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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

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

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 plaintiff debtors into a kafkaesque nightmare of stay-violating foreclosure and unlawful detainer, tardy foreclosure rescission

¹Recontrust Company, N.A., is a wholly-owned subsidiary of Bank of America, N.A. BAC Home Loans Servicing, LP, has been absorbed as a division of Bank of America, N.A.

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

5 The case migrated to federal court after a state appellate
6 court ruled that the federal damages remedy for stay violations,
7 11 U.S.C. § 362(k)(1), preempts state wrongful foreclosure damage
8 actions that are based solely on such violations. Although that
9 appeal established, as a matter of nonbankruptcy law, that the
10 plaintiffs' state-court complaint stated actionable claims
11 against Bank of America for deceit, promissory estoppel, breach
12 of fiduciary duty, aiding and abetting breach of fiduciary duty,
13 assumed liability of mortgage brokers, unfair competition, and
14 negligence, the plaintiffs focus here on the § 362(k)(1) remedy.

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

19 The stay violations being undeniable, the key questions of
20 law are whether, and for how long, "actual damages" under
21 § 362(k)(1) continue to accrue after the automatic stay expires?
22 The answer has two facets. First, damages continue to accrue
23 until full restitution is made. Second, applicable tort concepts
24 teach that damages encompass all consequences proximately caused
25 by the stay-offending conduct for so long as those consequences
26 continue, regardless of whether the stay has expired.

27 This nightmare also presents § 362(k)(1) "appropriate
28 circumstances" for awarding punitive damages and the concomitant

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

3
4 Facts²

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

15 The Sundquists were reluctant to agree to the new loan
16

17 ²Some procedural facts are derived from the decision of the
18 Court of Appeal of the State of California, Third Appellate
19 District, in Sundquist v. Bank of America, N.A., et al., No.
20 C070291, filed Sep. 5, 2013, of which this court took judicial
21 notice (as to authenticity) at the request of the parties. As
22 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.

23 ³An important source of evidence is the testimony of Renée
24 Sundquist, whom the court found to be a credible witness. She
25 began "Journaling as a way to deal with the insanity of the
26 communications with Bank of America." Renée Sundquist Decl. ¶ 22.
27 Extracts of the journal begin at paragraph 25 of her declaration.
28 A more complete version is B of A Exs. 000-VVV. The court
believed her live testimony and believed her declaration
testimony (as to which defendant had full and fair opportunity to
cross-examine), which incorporates the journal entries. She is
commended for having the courage to expose private personal and
potentially-embarrassing feelings and actions that reveal the
human cost of Bank of America's loan modification process.

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

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

9 The Sundquists, who were current on their \$4,557.72
10 (\$3,520.86 principal and interest) mortgage payments (and able to
11 remain current indefinitely with assistance from Mrs. Sundquist's
12 mother) but struggling financially, defaulted on loan payments in
13 March 2009 because Bank of America said that it would not
14 consider any loan modification request (and would not send
15 application forms) unless and until they ceased making payments.⁵

16 Their sole reason for defaulting, which they did with
17 considerable reluctance (their credit score had been above 800),
18 was acquiescence in Bank of America's demand that they default as
19

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

26 ⁵"I began to call and send letters to Bank of America asking
27 for help to reduce or delay our payments. I was finally told by
28 representatives of Bank of America that the only help was
29 modification and I had to stop making payments for three months
30 in order to receive a modification."

31 Renée Sundquist Decl. ¶¶ 20-22. The court believes, and so finds
32 as fact, this testimony. The statements attributed to Bank of
33 America are non-hearsay statements by an opposing party. Fed. R.
34 Evid. 802(d)(1).

1 a precondition for loan modification discussions with Bank of
2 America.⁶

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

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

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

14

15 ⁶From the Renée Sundquist Journal:

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

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

25 ⁷Example from the Renée Sundquist Journal:

26 "First part of February 2009, calling to ask for modification for
27 the fourth time; now we are two months behind. Finally received
28 the modification packet one and half months after requesting it.
I filled it out in an hour and took it down to the post office.
I was told we were not allowed to fax anything to the bank
because they said 'they lose everything.' A week passed since I
sent the modification documents. I called the bank to see if
they received them. The said they didn't receive the documents,
but I was looking at the signature from the bank when they
received them. No reason to argue. Called bank and they said
they would resend the modification packet. Called a week later

1 incomplete, or stale⁸ and in need of re-submission, or denied
2 without comprehensible explanation⁹ but without prejudice to yet
3 another request.¹⁰ With the other paw, Bank of America

4
5 and they still had not sent it. Bank said they lost the original
6 documents after signing for them."

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

11 ⁸Example from the Renée Sundquist Journal:

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

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

29 ⁹Example from the Renée Sundquist Journal:

30 "In May still have not been advised as to status of the
31 modification. When I call bank now they just hang up on me.
32 Today when I called I was lectured by the bank that I should know
33 how many modifications they are working on and the I should not
34 expect an update."

35 Renée Sundquist Decl. ¶¶ 56-58. The court believes, and so finds
36 as fact, this testimony. The statements attributed to Bank of
37 America are non-hearsay statements by an opposing party. Fed. R.
38 Evid. 802(d)(1).

39 ¹⁰Example from the Renée Sundquist Journal:

1 repeatedly scheduled foreclosures.¹¹

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

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

8
9 "Early August 2009 the bank does not have our modification
10 after all this time. Another call to them and they admit we are
11 now too past due we are not eligible for a modification.
12 September 2009 the bank tells us that the modification is under
13 review."

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

18
19 ¹¹Example from the Renée Sundquist Journal:

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

25
26 ¹²From the Renée Sundquist Journal:

27 "My mother sent a letter to the bank advising them she was
28 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."

29 Renée Sundquist Decl. ¶¶ 89-90. The court believes, and so finds
30 as fact, this testimony. The statements attributed to Bank of
31 America are non-hearsay statements by an opposing party. Fed. R.
32 Evid. 802(d)(1).

33
34 ¹³From the Renée Sundquist Journal:

35 "Called the bank talked to a representative who said the

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

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

14 Faced with imminent foreclosure, the Sundquists filed
15 chapter 13 case no. 10-35624 in this court on June 14, 2010, at
16 5:17 p.m., thereby triggering the automatic stay under 11 U.S.C.
17 § 362. They intended to use a chapter 13 plan to cure the Bank
18 of America default and move forward with the loan modification
19 that they were still expecting to occur.

20 Bank of America concedes that it received notice of the
21

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

25 Renée Sundquist Decl. ¶¶ 91-92. The court believes, and so finds
26 as fact, this testimony. The statements attributed to Bank of
27 America are non-hearsay statements by an opposing party. Fed. R.
28 Evid. 802(d)(1).

¹⁴Case No. 09-44647, Chapter 7 Individual Debtor's Statement
of Intention, Bank of America's Request for Judicial Notice of
Filed Documents, Ex. A.

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

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

7 Bank of America on June 16, 2010, further adjusted its
8 records to reflect that the bankruptcy case was filed June 14.¹⁶

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

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

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

25 Servicing Activities History: "HO filed for BK on 06/14/10,
26 chapter 13, case # 201035624 Submitted BK Notification.
27 Information has been changed on June 16, 2010." Sundquist Ex.
28 59.

29 ¹⁷Bank of America's "Rescind Sale" procedure: "Perform this
30 [rescission] procedure immediately after learning that the
31 borrower filed for bankruptcy, but the filing was not discovered
32 until after the sale was completed or Trustee Services receives
33 notice that a Bankruptcy has been filed and a claim that the sale
34 is not valid."

35 "If the Trustee's Deed has already been recorded, the
36 technician must print the appropriate Rescission of Trustee's

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

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

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

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

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

17 On multiple occasions between June 14 and September 7, 2010,
18 Bank of America, with knowledge of the automatic stay, caused its
19 agents to enter the Sundquists' gated community, sometimes on
20
21

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

24 B of A Ex. QQ at pp. 002-003.

25 ¹⁸B of A Ex. II-002. In the "File Transfer" entry dated
26 June 16, 2010, the comment is excised with the notation
27 "Redacted." Although this court did not compel disclosure of
28 what was already crawling around under that rock within 24 hours
of the foreclosure sale, this court, as trier of fact, is
entitled to (and does) infer that it tends further to confirm
that Bank of America knew of the Sundquist chapter 13 case.

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

5 On July 8, with knowledge of the automatic stay, Bank of
6

7
8 ¹⁹Orders directed by Bank of America to Countrywide Field
9 Service Corporation to inspect the Sundquist property ("Monthly
10 Bankruptcy") were dated July 7, 2010; July 26, 2010; and August
11 24, 2010. B of A Ex. FF-001.

12 ²⁰From the Renée Sundquist Journal:

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

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

26 "[August 2010] Today someone tailgated us right to our
27 driveway and then sped off. [10 yr-old twin sons] were really
28 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.

29 "[August 2010] Came home again today to someone stalking our
30 home. I am so scared to step out of my car sometimes. I now
31 pull into our garage with my finger on the garage door closer to
32 get the door down fast. Last night I dreamt that I closed the
33 door fast, but the man was standing inside my garage and I locked
34 him in. I woke up out of breath." Renée Sundquist Decl. ¶¶ 132-
35 36.

36 The court believes, and so finds as fact, the events and
37 reactions related in this testimony and concludes that the
38 surveillance and harassment was by Countrywide Field Service
Corporation as agent of Bank of America.

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

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

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

21 Upon learning that some type of lawsuit was pending in state
22 court, the Sundquists unsuccessfully tried between August 10 and
23 12, 2010, to find out from the state court what was going on.²²

24
25 ²¹It is not clear why Miles, Bauer, Bergstrom & Winters, LLP
has not been targeted for § 362(k)(1) damages in this action.

