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UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re

**Andrew Charles Kuffner
Anani Marie Kuffner,**

Debtors.

Case No. 12-36993-rld7

MOTION FOR CONTEMPT

MOTION

Under 11 U.S.C. §§ 105 and 524 and this Court's inherent and equitable power, Andrew Charles Kuffner (Kuffner) moves for an order of contempt and money judgment against Ocwen Loan Servicing, LLC (Ocwen) based on its unwanted collection calls after bankruptcy that served no legitimate purpose.

Ocwen relentlessly harassed Kuffner after bankruptcy with dozens and dozens of unwanted collection calls, sometimes 6 calls per day, for over a year, that served no legitimate purpose, despite Ocwen's knowledge **(1)** of this Court's discharge order, **(2)** that Kuffner had a bankruptcy attorney, **(3)** that Kuffner wished to receive no further calls, **(4)** that pre-foreclosure proceedings had already been commenced, **(5)** that Kuffner had already moved out of the property, **(6)** that Kuffner's intent was to surrender the property, **(7)** that Kuffner had no interest in reaffirmation or modification, and **(8)** that Kuffner was not eligible for deed in lieu options.

Under LBR 9020-1, Kuffner prays for specific relief as follows:

- A. IT IS ORDERED** that Ocwen is held in contempt of the discharge injunction.
- B. IT IS ORDERED AND ADJUDGED** that Ocwen must pay Kuffner compensation for the harm caused by its discharge violation.
- C. IT IS ORDERED AND ADJUDGED** that Ocwen must reimburse the law firms of Olsen Daines PC and Scott Hutchinson for their reasonable fees and costs in this contempt proceeding.

QUESTION TO BE DECIDED

At evidentiary hearing, will clear and convincing evidence prove that Ocwen willfully violated the discharge injunction? (yes)

RELEVANT FACTS

By September 2012, Kuffner had stopped making his home mortgage payments, moved out of his home, and surrendered his property in bankruptcy. Kuffner decl. ¶ 2.

On February 8, 2013 this Court discharged Kuffner's mortgage debt. Doc. 35. Ocwen learned of the discharge order when it the acquired servicing rights for Kuffner's mortgage debt in February 2013. Kuffner decl. ¶ 3.

After learning of the discharge order, Ocwen harassed Kuffner with dozens and dozens of unwanted collection calls for over a year. Kuffner decl. ¶¶ 4-5. Ocwen's unwanted calls served no legitimate purpose, as Ocwen knew of this Court's discharge order, knew that Kuffner had a bankruptcy attorney, knew that Kuffner wished to receive no further calls, knew that pre-foreclosure proceedings had already been commenced, knew that Kuffner had already moved out of the property, knew that Kuffner's intent was to surrender the property, knew that Kuffner had no interest in reaffirmation or modification, and knew that Kuffner was not eligible for deed in lieu options. *Id.* at ¶ 3.

LEGAL POINTS AND AUTHORITIES

Mortgage servicers may generally collect voluntary payments and discuss voluntary loan options with borrowers after bankruptcy. However, the discharge order prohibits unwanted calls that serve no legitimate purpose.

1. Authority to Enforce the Discharge Order

Section 105 of Title 11 empowers bankruptcy courts to issue orders and judgments as necessary to enforce § 524's discharge order provisions. Bankruptcy courts also possess inherent powers to sanction wrongful practices, so long as the sanctions don't contravene express Code provisions. *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014).

2. Conduct Prohibited by the Discharge Order

Section 524 of Title 11 provides for a broad injunction to ensure debtors receive a fresh start. Alan N. Resnick & Henry J. Sommer, 4 Collier on Bankruptcy ¶524.02[2] (16th ed. 2012).

“[E]ven legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a ‘fresh start’ and are not unfairly coerced into repaying discharged prepetition debt.” *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006).

2.1 Legislative History

Legislative history demonstrates that the purpose of the discharge order was to “eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts.” H.R. Rep. No. 95-595, at 365-66 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6321. The discharge injunction “is intended to insure that once a debt is discharged, the debtor will *not be pressured in any way* to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that.” *Id.* at 366 (emphasis added).

