evidence for the first time when they
20 could reasonably have been raised earlier in the litigation."
21 Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th
22 Cir. 2000) (quoting 389 Orange St. Partners v. Arnold, 179 F.3d
23 656, 665 (9th Cir. 1999)). The call logs were available to Ocwen
24 prior to trial and were referenced by Ocwen's witness; the
25 bankruptcy court even expressed its displeasure that Ocwen did
26 not introduce the call logs into evidence but only relied on
27 Mr. Prudent's testimony about their contents. The logs were not
28 "newly discovered evidence" within the meaning of Civil Rule

1 59(e). See Feature Realty, Inc. v. City of Spokane, 331 F.3d
2 1082, 1093 (9th Cir. 2003) ("Evidence 'in the possession of the
3 party before the judgment was rendered is not newly discovered.'" (citation omitted)).

4
5 There is another independently sufficient reason to affirm.
6 Ocwen failed to provide us with a transcript of the hearing on
7 the Motion for Reconsideration. See Clinton v. Deutsche Bank
8 Nat'l Tr. Co. (In re Clinton), 449 B.R. 79, 83 (9th Cir. BAP
9 2011) ("Without a transcript, it is impossible to determine why
10 the bankruptcy court ruled as it did. Therefore, we have little
11 choice but to exercise our discretion and summarily affirm the
12 bankruptcy court's decision[.]").

13 **3. The damages were reasonable and supported by the**
14 **evidence.**

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

18 The Ninth Circuit has allowed emotional distress damages for
19 automatic stay violations when the debtor "(1) suffer[s]
20 significant harm, (2) clearly establish[es] the significant harm,
21 and (3) demonstrate[s] a causal connection between that
22 significant harm and the violation of the automatic stay (as
23 distinct, for instance, from the anxiety and pressures inherent
24 in the bankruptcy process)." Snowden v. Check Into Cash of Wash.
25 Inc. (In re Snowden), 769 F.3d 651, 657 (9th Cir. 2014) (quoting
26 Dawson v. Wash. Mutual Bank, F.A. (In re Dawson), 390 F.3d 1139,
27 1149 (9th Cir. 2004)) (discussing violation of the automatic
28 stay). The same rule should apply to violations of the discharge

1 injunction. See In re Nordlund, 494 B.R. at 523 (applying
2 Dawson's three-part test to violations of the discharge
3 injunction); C & W Asset Acquisition, LLC v. Feagins (In re
4 Feagins), 439 B.R. 165, 178 (Bankr. D. Haw. 2010) ("Although
5 Dawson considered the remedy for violations of the automatic stay
6 under section 362(k)(1), the same reasoning applies to willful
7 violations of the discharge injunction.").

8 Ocwen contends that the bankruptcy court's award of \$1,000
9 per contact was arbitrary and that the total award should not
10 have exceeded "several thousand dollars" in accordance with Dyer.
11 But Ocwen ignores the fact that the bankruptcy court awarded
12 compensatory damages for emotional distress, not punitive
13 sanctions. The limit on punitive sanctions discussed in Dyer¹¹
14 does not apply to a compensatory award.

15 Ocwen also argues that the Marinos' emotional distress
16 predated the post-discharge communications and was not caused by
17 its violation of the discharge injunction. But the Marinos and
18 Ms. O'Kane testified that the Marinos' health and relationship
19

20
21 ¹¹ Ocwen cites In re Martinez, 561 B.R. 132, 173 (Bankr. D.
22 Nev. 2016), for the proposition that a "\$1,000 per violation
23 figure can be arbitrary as it does not take into account the
24 circumstances of the individual victim, and therefore, would not
25 compensate for the actual damages suffered." But the Martinez
26 court also stated that "[a] \$1,000 per violation figure can be
27 too high in some cases, but too low in others. Repeated attempts
28 by a creditor to collect a discharged debt may cause little
concern to an individual who is represented by effective
bankruptcy counsel, but may be gut wrenching to a pro se debtor
who thought he had received a fresh start." Id. at 173 n.47. In
this case, the bankruptcy court heard testimony from the Marinos
about how Ocwen's violations affected them. The court's award
did "take into account the circumstances of" the Marinos.

1 improved after they filed for bankruptcy but deteriorated again
2 when Ocwen began contacting them post-discharge. The bankruptcy
3 court weighed the evidence and determined that Ocwen's violation
4 of the discharge injunction caused the Marinos' injury. The
5 court did not clearly err in assigning blame to Ocwen.

6 **B. The Marinos' cross-appeal**

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

10 While the Ninth Circuit has stated that the bankruptcy
11 courts are prohibited from assessing any "serious" punitive
12 damages, it has left open the possibility of "relatively mild
13 noncompensatory fines." In re Dyer, 322 F.3d at 1193. We have
14 previously stated that, "[i]f a bankruptcy court finds that a
15 party has willfully violated the discharge injunction, the court
16 may award actual damages, punitive damages and attorney's fees to
17 the debtor." In re Nash, 464 B.R. at 880 (citing Espinosa v.
18 United Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir.
19 2008), aff'd, 559 U.S. 260 (2010)).

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

24 Some bankruptcy courts understand Dyer to mean that a
25 bankruptcy court may not allow "punitive damages" for a violation
26 of the discharge injunction but may award "relatively mild
27 noncompensatory fines." See, e.g., In re Martinez, 561 B.R. at
28 175 ("this court has no authority to award punitive damages for a

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

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

22 Alternatively, the bankruptcy court might choose to issue
23 proposed findings and a recommended judgment on punitive damages
24

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

1 to the district court or refer the matter to the district court
2 for criminal contempt proceedings. See, e.g., Exec. Benefits
3 Ins. Agency v. Arkison, 134 S. Ct. 2165, 2173 (2014) (When faced
4 with "core" claims that cannot be adjudicated by the bankruptcy
5 court under Stern v. Marshall, 564 U.S. 462 (2011), "[t]he
6 bankruptcy court should hear the proceeding and submit proposed
7 findings of fact and conclusions of law to the district court for
8 de novo review and entry of judgment."); In re Dyer, 322 F.3d at
9 1194 n.17 ("We do not preclude the possibility that a bankruptcy
10 court could initiate criminal contempt proceedings by referring
11 alleged contempt to the district court. Nor do we address
12 whether the district court could refer those proceedings back to
13 the bankruptcy court if the parties so consented."). The
14 restriction on the bankruptcy court's power to grant punitive
15 damages and punish contempt stems from the fact that bankruptcy
16 judges lack life tenure. District judges do not face that
17 restriction. See In re Dyer, 322 F.3d at 1194.

18 **CONCLUSION**

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