26
27 ²²On August 10, 2010, Renée Sundquist sent the following
email to her counsel: "I need help. I am having difficulty
28 Notice of Restricted Access that Bank of America filed.

1 On or about August 19, with knowledge of the automatic stay,
2 Bank of America caused its agent to serve on the debtors a Three-
3 Day Notice To Quit (by throwing the papers against the door so
4 hard that they ricocheted some feet from the door²³) creating the
5 impression in the minds of the Sundquists that they must move
6 within three days or the sheriff would physically remove them and
7 their property from the premises.²⁴

8 Their bankruptcy attorney called Bank of America on August
9 20, 2010, and asked why the Sundquists were being evicted after
10 their home had been sold in violation of the automatic stay.

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

13
14 And on August 12: "I waited for some time this morning
15 attempting to get copies of the case file, ha! The judge has
16 sealed the file and they don't have access to give me copies."

17 Sundquist Ex. 100; B of A Ex. KKK.

18 ²³From the Renée Sundquist Journal:

19 "[August, 2010] Today a letter was thrown at our front door.
20 It was such a loud bang I could hear it in the kitchen. I opened
21 the door slowly, couldn't see anything from our peep hole. A
22 random envelope on the cement the force of the throw caused the
23 letter to fly far away from the doorstep. Having to step outside
24 and find it was an 'unlawful detainer' not even sure what the
25 document is stating. I just stood shaking and could barely call
26 Erik. One thing for sure the document looks court official and
27 the worst option was to leave our house in three days. Erik sent
28 the document to our bk attorney. B of A steals another night
from my family. Horrid night topped off by some weird car across
the street looking at the house. [10 yr-old son] was too scared
to sleep. I let him sleep in our room. What a horrible night
for Erik to be in LA."

Renée Sundquist Decl. ¶¶ 143-54. The court believes, and so
finds as fact, the events and reactions related in this
testimony.

²⁴B of A Ex. DD; Testimony of R. Sundquist.

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

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

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

14

15 ²⁵Bank of America computer record:

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

19 B of A Ex. GG.

20 ²⁶B of A Ex. QQ.

21 ²⁷From the Renée Sundquist Journal:

22 "[August 20, 2010] I will never forget today it is etched in
23 my being. I received a call at 5:10 p.m., I stepped out of the
24 pros room at the rin[k]. I was just about to go teach on the ice
25 when our attorney called. She said you won't believe this b of a
26 sold your house. Time stood still and life has changed forever
27 and forever. I felt as though I couldn't breathe, everything
28 inside of me wanted to scream and then die. I started asking our
attorney so many questions, all of which she couldn't answer.
She said B of A responded that they have no idea [h]ow to
untangle this web and admitted their mistake in selling our house
while we were in bankruptcy. My head was spinning, I have one
minute to get my head clear and instruct a class of tots. As I
write, I don't even remember how I walked onto the ice. Tots

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

8
9
10
11 whirling around me in a maze. I do remember throwing up in the
12 garbage can on the other side of the ice. The embarrassment, one
13 of my little 5 year olds asked if I was ok. Will not be sleeping
14 tonight. So sad, we can't even stay if the bank made a mistake,
15 if the sheriff comes and throws us out that would be even more
horrorifying 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."

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

18 ²⁸From the Renée Sundquist Journal:

19 "Last night [10 yr-old son] was scared again. Tonight I was
20 just obsessing if a knock on the door would result in us getting
21 kicked out of our house. I realized at 2 am this morning that
22 the letter that our attorney received and the modification packet
23 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.

24 "All I do is cry. Today we discussed moving again and
25 renting a home. This is way too stressful; I feel sick every
26 day. I could barely breath[e] all night. Erik decided nothing
27 is worth the stress of staying in our home. Erik wrote to our
attorney and told her we have to move quickly or someone in our
family is going to die. He didn't tell her that part but it is
true." Renée Sundquist Decl. ¶¶ 185-91.

28 The court believes, and so finds as fact, this testimony.
The court believes, and so finds as fact, this testimony.

1 mortgage payment was \$4,557.72).²⁹

2 They moved to the rental during Labor Day Weekend (September
3 4-6, 2010),³⁰ leaving the premises, including all major
4 appliances, window coverings, and carpets, in good order and
5 locked the doors. In Renée Sundquist's words while testifying,
6 the lawn and shrubbery were "beautiful." As Erik Sundquist
7 testified, they "felt evicted."

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

14

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

24

³⁰From the Renée Sundquist Journal:

25

26 "September we just threw everything we could in boxes, we
27 needed to move quickly. We found a place to lease for \$4000 a
28 month. How stupid we can't get loan modification but we can't
29 pay that amount to B of A. I am so sick, and I have such a
30 headache, threw up again today from my head. Moving is rough, so
31 tired, my heart is pounding. I can never sleep anymore. Fixated
32 on all the bank['s] wrongdoing. Had to take so much medication
33 because the pain is horrific with fibromyalgia. I can't take a
34 step without pain. I don't want my boys to get anymore messed by
35 the move so I will medicate to get moving. Our attorney
36 confirmed that B of A sold our house back to themselves."

37

38 Renée Sundquist Decl. ¶¶ 192-201. The court believes, and so
finds as fact, this testimony.

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

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

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

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

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

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

21 ³¹Bank of America computer record:

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

25 B of A Ex. GG.

26 ³²Sundquist Ex. 96, p. 2. Bank of America internal inquiry:
27 "Recon Trust confirmed the following. We don't [sic] send
28 anything directly to the borrower. We send the document to title
and they send them to the county for recording. This confirms
that Recon Trust is no [sic] required to inform the borrower of
the rescission."

1 rescinded, it did not withdraw the unlawful detainer action or
2 tell the Sundquists the action would be dismissed. The state-
3 court docket of the action reflects zero activity between August
4 12, 2010, and February 7, 2011, when counsel for Bank of America
5 filed a voluntary dismissal without prejudice.³³

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

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

16 The Sundquists had no reason to suspect that they would
17 secretly be placed back in title on their residence as of
18 December 30, 2010, and that the Bank of America loan modification
19 process would again rear its head. As noted, the Notice of
20 Rescission of Trustee's Deed Upon Sale pursuant to Civil Code
21 Section 1058.5 was recorded December 30, 2010.³⁴

23 ³³Bank of America's Request for Judicial Notice of Filed
24 Documents, Ex. C.

25 ³⁴Recital No. 5 on the Notice of Rescission includes the
26 following self-serving and disingenuous explanation:

27 "5.) THAT THE TRUSTEE has been informed by the Beneficiary that
28 the Beneficiary desires to rescind the Trustee's Deed recorded
upon the foreclosure sale which was conducted in error due to a
failure to communicate timely, notice of conditions which would
have warranted a cancellation of the foreclosure sale which did

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

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

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

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

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

20 _____
21 occur on 06/15/10;"

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

24 This explanation is truthful only to the extent that the
25 "failure to communicate" was an internal failure of Bank of
America to communicate with itself.

26 ³⁵B of A Request for Judicial Notice of Filed Documents for
Trial, Exs. D-F.

27 ³⁶B of A Exs. AA & BB & CC. Work order 45674424-2, ordered
28 02/04/2011 (Ex. AA-004), completed 02/10/11 (Ex. AA-006).
Exhibits include 12 photos dated 02/10/2011.

1 rescission had been recorded on December 30, 2010.

2 The Sundquists, in the presence of counsel, called Bank of
3 America in early April 2011 and asked about the status of the
4 property. For the first time, Bank of America told the
5 Sundquists that it had rescinded the foreclosure sale three
6 months earlier. Counsel asked if they could have the keys. The
7 keys were delivered to the Sundquists on April 5, 2011.³⁷

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

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

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

22 One particularly vexing issue for the Sundquists related to
23 the failure by Bank of America to have paid all the Homeowners
24

25 ³⁷B of A Ex. YY & from the Renée Sundquist Journal: "April
26 2011 Our attorney called the bank and was told the house was in
our names. The keys to the house back."

27 Renée Sundquist Decl. ¶¶ 192-201. The court believes, and
28 so finds as fact, this testimony.

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

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

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

16 The Sundquists have insisted that Bank of America should

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

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

23 ⁴⁰On April 22, 2011, Bank of America received a \$22,633.50
24 HOA bill for assessments for April and May 2011 (\$235.00/mo) plus
late fee (\$15.50) plus balance carried forward (\$22,168.00).
Sundquist Ex. 29.

25 ⁴¹The Sundquists' state of mind is revealed by the following
26 from Renée Sundquist: "[HOA] told our neighbors the dollar amount
27 we owed, and that we were embarrassing in a board meeting! My
neighbor emailed me to let me know they were planning an ambush
28 had we attended the meeting/hearing. It is in dispute exactly
what maintenance is done on a dead lawn? And, all the dead scrubs
and trees." Sundquist Ex. 100, p. 8.

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

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

10 In June 2011, at loggerheads with Bank of America over the
11 correct loan balance, the Sundquists filed a lawsuit in a
12 California superior court naming as defendants the original loan
13 broker, his loan brokerage, the original lender, its loan
14 officer, Bank of America, ReconTrust (foreclosure agent for Bank
15 of America), and BAC Home Loans Servicing, LP ("BAC"). As
16 against the Bank of America entities, the complaint alleged
17 causes of action for deceit, breach of fiduciary duty, aiding and
18 abetting breach of fiduciary duty, negligence, assumed liability,
19 civil conspiracy, promissory estoppel, wrongful foreclosure, and
20 unfair competition in violation of California Business and
21 Professions Code § 17200.⁴²

22 In November 2011, the state trial court dismissed the action
23 as to all counts on the motion of Bank of America (acting for
24 itself, ReconTrust, and BAC) on the theory that the complaint did
25 not state any cause. The Sundquists appealed.

26 While the state-court appeal was pending, the Sundquists
27

28 ⁴²Sundquist v. Bank of America, N.A., Memorandum Opinion,
No. C070291 (Cal. App. 3d Dist. 9/5/13) at p. 5.