“Given its important role in achieving the Bankruptcy Code’s overall policy aim of giving a debtor a ‘fresh start,’ § 524(a)(2) is an expansive provision that is sensitive to the diversity of ways a creditor might seek to collect a discharged debt.” *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1321 (11th Cir. 2015) (creditor’s proof of claim on discharged debt constituted coercive conduct in violation of § 524(a)(2) even though creditor made no explicit demand for payment to debtor).

2.2 Coercive conduct prohibited

After bankruptcy, mortgage servicers may generally contact borrowers to collect voluntary payments and discuss voluntary loan modifications. *In re Garske*, 287 B.R. 537 (9th Cir. BAP 2002).

However, objectively coercive conduct with respect to discharged debt violates § 524, even in the absence of direct threats or the actual seizure of involuntary payments. *See, e.g., In re Culpepper*, 481 B.R. 650 (Bankr. D. Or. 2012) (*aff'd*, Mosman, J.) (mortgage servicer's unwanted calls after bankruptcy that served no legitimate purpose violated the discharge order).

3. Enforcement of the Discharge Order

In the Ninth Circuit, debtors must enforce discharge orders by filing motions for contempt. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 506-07 (9th Cir. 2002); *Barrientos v. Wells Fargo Bank*, 633 F.3d 1186, 1191 (9th Cir. 2011); Fed. R. Bnkr. P. 9020.

4. Elements of Contempt

Contempt requires proof a creditor (1) had knowledge of a bankruptcy court order and (2) intended conduct that violated the order. *Zi-LOG, Inc. v. Corning*, 450 F.3d 996, 1007 (9th Cir. 2006).

5. Legal Standard for Contempt

To recover sanctions against a creditor, a violation must be proved with clear and convincing evidence. *Renwick v. Bennett, (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002). Creditors are generally entitled to

an evidentiary hearing as to whether they received actual notice of a court order. *Yen v. Pedroche (In re Pedroche)*, 2014 Bankr. LEXIS 4689 (9th Cir. BAP Nov. 10, 2014).

6. Sanctions for Contempt

A willful violation of the discharge order entitles aggrieved debtors to compensatory sanctions including actual damages, mild coercive sanctions, and reimbursed fees and costs through evidentiary hearing. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1197 (9th Cir. 2003); *In re Segal*, BAP No. CC-14-1175-KuPaTa, pg. 19 (9th Cir. BAP Jan. 29, 2015).

A debtor is entitled to recover compensation for emotional harm resulting from a discharge violation, even in the absence of any economic loss. *In re Feldmeier*, 335 B.R. 807, 813-814 (Bankr. D. Or. 2005) (awarding emotional harm damages under section 524 without any economic loss); *In re Culpepper*, 481 B.R. at 655 (same).

ARGUMENT

At evidentiary hearing, clear and convincing evidence will prove that Ocwen willfully violated this Court's discharge order by harassing Kuffner with dozens and dozens of collection calls after bankruptcy that served no legitimate purpose. Kuffer decl. ¶¶ 4-5.

Ocwen has already acknowledged this Court's discharge order applies with respect to Kuffner's debt. *Id.* at ¶ 3. Phone records, voicemails, and Kuffner's testimony will establish that Ocwen harassed him for over a year with autodialed calls, sometimes up to 6 calls a day, after he repeatedly asked Ocwen to stop. *Id.* at ¶ 5.

Ocwen's unwanted calls served no legitimate purpose, as Ocwen knew (1) of this Court's discharge order, (2) that Kuffner had a bankruptcy attorney, (3) that Kuffner wished to receive no further calls, (4) that pre-foreclosure proceedings had already been commenced, (5) that Kuffner had already moved out of the property, (6) that Kuffner's intent was to surrender the property, (7) that Kuffner had no interest in reaffirmation or modification, and (8) that Kuffner was not eligible for deed in lieu options. Kuffner decl. ¶ 3. At evidentiary hearing, Kuffner will testify to the significant annoyance, stress, and anxiety Ocwen's harassment caused him. *Id.* at ¶ 6.

The outcome of this contempt motion is largely compelled by this Court's prior published opinion in *In re Culpepper*, 481 B.R. 650 (Bankr. D. Or. 2012). The *Culpepper* opinion, as affirmed by Judge Mosman, and by which this Court is bound, is on point. In *Culpepper*, a mortgage servicer was held in contempt of the discharge order after harassing a debtor with multiple unwanted calls after bankruptcy. Like Kuffner, the debtor in *Culpepper* surrendered the real property at issue, moved out,

and was not interested in modification options. *In re Culpepper*, 481 B.R. at 660.