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

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

8
9 ⁴³From the Renée Sundquist Journal:

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

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

27
28 ⁴⁴From the Renée Sundquist Journal:

29 "[On finding personal items that had been left behind when
30 they moved in September 2010] Sometimes it is like I am living
31 outside my body, I can't pull it together to be a wife or mother
32 or daughter! How can I let a bank steal my life? I am too smart
33 for this. I am crying so hard right now, I keep trying to
34 convince myself it was just material things I left, but it wasn't
35 really, it was a card from my dying mother and it could never be
36 replaced had I not found it again. And, even more startling, I
37 didn't miss it because I am so messed up over this horrid bank
38 crap. That is horrible how side tracked I am all the time! I
39 also found my childhood stuff animal boogsie, that stuff animal
40 was with me when I won the Italian National Championships and
41 earned a spot on the World Team. I didn't miss that either?
42 [Son's] entire top shelve of his closet was filled with his

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

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

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

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

17 ⁴⁵From the Renée Sundquist Journal:

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

27 "Today I spent the day watching my Mom labor every breath, I
28 can barely write tonight. Some b/a jerk CEO representative tells
29 me I need to list the items stolen from my home. I am thinking
30 why waste the time, your office loses EVERYTHING. Like isn't 3
31 years of paperwork enough for you all. I hate the bank. I know
32 I am going to look back and regret being side tracked by the bank
33 while my Mom is dying. Who am I kidding, I am already regretful
34 about today! God help me. Please don't let my Mom go. I need
35 her..."

36 "Today I hit an all-time low with b/a because I typed a
37 letter at my Mom's hospital bed on my ipad listing all the items

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

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

8
9
10 taken from our house after we moved out. She actually had a
11 moment of clarity, and got really mad when she figured out what I
12 was doing. I started to cry so hard, even when she is dying I
13 can't hide anything from her. I hope I can be as great as her
14 someday. She touched my face, and said she was going to miss me.
15 OMG! I wonder why my mom is dying and the bank goes on! I need
16 my Mom, I can't do this without her. She was clear to say she
17 didn't want me to lose my inheritance that went into the house.
18 Ugh! This is what we are going to think about during her last
19 days? NO, it can't beeeeeeeeeeeeeee!!!"

20 "The wors[t] day of my life, I watch for hours my Mom barely
21 breathing. I can barely write, or breathe myself, she is dead.
22 I will never get back all the hours, days, years I have spent
23 fighting this f'ing bank, all the time wasted where I couldn't
24 even think straight to not waste time with my Mom. No one cares.
25 No one cares. I promised her I wouldn't quit fighting the bank,
26 I might not make it! She was so strong always, and it is so very
27 dark now. My life will never be the same. How does one journal
28 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.

⁴⁶From the Renée Sundquist Journal:

"[Late January 2012] My Mom so very sick, wish she was well
enough to talk, I miss and need her so much. She had very few
words today, but did make it a point to remind me to never give
up on the lawsuit because the 'the bank was wrong'. This was one
of her last coherent thoughts.

B of A Ex. RRR-001; accord Renée Sundquist Decl. ¶ 299.

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

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

9

10 ⁴⁷From the Renée Sundquist Journal:

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

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

25 B of A Ex. SSS; accord, Renée Sundquist Decl. ¶¶ 306-10.

26 ⁴⁸On June 13, 2012, Bank of America made the following two
27 entries in its "HomeSaver - Workout Notes":

28 "Note ID: 87
Reasearch[sic]- customer filed bk 6/14/2010, fcl sale date

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

7 As to the claim for wrongful foreclosure, however, the
8 appellate court invoked what is known in federal practice as
9 "conflict preemption."⁵⁰ It ruled that Bankruptcy Code
10 § 362(k)(1) preempts state-law wrongful foreclosure claims that
11 are based solely on violation of the automatic stay, which it

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

21 "Note ID: 88

22 11/2009 declined mod Surplus income will not support a
23 repayment plan and a mod will not get approved becuase [sic] the
24 amount has gotten larger with no payment and will agin [sic] be
25 declined but we are more than happy to resubmit but it will be
26 declined."

27 Sundquist Ex. 73 (emphasis supplied).

28 ⁴⁹Sundquist 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
cause of action under California's unfair competition statute.
CAL. BUS. & PROF. CODE § 17200; Oskoui v. J.P. Morgan Chase Bank,
N.A., ___ F.3d ___, ___ (9th Cir. 2017), 2017 Westlaw 957206,
slip op. at 10-13.

⁵⁰Conflict preemption was applied in connection with a § 362
stay violation and a California tax foreclosure sale. 40235
Washington St. Corp. v. Lusardi (In re 40235 Washington St.
Corp.), 329 F.3d 1076, 1083-86 (9th Cir. 2003).

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

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

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

12 The Bank of America response to CFPB is noteworthy for two
13 false statements made by the Office of the Bank of America CEO
14 and President. It falsely asserts that there was no foreclosure
15 of the Sundquist residence.⁵¹ And, it falsely asserts that the
16
17

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

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

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

25 It is beyond cavil that Bank of America's statement to CFPB
26 that the "account was flagged for bankruptcy and any foreclosure
27 proceedings were placed on hold" was false. There was an actual
foreclosure on June 15, 2010, which violated the automatic sale
28 and was, as a matter of law, void ab initio. This litigation is
about that foreclosure and everything else thereafter that was
not placed on hold.

1 Sundquists are not in active litigation with Bank of America.⁵²

2 Both statements were materially false.⁵³

3 Throughout the dispute between the Sundquists and Bank of
4 America, interest has been continuing to accrue on the
5 \$584,893.97 principal balance at the contract rate of 6 percent,
6 or \$35,093.64 per year (\$96.15 per day).

7 The Sundquists entered their ordeal with Bank of America as
8 physically strong people. Throughout the chapter 13 phase of the
9 ordeal, a significant emotional and physical toll debilitated
10 them. They had been elite athletes. He had been a member of a
11 NCAA National Championship Soccer Team. She was an ice skater on
12 Italy's Olympic team and was teaching ice skating. He emerged
13 from the ordeal restricted to exercising only on an elliptical
14 trainer and had attempted suicide. She was hospitalized with
15

16 ⁵²Bank of America's CEO's office wrote:

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

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

22 At the time that Bank of America made that statement to CFPB
23 on May 23, 2013, there was pending in the Court of Appeal of the
24 State of California, Third Appellate District, case no. C070291,
Sundquist v. Bank of America, N.A., which was not decided until
25 September 5, 2013. There were numerous court documents that
26 could have been supplied to CFPB.

27 ⁵³Cf. 18 U.S.C. § 1001; Hubbard v. United States, 514 U.S.
28 695, 699-708 (1995) (history of false statement statute
explained). The maximum fine for a corporate violator of 18
U.S.C. § 1001 is \$500,000.00. 18 U.S.C. § 3571(c)(3).
Regardless of how prosecutors may exercise their discretion, Bank
of America's false statements to CFPB regarding the Sundquists
are probative of its bad faith regarding the Sundquists.

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

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

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

10 11 Jurisdiction

12 Federal subject-matter jurisdiction is founded on 28 U.S.C.
13 § 1334. Enforcement of the automatic stay arises under
14 Bankruptcy Code § 362 and is a core proceeding that may be heard
15 and determined by a bankruptcy judge. 28 U.S.C.
16 § 157(b)(1)(G).⁵⁴

17
18 ⁵⁴There is also federal subject-matter jurisdiction by way
19 of 28 U.S.C. § 1367 over the state-law causes of action (deceit,
20 promissory estoppel, breach of fiduciary duty, aiding and
21 abetting breach of fiduciary duty, assumed liability of mortgage
22 brokers, unfair competition, and negligence) as to which the
23 California Third District Court of Appeal ruled that the
24 Sundquists had stated claims and remanded to the trial court.
25 The state-court action was dismissed without prejudice. Such
26 causes of action, if they were to be alleged in this federal
27 civil action in an amended complaint (which could happen if this
28 litigation were to become prolonged as a result of being vacated
or reversed on appeal) would constitute non-core proceedings that
would be subject to 28 U.S.C. § 157(c) and potentially subject to
trial by jury. The state appellate decision may be viewed as law
of the case as to whether state-law claims have been stated. If
this court's § 362(k)(1) judgment were to be vacated on appeal as
to remedy, there would not be a final judgment eligible to
trigger claim preclusion, and it could be argued that this action
is amenable to amendment of pleadings to assert those other
causes of action.

1 Jurisdiction over automatic stay violation remedies survives
2 dismissal or closing of the case. Carraher v. Morgan Elecs.,
3 Inc. (In re Carraher), 971 F.2d 327, 328 (9th Cir. 1992); Davis
4 v. Carrington (In re Davis), 177 B.R. 907, 911-12 (9th Cir. BAP
5 1995). Hence, the bankruptcy case has not been reopened.

6 To the extent that this proceeding may ever be determined to
7 be a matter that cannot be heard and determined of right by a
8 bankruptcy judge, the parties are nevertheless agreed that it may
9 be heard and determined by a bankruptcy judge. 28 U.S.C.
10 § 158(c)(2).

11 Discussion

12 First, the law. Then, application of the facts to the law.
13 The Second Amended Complaint alleges two counts: automatic stay
14 violation on account of foreclosure and automatic stay violation
15 on account of unlawful detainer action.
16

17 I

18 The legal effect of an act in violation of the automatic
19 stay is well-understood in this circuit.
20

21 A

22 The fundamental rule is that any act done in violation of
23 the automatic stay is void from the outset, not merely voidable.
24 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 570-72
25 (9th Cir. 1992).
26

27 The court's statutory power to annul the automatic stay
28 under § 362(d) does not make a stay violation merely voidable.

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

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

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

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

15

16 B

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

21 Nevertheless, consequences directly attributable to the
22 violation of the stay before its expiration may continue to be
23 visited upon a debtor for an additional period of time. Snowden
24 v. Check Into Cash of Wash., Inc. (In re Snowden), 769 F.3d 651,
25 659 & 662 (9th Cir. 2014).

26 Hence, liability for a stay violation continues at least
27 until full restitution is actually made or, if after the
28 expiration of the stay, the court orders full restitution.

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

3
4 II

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

9 General civil contempt remedies are available to all victims
10 of stay violations, individuals and non-individuals alike. Pace,
11 67 F.3d at 193-94.

12 Concurrent with the restructuring of bankruptcy courts in
13 1984 to resolve Constitutional issues,⁵⁵ Congress supplemented
14 the automatic stay provision by adding a new subsection § 362(h)
15 providing that any individual victim of a willful stay violation
16 may recover actual damages, including costs and attorneys' fees,
17 as well as punitive damages:

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

22 11 U.S.C. § 362(k)(1), first enacted as § 362, Pub. L. 98-353,
23 § 304, 98 Stat. 333 (July 10, 1984); Pace, 67 F.3d at 191-92.

24 This case primarily implicates the § 362(k)(1) damages
25 remedy and its boundaries.
26
27

28 ⁵⁵Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S.
50, 87-89 (1982).

1 A

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

4
5 1

6 A "willful violation" does not require specific intent to
7 violate the automatic stay. Rather, the "willfulness" question
8 is whether Bank of America knew of the automatic stay and whether
9 actions in violation of the stay were intentional actions. Pace,
10 67 F.3d at 191; Goichman v. Bloom (In re Bloom), 875 F.2d 224,
11 227 (9th Cir. 1989).

12 Willfulness is a question of fact, reviewed for clear error.
13 Eskanos & Adler, P.C. v. Leetien (In re Leetien), 309 F.3d 1210,
14 1213 (9th Cir. 2002).

15
16 2

17 A good faith belief that an actor has a right to the
18 disputed property is (with an exception not pertinent here⁵⁶) not
19 relevant to whether an act offending the stay is "willful" or
20 whether compensation should be awarded. Bloom, 875 F.2d at 227;
21 11 U.S.C. § 362(k).

22
23
24
25 ⁵⁶The exception is for a good faith belief that the stay has
26 terminated with respect to personal property because the debtor
27 has not timely redeemed such personal property from a lien,
28 reaffirmed such personal property debt, or assumed an unexpired
personal property lease. 11 U.S.C. § 362(h), Pub. L. 109-8,
§ 305, 119 Stat. 41 (April 20, 2005). This case does not involve
personal property debt.

1 B

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

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

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

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

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

22 The common element in actual damages awards appears to be
23 the "but for" analysis familiar in tort law. If a consequence
24 would not have occurred "but for" the automatic stay violations,
25 then courts make awards based on that consequence.

26
27 C

28 Damages for emotional distress are available as actual

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

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

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

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

21 In the end, it all adds up to a question of proof for the
22 trier of fact. If the court, in its capacity as trier of fact,
23 is persuaded that significant harm has been clearly established
24 and that there is a causal connection between the stay violation
25 and the harm, then § 362(k)(1) damages are appropriately awarded.

26

27

D

28

Attorneys' fees and costs are a mandatory component of the

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

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

10

11 E

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

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

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

23 An award of punitive damages is a matter of discretion
24 reviewed for abuse of discretion. Snowden, 769 F.3d at 657.

25

26 III

27 Other general considerations applicable in this case are
28 also noted.

1 A

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

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

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

17 Thus, for example, the Supreme Court in addressing the
18 question of punitive damages in the context of 42 U.S.C. § 1983
19 looked to the Restatement (Second) of Torts and to Professor
20 Prosser's treatise on torts to note that punitive damages are
21 intended to punish the wrongdoer for intentional or malicious
22 acts and to deter that wrongdoer and others from similar extreme
23 conduct. Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67
24 (1981), citing RESTATEMENT (SECOND) OF TORTS § 908 (1979) and W.
25 PROSSER, LAW OF TORTS 9-10 (4th ed. 1971).

26 Accordingly, it is appropriate in this case to construe
27 Dawson and its progeny through the matrix of the Restatements and
28 to apply tort damages principles.

B

1
2 Emotional harm refers to impairment or injury to a person's
3 emotional tranquility. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL
4 HARM § 45 (2012).

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

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

C

13
14
15 One of the risks that a willful stay violator assumes is
16 that an individual victim will be abnormally vulnerable to
17 emotional distress and to abnormal consequences.

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

22 This concept is in the mainstream of the law of torts.
23 Formally stated, when an actor's conduct causes harm to a person
24 that, because of a preexisting physical or mental condition or
25 other characteristics of the person, is of a greater magnitude or
26 different type than might reasonably be expected, the actor is
27 nevertheless subject to liability for all such harm to the
28 person. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 31.

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

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

17
18 D

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

21 Although there are medical aspects to the plaintiffs' case
22 regarding their physical and mental condition as to which one
23 ordinarily would expect corroborating expert medical opinion
24 testimony and evidence of medical bills, such corroborating
25 medical evidence was not provided.

26 Instead, the plaintiffs' case consisted of their testimony
27 in open court corroborated by a 494-paragraph declaration by
28 Renée Sundquist that recited the contents of a journal that she

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

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

6 While experienced litigation lawyers would regard the
7 incomplete evidentiary presentation as risky, Dawson
8 unambiguously permits proof of significant harm to be established
9 by testimony alone and by reference to egregious conduct.

10 Dawson, 390 F.3d at 1149-50. In such circumstances, everything
11 turns on the degree to which the trier of fact is persuaded by
12 the evidence that is presented.

13 Here, the court, in its capacity as trier of fact, found
14 Renée Sundquist to be an exceptionally credible witness. She
15 displayed considerable courage in revealing her very private
16

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

20 ⁵⁸The 494-paragraph Renée Sundquist Declaration, which the
21 court has in its discretion made part of the record, is presented
22 in a more complete and readable form in Defendant's exhibits 000-
23 VVV, because it is in the format in which it was originally
24 written on a computer. Before oral argument commenced, the court
25 noted that those exhibits had not been admitted and proposed
26 admitting them and offered Bank of America an opportunity to
27 cross examine her further. Bank of America's counsel agreed to
28 their admission and declined the court's offer of further
examination. They were admitted. An hour later, after hearing
the plaintiffs' closing argument, Bank of America changed its
mind and attempted to renege on admitting its exhibits, saying
that they had only been intended as rebuttal exhibits and that no
rebuttal was needed. Too late; the exhibits remain part of the
evidentiary record. In any event, any error in this respect is
likely to be harmless as the subject exhibits do not contradict
the less-readable extracts in the 494-paragraph Renée Sundquist
Declaration, which the court has elected to admit in evidence.

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

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

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

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

20

21 E

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

24 First, a finance professional would point out that the 6
25 percent contract interest rate on the note that keeps accruing at

26

27 ⁵⁹At this time [January 2010], I began Journaling as a way
28 to deal with the insanity of the communications with Bank of
America. Renée Sundquist Decl. ¶ 22.

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

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

10 Bank of America has little financial incentive to kill a
11 goose that keeps laying 6 percent golden eggs when the federal
12 funds rate is 0.39 percent⁶⁰ and the average mortgage rate is
13 3.45 percent for a 30-year fixed rate.⁶¹

14 IV

15 The "willful violation" predicate for an award of actual
16 damages under § 362(k)(1) has been satisfied. This court is
17 persuaded by the preponderance of evidence that Bank of America
18 acted willfully in all of its actions, beginning June 15, 2010,
19 and also is persuaded that all such actions were intentional.
20

21 A

22 Every act by Bank of America taken after June 14, 2010, was
23
24

25 ⁶⁰Board of Governors of the Federal Reserve System (US),
26 Effective Federal Funds Rate [FEDFUNDS], retrieved from FRED,
27 Federal Reserve Bank of St. Louis;
<https://fred.stlouisfed.org/series/FEDFUNDS>, August 17, 2016.

28 ⁶¹Primary Mortgage Market Survey, U.S. Weekly Average, Aug.
11, 2016. <http://www.freddiemac.com/pmms/>.

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

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

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

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

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

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

25
26 B

27 Nor is this an instance of a single willful stay violation.
28 The record teems with stay violation. There was a string of more

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

5
6 1

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

12 Everything that follows is the fruit of the poisoned
13 foreclosure.

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

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

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

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

23 On July 23, 2010, Bank of America caused an unlawful
24 detainer action to be filed in Placer County Superior Court.

25 On or about August 19, 2010, Bank of America caused a three-
26 day Notice to Quit to be served at the premises.

27 These are six separate and distinct "willful" violations of
28 the automatic stay. Each of these acts were intentional.

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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 really was about to throw them onto the street.

In short, the court is persuaded that the actions by Bank of America during each of its "inspections" between the time the Sundquist chapter 13 case was filed on June 14, 2010, and the time it was dismissed on September 20, 2010, were intentional

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

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

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

9
10 3

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

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

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

24 All of them were litigated by the parties in the context of
25 the § 362(k)(1) stay violation remedy. There was no objection to
26 evidence of any of the stay violations. Hence, it is fair to
27 infer that they were tried by implied consent. Fed. R. Civ. P.
28 15(b)(2), as incorporated by Fed. R. Bankr. P. 7015.

V

1
2 As noted above, actual damages include both physical damages
3 and economic damages, all of which must be established by a
4 preponderance of evidence persuasive to the trier of fact.

A

5
6
7 In light of the focus by Congress on damages to individuals,
8 damages for individuals who are victims of automatic stay
9 violations are assessed in accordance with tort damage
10 principles, which primarily are addressed to injuries suffered by
11 people. Here, one is looking for the fruit of the poisoned
12 foreclosure. The useful shorthand is "but for" causation.