Like the mortgage servicer in *Culpepper*, Ocwen should be held in violation of the discharge order based on its unwanted calls after bankruptcy that served no legitimate purpose.

CONCLUSION

Ocwen should be held in contempt of the discharge injunction and Kuffner should be fairly compensated for the harm caused by Ocwen's harassment.

June 10, 2016

RESPECTFULLY FILED,

/s/ Michael Fuller
Michael Fuller, OSB No. 09357
Special Counsel for Debtor
Olsen Daines PC
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Portland, Oregon 97204
michael@underdoglawyer.com
Direct 503-201-4570

CERTIFICATE OF SERVICE

I certify that on the date below, I caused this document and all attachments to be served on creditor at the address below by U.S. Mail, first class regular and certified mail, postage pre-paid, return receipt requested:

**Ocwen Loan Servicing, LLC
c/o R.A. Corporation Service Company
1127 Broadway Street NE Ste 310
Salem, Oregon 97301**

June 10, 2016

/s/ Michael Fuller
Michael Fuller, OSB No. 09357
Special Counsel for Debtor
Olsen Daines PC
US Bancorp Tower
111 SW 5th Ave., Suite 3150
Portland, Oregon 97204
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Direct 503-201-4570

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re

**Andrew Charles Kuffner
Anani Marie Kuffner,**

Debtors.

Case No. 12-36993-rld7

**DECLARATION OF
ANDREW KUFFNER**

**IN SUPPORT OF HIS
MOTION FOR CONTEMPT**

DECLARATION

I, Andrew Kuffner, declare the following under penalty of perjury:

1. I know the facts I am testifying about based on my personal knowledge.
2. By September 2012 I stopped making my home mortgage payments, moved out of my home, and surrendered my property in bankruptcy.
3. Ocwen learned of the discharge order when it the acquired servicing rights for my mortgage debt in February 2013. The document attached as Exhibit 2 is a true and correct copy of a letter from Ocwen acknowledging its receipt of the discharge order in my

DECLARATION OF ANDREW KUFFNER – Page 1 of 2

bankruptcy case. Ocwen knew that I had a bankruptcy attorney, that I wished to receive no further calls, that pre-foreclosure proceedings had already begun, that I had moved out, that my intent was to surrender the property in bankruptcy, that I was not interested in reaffirmation or modification, and that my second mortgage servicer would not agree to deed in lieu.

4. After learning of the discharge order, Ocwen harassed me with dozens and dozens of collection calls that served no legitimate purpose.
5. Ocwen harassed me for over a year with autodialed calls, sometimes up to 6 calls a day, after I repeatedly told Ocwen to stop calling. I have proof of Ocwen's harassment in the form of phone records and voicemails.
6. Ocwen's unwanted calls caused me significant annoyance, stress, and anxiety that I intend to testify about at evidentiary hearing.
7. Under 28 U.S.C. § 1746, I declare under penalty of perjury that this declaration is true and correct.

June 9, 2016


Andrew Kuffner

DECLARATION OF ANDREW KUFFNER – Page 2 of 2



August 28, 2015

Andrew Charles Kuffner
7444 N. Newell
Portland, OR 97203

RE: CFPB File No.: 150819-002508
OLS Account No.: [REDACTED] 7601
Property Address: 15864 SE Chelsea Morning Drive
Happy Valley, OR 97015

Dear Mr. Kuffner:

On behalf of Ocwen Loan Servicing, LLC (Ocwen), the Office of the Consumer Ombudsman would like to thank you for your recent correspondence regarding the above-referenced account. The Consumer Ombudsman's office was created to provide a resource to assist with unresolved concerns and issues.

Ocwen acquired the servicing rights of this account from GMAC Mortgage (GMACM) on February 16, 2013 and in foreclosure. As part of the acquisition, Ocwen obtained the servicing records for this account. Ocwen's response is therefore based upon the available account records acquired from GMACM, as well as account records maintained by Ocwen.

The entity that currently hold the Note is Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-QA6, 1761 East St. Andrew Place, Santa Ana, CA 92705, phone number (714) 247-6000. The ownership status of this account is based upon Ocwen's review of its records as of the date of this response. The ownership status may change from time to time. However, Ocwen Loan Servicing, LLC is currently servicing this account, and all inquiries should be directed to our office.