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

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

B

23
24
25 Actual economic damages for a wrongfully displaced victim of
26 an automatic stay violation include alternative housing expense.

27 The Sundquists rented alternative housing for eighteen
28 months at a net rental expense exceeding \$4,000.00 before they

1 moved back into their home.

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

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

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

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

21 Bank of America questions the extent to which the Sundquists
22 mitigated damages. It argues that the one-year initial term of
23 the lease means that they could have vacated the rental and moved
24 back into their home six months earlier than they did.

25 The duty to mitigate damages in the context of § 362(k)(1)
26

27 ⁶²Erik Sundquist testified the rent was \$4,200.00; Renée
28 Sundquist testified the rent was \$3,900.00 for the first year and
\$4,200.00 for the second year.

1 recognizes that it is not appropriate to exploit a stay-violation
2 liability situation merely to pocket a higher recovery. Eskanos
3 & Adler v. Roman (In re Roman), 283 B.R. 1, 12 (9th Cir. BAP
4 2002); cf. Dawson, 390 F.3d at 1152 (stay violation attorney's
5 fees must be reasonable); Computer Commc'ns, Inc. v. Codex Corp.
6 (In re Computer Commc'ns, Inc.), 824 F.2d 725, 731 (9th Cir.
7 1987) (stay violation contempt damages must be reasonable).

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

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

22 This court is persuaded that not returning to the premises
23 until nine months after first learning that the foreclosure had
24 been rescinded was reasonable under the circumstances. The duty
25 to mitigate § 362(k)(1) damages was not offended.

26 The calculation of the alternative housing component of
27 actual damages is straightforward. The court finds as fact that
28 the actual monthly expense was \$4,000.00 for the first twelve

1 months and \$4,200.00 for the next six months.

2 Moving expenses incurred vacating the foreclosed property
3 and later moving back in are a component of alternative housing
4 expense. The Sundquists assert that moving expenses were
5 \$10,000.00. That sum is credible and was not questioned.

6 Hence, actual damages for alternative housing expense are
7 \$73,200.00 in rent, plus \$10,000.00 in moving expenses, for a
8 total of \$83,200.00.

9

10

C

11 Section 362(k) designates attorneys' fees as an element of
12 damages, rather than an item separate from damages.

13 Such fees are regarded as "mandatory." Schwartz-Tallard,
14 803 F.3d at 1099-1101; Snowden, 769 F.3d. at 657.

15 While there are a variety of ways to determine attorney's
16 fees, the common denominator regarding fees in bankruptcy courts
17 is that fees should not exceed the "reasonable" value of services
18 rendered. See, e.g., 11 U.S.C. §§ 328(a), 329(b), 330(a)(1)(A),
19 502(b)(4), 503(b)(4) & 506(b) ("reasonable").

20 The "reasonable" value of services, of necessity, is
21 determined on a case-by-case basis in light of the peculiar
22 circumstances of each case, as modulated by the sound discretion
23 of the bankruptcy court.

24

25

1

26 This case is atypical because there were successive state
27 and federal actions. This invites inquiry into whether the
28 multiple actions were necessary.

1 The key circumstance is Bank of America's institutional
2 obstinance and dishonesty (including lying to the CFPB regarding
3 the status of the state-court litigation) in refusing all
4 recompense after the Sundquists discovered that Bank of America
5 had secretly restored them to title after they moved and was
6 demanding that they pay for damages resulting from Bank of
7 America's incompetent stewardship of its illegally-acquired
8 property.

9 The Sundquists' general practice lawyer recognized that the
10 overall situation implicated several state-law causes of action
11 and elected to sue in state court on multiple theories, including
12 the automatic stay violation, on the theory that more
13 comprehensive relief would be available in the state forum.

14 Twenty-twenty hindsight reveals that the state appellate
15 court deemed the automatic stay violation theory to be a matter
16 of exclusive federal jurisdiction, which would have permitted
17 immediate resort to federal court. But it is also significant
18 that other causes of action stated in the state-court action were
19 deemed meritorious.

20 The Sundquists would not have commenced that state-court
21 action "but for" the actions of Bank of America regarding the
22 automatic stay. The evidence is that they did not consult the
23 counsel who filed the state-court lawsuit for them until after
24 Bank of America had secretly rescinded the foreclosure and
25 started sending them bills and notices of delinquency. What
26 finally provoked them to sue was Bank of America's refusal to
27 make amends for the stolen appliances and window coverings and
28 for the HOA expenses after it had belatedly and secretly

1 court that bear a nexus to enforcing bankruptcy law.

2 If the compensation exceeds the reasonable value of
3 services, then the court has the power to cancel the agreement
4 and to order the return of payments. 11 U.S.C. § 329(b).

5 Here, the key cause of action in the state-court was
6 premised on violation of 11 U.S.C. § 362, which is at the heart
7 of enforcement of bankruptcy law. Accordingly, the Sundquists'
8 state-court counsel was required to file his Rule 2016(b)
9 statement.

10 Likewise, the Sundquists' counsel in this adversary
11 proceeding also must comply with Rule 2016(b).⁶³

12
13 a

14 The Sundquists' state court counsel filed a Rule 2016(b)
15 statement (after this court called the requirement to his
16 attention) in which he reported having received \$17,882.00.⁶⁴

17 This court has reservations about the quality of performance
18 by that counsel and the wisdom and efficacy of his strategy.
19 Nevertheless, it cannot say, in the face of the nature of the
20 litigation strategy of Bank of America, that \$17,882.00 exceeded
21 the reasonable value of services within the meaning of § 329(b).

22 Those services led to a state appellate determination of the
23 theretofore open question whether California's remedies for

24
25 ⁶³These requirements imposed by § 329(a) and Rule 2016(b)
26 also apply to counsel representing the debtor in a bankruptcy
27 appeal. Hence, an appellate counsel representing the debtor in
any appeal from the judgment rendered in this adversary
proceeding will need to comply.

28 ⁶⁴Disclosure of Compensation of Attorney for Debtors, No.
10-35624, Dkt. #68.

1 wrongful foreclosure can be premised on nothing other than a
2 violation of the federal bankruptcy automatic stay. That, at a
3 minimum, clarified the law in a murky area and redirected the
4 Sundquists to this court. In addition, the Sundquists were
5 provoked to consult state court counsel because Bank of America
6 secretly rescinded its illegal foreclosure and tried to leave the
7 Sundquists holding the bag for expenses attributable to its
8 incompetent stewardship of the Sundquists' residence.

9 It follows that the services rendered in the state court
10 litigation have a sufficient nexus to the § 362 stay violation to
11 qualify as § 362(k) damages.

12 Hence, the component of § 362(k)(1) attorney's fee damages
13 attributable to the state-court litigation is \$17,882.00.

14
15 b

16 The Sundquists engaged different counsel to prosecute this
17 adversary proceeding. That attorney, who was also their counsel
18 in the chapter 13 case, complied with 11 U.S.C. § 329 by filing
19 the supplemental statement required by the last sentence of Rule
20 2016(b) for any payment or agreement not previously disclosed.
21 Her initial statement had been made contemporaneous with the
22 filing of the chapter 13 case in 2010.

23 In the subsequent statement, she reported having taken the
24 stay violation case on a contingency fee basis.⁶⁵

25 A copy of the actual contingency fee agreement was filed
26
27

28 ⁶⁵Disclosure of Compensation for Attorney for Debtors, No.
10-35624, Dkt. #69.

1 pursuant to court order.⁶⁶

2 The agreed contingency fee is the higher of 30 percent of
3 the total recovery or the amount of fees that the court orders
4 paid by the other side.⁶⁷

5

6

i

7 If the agreed compensation for debtors' counsel exceeds the
8 reasonable value of services, the court may cancel the agreement.
9 11 U.S.C. § 329(b).

10 In principle, contingent fees are permissible in bankruptcy
11 cases. Trustees and committees are expressly authorized to
12 employ professionals on a contingency fee basis. 11 U.S.C.
13 § 328(a). There may even be scenarios in which contingency fees
14 are appropriate for counsel representing a debtor.

15 Contingency fees for debtor's counsel in § 362(k)(1) stay
16 violation disputes, however, present logical difficulties.
17 Attorneys' fees are an element of § 362(k)(1) damages. A simple
18 contingency fee agreement in a situation in which attorneys' fees
19 are an element of damages leads to contingency fees on
20 contingency fees, which would set up a repetitive loop in which
21 fees would increase to infinity.

22 While it may be possible to draft a debtors' counsel
23 contingency fee agreement that might solve the problem described
24 here, the specific contingency fee agreement in this case does

25

26 ⁶⁶Order that Dennise Henderson File Copy of Contingency Fee
27 Agreement and Justify Agreement under 11 U.S.C. §§ 329(b) and
362(k)(1), No. 10-35624, Dkt. #70.

28 ⁶⁷Attorney-Client Retainer and Fee Agreement, No. 10-35624,
Dkt. #74.

1 not do so.

2 It follows that the agreement between counsel and the
3 debtors calls for fees that exceed the reasonable value of
4 services. Accordingly, pursuant to § 329(b) the portion of the
5 Attorney-Client Retainer and Fee Agreement calling for a
6 contingency fee is cancelled to the extent that it calls for
7 excessive compensation. 11 U.S.C. § 329(b).

8

9

ii

10 The consequence of the § 329(b) cancellation of the
11 excessive portion of the fee agreement means that the court must
12 determine the portion of the fee that is not excessive.

13 In response to this court's order to justify the contingency
14 fee under §§ 329(b) and 362(k)(1), the Sundquists' counsel
15 restated her fees on the hourly lodestar basis commonly used in
16 fee award cases.

17 Lodestar fees consistent with § 330 are presumptively
18 reasonable for purposes of § 329 so long as they are proportional
19 in terms of time, rate, and the nature and amount of the
20 controversy. 11 U.S.C. §§ 329(b)-330.

21 Here, the statement of lodestar fees in the hourly fee
22 application documents 207.56 hours devoted to representation of
23 the Sundquists in the stay violation matter and uses an hourly
24 billing rate of \$300.00, the product of which is \$62,268.00.
25 Counsel also has documented costs of \$6,606.55.

26 This court, having presided over the entire stay violation
27 litigation, is persuaded that \$68,874.55 does not exceed the
28 reasonable value of services rendered within the meaning of

1 § 329(b). If anything, as implied by comments elsewhere in this
2 opinion, counsel could have taken more time, effort, and expense
3 to prepare a more complete evidentiary presentation.

4 The component of § 362(k)(1) damages based on attorney fees
5 is \$70,000.00, which sum includes the documented fees and
6 expenses, together with an additional sum to compensate for the
7 time spent preparing the statement of fees.⁶⁸

8

9

D

10 Lost income is another element of § 362(k)(1) economic
11 damages, which subdivides into the income of the respective
12 plaintiffs.

13

14

1

15 Renée Biagi Sundquist has a bachelor's degree in marketing
16 and finance. She stopped working in the finance industry about
17 1999 when her twin sons were born.

18 She is an ice skater. As a youth, she competed in the
19 United States, was National Champion of Italy, and qualified for
20 the 1980 Italian Olympic Team but was unable to compete because
21 of illness. This background matters in this case because it
22 connotes the mental toughness inherent in individual performance
23 athletes who are able to compete at national and Olympic levels.

24 In January 2010, she was working as a figure skating coach

25

26 ⁶⁸If there is an appeal of this court's order in which the
27 Sundquists prevail, they will be entitled to fees reasonably
28 incurred in defending the appeal. The Best Service Co. v. Bayley
(In re Bayley), No. 15-55142 (9th Cir. Feb. 27, 2017), slip op.
at 3, citing Schwartz-Tallard, 803 F.3d at 1099 (en banc).

1 at Skatetown (Roseville Sportworld Inc.) in Roseville,
2 California, at \$20.00 per hour. In addition, she taught private
3 lessons for \$79.00 to \$100.00 per hour.

4 In August 2010, she accepted employment as Skating Director
5 at Skatetown on a job-share basis in which her share of the job's
6 annual salary was \$37,500.00. And she was able to teach private
7 lessons. Her IRS Form W-2 for 2010 reflects compensation from
8 Roseville Sportworld Inc. of \$22,732.29. The court infers that
9 her lesson-based income was about \$7,100.00 in 2010.⁶⁹

10 She found the work increasingly difficult because the stress
11 of dealing with Bank of America was draining her physical and
12 emotional resources. Migraine headaches, diagnosed by her
13 neurologist as stress-induced,⁷⁰ interfered with her ability to
14 work.

15 In August 2011, she was offered the Skating Director
16 position at Skatetown on a full-time basis with an annual salary
17 of \$80,000.00. But the effect of the stress of dealing with Bank
18 of America and concomitant migraine headaches prevented her from
19 accepting the job.⁷¹

20 Her IRS Form W-2 for 2011 reflects compensation from
21 Roseville Sportworld Inc. of \$47,491.68.

22 By 2012, her income as skating instructor dwindled as her
23

24 ⁶⁹Five months of income at an annual rate of \$37,500.00 is
25 \$15,625.00. The remaining \$7,107.29 probably reflects hourly
income.

26 ⁷⁰The court believes her testimony regarding headaches and
27 diagnosis.

28 ⁷¹The court believes her testimony about the offer and
rejection of the full-time position.

1 physical reactions to the situation with Bank of America
2 worsened.

3 Her IRS Form W-2 for 2012 reflects compensation from
4 Roseville Sportworld Inc. of \$7,397.00.

5 Tax returns for 2013 and 2014 reflect that she had no income
6 during those years.

7 She testified that her health is now "terrible" and that she
8 is unable to work and has insufficient prior work credits to
9 qualify for Social Security disability. Migraine headaches are
10 near daily occurrences. Multiple rounds of migraine medication
11 make her slow. Anti-seizure medication makes it hard for her to
12 speak.⁷²

13 The court is persuaded that Renée Sundquist was unable to
14 accept the \$80,000.00 Skating Director position in August 2011
15 because of the stress induced by the difficulties resulting from
16 the stay violation by Bank of America and its refusal to redress
17 the stay violation by eliminating inappropriate charges. It is
18 further persuaded that, "but for" the conduct of Bank of America
19 regarding its stay violation, she would have been successful in
20 that job and would still be employed in that position.

21 The court is not persuaded that she actually lost a material
22 amount of income in 2010 due to the stay violation.

23 Nor is the court persuaded that lost income should be
24 projected beyond the date of trial without the benefit of expert
25 medical opinion evidence regarding her long-term prospects.

26 Her lost income proximately caused by Bank of America's stay
27

28 ⁷²The court believes, and so finds as fact, this testimony.

1 violation and its aftermath is: 2011 \$8,908;⁷³ 2012 \$72,603;⁷⁴
2 2013 \$80,000; 2014 \$80,000; 2015 \$80,000; 2016 \$80,000.⁷⁵ Hence,
3 her total lost income for purposes of § 362(k)(1) actual damages
4 is \$401,511.00.

5
6 2

7 After Erik Sundquist graduated from the University of
8 California at Berkeley, he joined, and eventually succeeded to
9 ownership of, the construction company founded by his father in
10 the 1960s. He also formed some development-related businesses.

11 A downturn in construction business led him to wind up the
12 construction firm. The development businesses, Finn-Am, Inc.,
13 Sundquist Custom Design Build, Sundquist Associates, and
14 Chandelle, LLC, fizzled out during the Great Recession.

15 On the downslope, his earnings were \$154,238.00 in 2007,
16 \$87,178.00 in 2008, and \$20,125.00 in 2009.⁷⁶

17 He also has engaged in professional acting, but that
18 endeavor produced negligible income during the period relevant to
19
20
21

22 ⁷³Eight months of \$37,500 (\$25,000) as job-sharing Skating
23 Director + 4 months of \$80,000 Skating Director (\$26,667) + eight
24 months of \$7,100 teaching income (\$4,733) - Actual W-2 income
(\$47,492) =

25 ⁷⁴\$80,000 - Actual W-2 income (\$7,397) = \$72,603.

26 ⁷⁵The court is not persuaded that, in the absence of expert
27 testimony that her inability to work will persist, it should
award future damages after 2016.

28 ⁷⁶B of A Ex. AAA & B of A Request for Judicial Notice of
Filed Documents for Trial, Ex. A, p. 36.

1 this stay violation matter.⁷⁷

2 In 2012, he developed a consulting business based on his
3 status as a Reserve Specialist certified by the Community
4 Associations Institute. That business, SMA Reserves, LLC,
5 advises homeowner associations on the reserves that need to be
6 established in light of long-term maintenance and construction
7 needs. These so-called reserve studies are then used by the
8 client HOA for budget purposes. Tax return documents in evidence
9 reflect that through SMA Reserves, LLC, he earned \$39,776.00 in
10 2012, \$67,931.00 in 2013, and \$85,899.00 in 2014.⁷⁸ SMA
11 Reserves, LLC, is taxed as a partnership in which Erik Sundquist
12 has a 60 percent share.

13 He testified that his HOA clients have primarily been in the
14 San Francisco Bay market area and that he has found himself
15 frozen out in the Sacramento market area.

16 Erik Sundquist asserts that Kocal Management Group: A
17 Division of The Management Trust,⁷⁹ the large management company
18 that manages the HOA for the Sundquist residence and a number of
19 other HOAs in the Sacramento area, has blackballed him on account
20 of the dispute between the Sundquists and Bank of America.

21 This explanation rings true. The record reflects
22 considerable hostility directed by the HOA towards the Sundquists

23
24 ⁷⁷His 2011 IRS Form 1040 reflects \$32.00 from the Screen
Actors Guild.

25 ⁷⁸According to its website, SMA Reserves, LLC, performs
26 reserve studies according to the National Reserve Study Standards
27 published by the Community Associations Institute. Erik
Sundquist is certified as a Reserve Specialist by the Community
Associations Institute. www.smareserves.com.

28 ⁷⁹Sundquist Ex. 29.

1 because of their stance that Bank of America is responsible to
2 pay the HOA monthly charges and the \$20,000.00 fine that accrued
3 during the time that Bank of America owned their residence. The
4 issue has festered because it is about more than money. The
5 eyesore of the dead landscaping has been an annoyance because the
6 standoff with Bank of America has made the Sundquists reluctant
7 to invest in landscaping if they are going to be unable to keep
8 the house. That, in turn, infuriates the HOA leadership.⁸⁰

9 The court concludes that Bank of America's refusal to pay
10 HOA charges during the time that it owned the residence in 2010
11 has had the consequence of reducing the number of engagements by
12 HOAs for reserve studies that Erik Sundquist's firm is asked to
13 do.

14 The problem becomes how to determine the amount of loss
15

16 ⁸⁰From the Renée Sundquist Journal:
17

18 [July 2015] "I worried all day, and was so mad about our
19 homeowners association calling a hearing to discuss our lawn.
20 After the bank sold our home, they forgot to water, now we are
supposed to pay the association penalties and replace our lawn
and s[h]rubs. How will all this wrong be right?"

21 "Really excited we were given an opportunity for a lynch mob
22 Association meeting to discuss, oh, I mean embarrass us into
23 paying fees we don't owe. We found out that man recently
blocking my garage and pounding on our door for 20 mins is from
24 the association board. Life is good. Still dealing with my
25 children's fear and my pounding heart. So upset tonight, the
26 bank takes no responsibility and the board is run by crazy folks.
27 How I really wanted to respond to the board emails was, hey
stupid, my husband's name is spelt with a 'k' not 'c', and you
parked on private property, blocked my car from leaving, and
disrupted my children's life again. A page right out of the
bank's book."