Ocwen's records indicate that you filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court for the Northern District of Illinois within the Chicago Division (Case No. 12-36993) on September 11, 2012. The bankruptcy court issued an Order of Discharge to you in the case on February 8, 2013. While the Order of Discharge relieves your personal liability with regard to the underlying debt, the secured lien, with regard to the mortgaged real property, passes through the bankruptcy estate and Ocwen may foreclose its security interest (In Rem) pursuant to state law under the terms of the Deed of Trust (enclosed) if the account were to be in a default status.

With regard to credit reporting of a discharged debt, please note, unless the debt is reaffirmed while the Chapter 7 case is still active, the debt must be reported as zero (0) balance being owed, because the debtor no longer has any personal liability to repay the debt. Again, the lien on the property still exists, but the personal obligation of the discharged debtor is extinguished. In order

to report the account in any other manner, a Reaffirmation Agreement for the Debt must be filed and approved by the Bankruptcy Court prior to the issuance of the discharge order. Bankruptcy Court records do not indicate that a Reaffirmation Agreement was filed or approved. Even if the debtor continues making payments to Ocwen after the discharge in order to keep the account from lapsing into a default status, the account would still be reported with a zero (0) balance because there is no personal liability. Neither credit reporting, nor account histories, will be updated from the date of discharge.

On September 3, 2013, Ocwen upgraded their systems, wherein your account records were deactivated from one servicing database to a new servicing database. As a result of the upgrade process, Ocwen began reporting the payment information on the account to the credit bureaus. To rectify this error, Ocwen submitted an updated request form to the four (4) major credit reporting agencies on August 26, 2015, deleting Ocwen's tradeline from your credit profile, because the account was discharged through Chapter 7 Bankruptcy prior to Ocwen's acquisition of the account. The confirmation number for this electronically submitted transaction is 76095120. Ocwen has submitted an additional request form to the credit bureaus on August 26, 2015 to reflect that the account was discharged through Chapter 7 while serviced by GMACM. The confirmation number for this electronically submitted transaction is 76095374.

Upon receipt of your recent inquiry, this office forwarded your concerns to Ocwen's Foreclosure Department, and was informed that Ocwen will foreclose on the referenced property in accordance with applicable state laws, and the terms and conditions set forth in the security instrument. If you have any further questions or concerns regarding the foreclosure status on the property, please contact Ocwen's foreclosure attorney, McCarthy and Holthus, LLP at (619) 685-4800.

Ocwen absolutely does not condone the practices such as described in your complaint. On behalf of Ocwen, this office sincerely apologizes for any inconvenience that you may have experienced during the foreclosure process.

Enclosed is a copy of Ocwen's Payment Reconciliation History, which reflects all credits and disbursements made to the account by Ocwen and the resulting account status. The payment history also reflects the escrow disbursements made on the account by Ocwen.

The mailing address referenced in your correspondence does not match the mailing address Ocwen has on file. If your mailing address has changed, please contact Ocwen's Customer Care Center at (800) 746-2936 to have your information updated accordingly.

Thank you for bringing your credit and foreclosure concerns to our attention. As notated above, if you have any additional questions regarding the status of the account, please contact Ocwen's foreclosure attorney for assistance. I have enclosed the documentation we relied upon to review your concern. If you believe there is additional documentation relevant to your issue, which was not provided, you may request such documents by contacting me directly.

The Office of the Consumer Ombudsman is your advocate in ensuring that Ocwen's servicing remains fair, reasonable, and proper. Should you have any further concerns relating to this response, you may contact us at (800) 390-4656. For other questions or servicing requests, please call Ocwen at 1-800-74-OCWEN (800-746-2936) or visit their website at www.ocwen.com.

Sincerely,

LeKisha Rowlett

LeKisha Rowlett
Consumer Account Analyst
Office of the Consumer Ombudsman
Ocwen Loan Servicing, LLC

Enclosure(s): Payment History and Deed of Trust

Copy: CFPB Portal

Andrew Charles Kuffner
8016 N. Washburn Avenue
Portland, OR 97217

This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. However, if the debt is in an active bankruptcy or has been discharged through bankruptcy, this communication is purely provided to you for informational purposes only with regard to our secured lien on the above referenced property. It is not intended as an attempt to collect a debt from you personally.