28 B of A Ex. UUU.

1 caused by Bank of America. No evidence has been presented
2 regarding the market for reserve studies, the degree of
3 competition, or other logically relevant factors. Ordinarily,
4 one would expect to see expert testimony on the point.

5 While some might believe that this leaves the court in the
6 uncomfortable position of needing to speculate, that is
7 incorrect. The court can and, based on the evidence of the
8 business success in the nearby San Francisco Bay area, does have
9 the ability to fashion an award. But it will be done in a
10 conservative fashion that will award less than what likely could
11 have been proved with a more focused evidentiary presentation.

12 The concrete evidence is the income actually received
13 through SMA Reserves, LLC, for 2012, 2013, and 2014. These sums
14 are sufficiently modest as to warrant the inference the firm has
15 excess capacity - i.e. the ability to undertake additional
16 reserve studies.

17 The question is how much additional reserve study business
18 would have ensued if Erik Sundquist had not been frozen out of
19 his home market. While an expert focusing in on the numerous
20 intangibles might be able to make a case for more than an
21 additional 50 or 100 percent, the court concludes that an
22 appropriately conservative number, giving Bank of America the
23 benefit of the doubt, is 25 percent.

24 Although there is a pattern of steady year-to-year increase
25 in business for SMA Reserves, LLC, the court's conservative
26 approach does not assume, in the absence of evidence, any
27 increase for 2015 and 2016. Similarly, the court regards
28 projection of lost income into years after 2016 as unduly

1 speculative without actual evidentiary support.

2 Accordingly, the computation of lost business damages under
3 § 362(k)(1) is: 2012 - \$9,944.00 (= \$39,776.00 x .25); 2013 -
4 \$16,982.75 (= \$67,931.00 x .25); 2014 - \$21,474.75 (= \$85,899.00
5 x .25); 2015 - \$21,474.75; 2016 - \$21,474.75. Total \$91,351.00.

6

7

E

8 Lost property warrants an award of § 362(k)(1) actual
9 damages. During the time that Bank of America owned the
10 Sundquist residence pursuant to its stay-violating foreclosure,
11 the major appliances (cooktop, oven, built-in refrigerator,
12 washer, dryer), window coverings, and carpet went missing through
13 no fault of the Sundquists.

14 The court believes the Sundquists' testimony that they left
15 the premises in good order and did not take any of the subject
16 property.

17 The personal property would not have been lost "but for" the
18 actions of Bank of America in violating the automatic stay by
19 foreclosing and thereafter prosecuting an unlawful detainer
20 action that had the effect of driving the Sundquists out of their
21 home and into a rental property.

22 The court also believes the Sundquist testimony that the
23 value of the lost personal property was \$24,000.00.

24 Hence, actual damages for lost property are \$24,000.00.

25

26

F

27 HOA fees are an item for § 362(k)(1) damages. Those fees
28 are in two categories: monthly assessments and one-time charges.

1 The Verdera Homeowners Association assessed a charge of
2 \$20,000.00 because Bank of America permitted the landscaping to
3 die while it owned the Sundquist residence pursuant to its stay-
4 violating foreclosure.

5 Bank of America is also liable for all HOA fees that accrued
6 during the time that it owned the Sundquist residence.

7 And Bank of America is liable for all HOA fees - \$235.00 +
8 \$15.50 late fee per month - that accrued between the time it
9 rescinded the foreclosure sale on December 30, 2010, and the time
10 that the Sundquists moved back in during late January 2012, a
11 total of 13 months.

12 Placing liability on Bank of America for HOA fees between
13 December 30, 2010, and January 31, 2012, is appropriate for two
14 independent reasons. First, the bank permitted the rescission to
15 remain secret until the Sundquists' curiosity about the resumed
16 billing got the better of them and prompted them to look at the
17 land records on March 21, 2011. Bank of America was content to
18 permit the rescission to remain secret through January 31, 2012,
19 if the Sundquists had not taken the initiative. If the bank had
20 foreclosed during that period, it would have been liable for the
21 accrued HOA fees.

22 Second, the Sundquists were locked into a lease for their
23 alternative housing. The reason they were in alternative housing
24 was Bank of America's activity violating the automatic stay by
25 foreclosing and thereafter prosecuting an unlawful detainer
26 action in order to force the Sundquists to move. "But for" the
27 stay violations by Bank of America, the Sundquists would not have
28 moved and would have paid their monthly assessments.

1 One related item relates to the landscaping. The HOA
2 assessment of \$20,000.00 in 2010 presumably was an approximation
3 of the cost of lawn and landscaping. Prices have risen nearly 10
4 percent in the interim and likely will be subject to further
5 increases before the Sundquists actually recover. Accordingly,
6 an extra \$2,000.00 will be awarded to enable replacement of the
7 landscaping that Bank of America permitted to die. This is yet
8 another fruit of the poisoned foreclosure tree; "but for" the
9 stay violations by Bank of America, the Sundquists would not have
10 moved and would not have suffered the landscaping penalty charge.

11 The § 362(k) (1) actual damages attributed to HOA fees,
12 charges, assessments, and penalties total \$26,637.50.⁸¹

13
14 G

15 The record is replete with descriptions of the many
16 occasions after June 14, 2010, that the Sundquists sent loan
17 modification applications and supporting materials to Bank of
18 America.⁸² These application packages typically consisted of

19
20 ⁸¹The accrued balance as of the May 2011 HOA assessment was
21 \$22,633.50. Sundquist Ex. 29. Since the monthly assessment and
22 late fee was \$250.50, the eight months remaining total through
23 January 31, 2012, is \$2,004.00. Thus, the HOA total is
24 \$22,633.50 + \$2004.00 = \$24,637.50. Adding the \$2,000.00
25 increased cost of replacing landscaping yields \$26,637.50.

26 ⁸²E.g., From the Renée Sundquist Journal:

27 "[August 2010] Sent another modification packet to b/a, this
28 has to be over twenty modification packets at this point. I was
fixated on the amount of papers that included over the years! I
was fixated on the amount of papers that included over the years!
OMGosh, the environment! That times 20 !!!!!!!!!!!!!!!"

B of A Ex. 000; accord Renée Sundquist Decl. ¶ 120.

1 more than thirty pages.⁸³

2 A persistent feature of the loan modification situation is
3 that the payoff statements from Bank of America include a demand
4 that the Sundquists pay expenses of \$5,696.61 incurred by Bank of
5 America during the time that it was in title to the Sundquist
6 residence in 2010 pursuant to its stay violations. The
7 Sundquists take umbrage at the demand that they pay Bank of
8 America's expenses incurred when Bank of America owned the
9 property by virtue of its stay-violating void foreclosure.

10 That \$5,696.61⁸⁴ includes, for example, "HOA fee \$562.50,"
11 which was the payment by Bank of America on September 17, 2010,
12 of the HOA invoice dated August 11, 2010.⁸⁵ It includes \$450.00
13 for yard maintenance that occurred while Bank of America was in
14 possession of the property. It includes \$120.00 in property
15 inspection fees incurred before the rescission of the foreclosure
16 on account of the stay violations.

17 _____
18 "[2012] Called and left a message for [CEO Representative]
19 Lexi asked why we needed to sent the modification so many times
and asked for the current payoff.

20 Renée Sundquist Decl. ¶ 393.

21 "Today we received another random loan modification packet
22 to be completed. There must be a rule to send out a bogus denial
or send out a new modification packet."

23 Renée Sundquist Decl. ¶¶ 394-95.

24 The court believes, and so finds as fact, the facts asserted in
25 this testimony.

26 ⁸³B of A Ex. U (transmittal from Sundquist attorney faxing
32-page modification application).

27 ⁸⁴B of A Ex. WWW-002.

28 ⁸⁵Sundquist Exs. 76 & 81 & 89.

1 When one compares the payoff statement dated March 3, 2016,
2 with the payoff statement dated June 12, 2012, the additional
3 charges confirm the Sundquists' contention that Bank of America
4 has been continuing to demand to be reimbursed for expenses it
5 ran up during the period it owned the property.⁸⁶ This has been
6 a major sticking point in loan modification efforts from the
7 standpoint of the Sundquists.

8 The court agrees with the Sundquists that it is both wrong
9 and in bad faith for Bank of America to continue to demand that
10 Bank of America be reimbursed for the fruits of its own
11 misconduct.

12 This unreasonable and unconscionable position by Bank of
13 America is the main reason that there has been a six-year
14 standoff with the Sundquists. During that time, there has been
15 no meaningful effort by Bank of America to atone for its stay
16 violations. Hence, these are fruits of the poisoned foreclosure
17 and unlawful detainer.

18 The court finds that in the six years since the stay
19 violation there have been twenty loan modification requests and
20 finds that Bank of America's insistence on reimbursement of fees
21 and expenses incurred after its stay-violating foreclosure and
22 stay-violating unlawful detainer is not consistent with its
23 obligation of good faith and fair dealing. It follows that all
24 of its loan modification invitations to the Sundquists were made
25 with no intention to reach agreement.

26 The Sundquists had the burden of preparing repetitive
27

28 ⁸⁶Compare B of A Ex. WWW, with Sundquist Ex. 14.

1 applications with extensive documentation that, the court finds,
2 they faithfully completed and submitted, like Sisyphus, hoping
3 that this time would be different. The fact (which the court
4 finds as fact) that Bank of America had no intention of seriously
5 entertaining the applications that included requests for
6 adjustments on account of Bank of America's stay violations
7 created a burden that appropriately is included as actual damages
8 for stay violation.

9 Actual damages for each incidence of bad faith refusal to
10 entertain loan modification requests adjustments on account of
11 Bank of America's stay violations are \$1,000.00 per incidence.
12 Hence, § 362(k)(1) actual damages on this account are \$20,000.00.

13
14 H

15 Medical expenses are also an item for § 362(k)(1) actual
16 damages.

17
18 1

19 Renée Sundquist testified that after moving to the house in
20 Folsom over Labor Day weekend 2010 she was distracted, confused,
21 and angry at what seemed to her (and to him) as an eviction. She
22 started having trouble breathing and suffered panic attacks.

23 Erik Sundquist testified that he came home one day and found
24 his wife unable to breathe and rushed her to a hospital emergency
25 room, where she underwent "the full heart attack protocol."

26 Renée Sundquist confirmed that her husband took her to Mercy
27 Hospital Folsom on October 23, 2010. She had labored breathing.
28 Her heart rhythm was bad. The hospital kept her two days to

1 determine whether she was having a heart attack.

2 The ultimate conclusion was that the symptoms resulted from
3 stress. The prescribed treatment included Xanax and Valium.

4 She had been suffering from occasional migraine headaches
5 that had begun about one year before the move to the rental.
6 Beginning in September 2010, their incidence increased noticeably
7 to about one per week. Since then, they have become chronic and
8 nearly daily. Sometimes she has four three-day migraine
9 headaches in a month. She is under the care of a neurologist and
10 finds that the prescribed medication - Amatrex - has debilitating
11 side effects. She understands that stress is at the root of the
12 migraines.

13 She testified that she has incurred medical bills totaling
14 \$30,000.00.⁸⁷ There is no evidence of medical bills for Erik
15 Sundquist.

16 The court believes her testimony and finds that Bank of
17 America's stay violating activity in 2010 was the "but for" cause
18 of her medical issues that led to \$30,000.00 in medical bills.
19 They are fruits of the poisoned foreclosure and unlawful
20 detainer.

21 Once again, however, the problem is that the evidentiary
22 presentation is weak. One would expect to see, at a minimum,
23 medical bills and medical records and perhaps hear from medical
24 experts. With such evidence, the award likely would be greater
25 than what can be awarded on this evidentiary record.⁸⁸

26
27 ⁸⁷Sundquist Ex. 15.

28 ⁸⁸If the case were to need to be retried, the Sundquist
evidence likely would be considerably more robust.

1 The award of § 361(k)(1) actual damages on account of
2 medical bills that would not have been incurred "but for" the
3 automatic stay violations of Bank of America is \$30,000.00.
4

5 2

6 Erik Sundquist testified that he suffered physical injury
7 during the move over Labor Day weekend 2010 - he hurt his back
8 due to the heavy lifting and now suffers from a herniated disc.

9 The treatment for what is now chronic back pain includes
10 steroid injections, ibuprofen and prescription opioids.⁸⁹

11 Although the court is persuaded that at least some of his
12 back condition is attributable to having been propelled by Bank
13 of America to move during Labor Day weekend, the difficulty is
14 that there is no evidence of medical bills that this court can
15 use as a basis for making an award of medical expenses.

16 Accordingly, there is no § 362(k)(1) actual damages award for
17 Erik Sundquist's medical expenses.⁹⁰
18

19 I

20 Actual damages under § 362(k)(1) may include personal injury
21 when a personal injury is the proximate result of a stay
22 violation. Erik Sundquist's back injury is eligible for such an
23 award.

24 Previous to the move induced by Bank of America's continued
25

26 ⁸⁹The court believes, and so finds as fact, the facts
27 asserted in this testimony.

28 ⁹⁰If the case were to need to be retried, the Sundquist
evidence likely would be considerably more robust.

1 prosecution of its stay-violating unlawful detainer action
2 consequent to its stay-violating foreclosure, Erik Sundquist had
3 always been healthy and had no prior back injury.

4 This court believes his testimony and finds as fact that
5 Erik Sundquist hurt his back for the first time in the course of
6 the Bank of America-induced move in September, 2010. It further
7 finds that the injury is a material factor in his current
8 condition.

9 Before the move, Erik Sundquist was an athlete who played
10 soccer, skied, ran, and cycled. His athletic history included
11 membership on UCLA's NCAA National Championship soccer team in
12 1985.

13 After the move, he lost the physical ability to play soccer,
14 ski, run, or cycle. His exercise is restricted to using an
15 elliptical machine. He cannot sit for long periods of time. He
16 is in chronic pain from a herniated disc.

17 The court is persuaded that there is a lingering and chronic
18 pain back injury proximately caused by the heavy lifting and
19 twisting that commonly occurs in connection with moving household
20 furniture and that was occasioned by the move induced by Bank of
21 America's stay violations.

22 The injury significantly degraded his ability to continue
23 his habitual athletic activity. For an athletically-inclined man
24 with 10-year-old twin sons at the time of the injury, the loss is
25 significant.

26 Once again, however, the lack of medical opinion evidence
27 hampers the ability of the court to determine damages. There is
28 the possibility that other factors – such as the ravages and

1 accretions of the aging process - have also been at work.
2 Without such evidence, the court will adopt a conservative
3 approach and make an award that is less than what would be likely
4 if there were to be a better evidentiary presentation.

5 In these circumstances, actual § 362(k)(1) damages for the
6 back injury to Erik Sundquist is \$10,000.00.⁹¹

7

8

J

9 Emotional distress is an additional basis for actual
10 § 362(k)(1) damages.

11 As noted, proof of egregious conduct causing emotional
12 distress suffices. Alternatively, proof of less-than-egregious
13 circumstances suffice if it is obvious that a reasonable person
14 would suffer significant emotional harm. Dawson, 390 F.3d at
15 1149-50.

16 Here, the relevant proof comes from the testimony of Renée
17 Sundquist, which the court believed, and from her remarkably
18 self-revealing journal that she has had the courage to expose to
19 the world.

20

21

1

22 Renée Sundquist descended to depths of emotional despair
23 during the six years between Bank of America's illegal
24 foreclosure in violation of the automatic stay and the time of
25 trial. In later stages of that ordeal, she reacted to the

26

27

28 ⁹¹If this matter were to need to be retried following an
appeal, the Sundquist evidentiary support likely would be more
robust.

1 doorbell by hiding under the clothes hanging in her closet,
2 developed suicidal thoughts, and responded to written
3 communications from Bank of America by cutting herself with a
4 razor and bleeding all over the bathroom.

5 The process of how Bank of America drove her into the status
6 of an "eggshell plaintiff" warrants review.

7 By the time that the stay violation occurred in June 2010,
8 her prior dealings with Bank of America had been nothing short of
9 frustrating. Bank of America had induced the Sundquists to
10 default on their mortgage on the representation that a mortgage
11 modification would be entertained in good faith. Yet their
12 application papers were repeatedly declared to be "lost" or "not
13 received" or "stale," while Bank of America simultaneously
14 pursued foreclosure.

15 Throughout, the Sundquists were acting in good faith, not
16 realizing that Bank of America had no intention of acting in good
17 faith. The elimination of business debt concomitant to obtaining
18 a chapter 7 discharge following the closing of Erik Sundquist's
19 construction business was of no moment to Bank of America. Nor
20 was Bank of America impressed by the fact that Renée Sundquist's
21 mother was in a position, once a modified mortgage was agreed
22 upon, to cure the mortgage default that Bank of America had
23 induced.

24 The chapter 13 case was filed on the eve of a scheduled
25 foreclosure in the belief that the chapter 13 process would
26 enable the bank-induced default to be cured and a mortgage
27 modification agreed upon.

28 She did not anticipate that Bank of America would disregard

1 the automatic stay, pursue an unlawful detainer, drive the
2 Sundquist family out of their home, cause a \$20,000 HOA liability
3 while it was in title, permit the home to be looted before
4 secretly restoring them to title and then try to saddle them with
5 liability for Bank of America's conduct.

6 Her journal reveals the central role that Bank of America
7 assumed in her life during those six years. She kept submitting
8 and resubmitting mortgage information in response to requests by
9 Bank of America.

10 But, unlike Camus' conclusion about Sisyphus,⁹² she became
11 increasingly unhappy. Early entries connote optimism;⁹³ later
12 entries resignation.⁹⁴

13

14

15 ⁹²"One must imagine Sisyphus happy" ("Il faut imaginer
16 Sisyphes heureux"). Albert Camus, THE MYTH OF SISYPHUS (Penguin
17 Books, London, 2000), at 89 (tr. Justin O'Brien).

18

19 ⁹³From the Renée Sundquist Journal:

20

21 "[Fall 2009] Bank sends out new modification packet. The
22 representative at bank's HOPE department told me that they
23 are actually modifying loans and we should fill out the
24 modification again. For some strange reason I felt
25 hopeful."

26 Renée Sundquist Decl. ¶¶ 78-80. The court believes, and so
27 finds as fact, this testimony.

28

29 ⁹⁴From the Renée Sundquist Journal:

30

31 "August 2010 sent another modification packet to bank this
32 has to be over 20 modification packets at this point.

33

34 ...
35 we received an email from our bk attorney today, apparently,
36 the bank says they want to discuss options outside of
37 bankruptcy. I try to remain optimistic, however, I am a
38 seasoned loan modification filler outer. I know better."

39 Renée Sundquist Decl. ¶¶ 120-23. The court believes, and so
40 finds as fact, this testimony.

1 She began to realize that Bank of America was animated by
2 bad faith.⁹⁵

3 She started hiding in the closet when there was activity at
4 the door.⁹⁶ As time went by, this reaction to activity and the
5 front door persisted.⁹⁷ Eventually, it was viewed as a symptom

6
7 ⁹⁵From the Renée Sundquist Journal:

8 "I realized at 2 am this morning that the letter that our
9 attorney received and the modification packet sent out was
10 when they had sold the house and we no longer owned it. How
11 can they do a modification. I need professional help to get
12 past this. What a horrid pit in my stomach and my head
13 hurts so badly too."

14 Renée Sundquist Decl. ¶¶ 174-76; accord, B of A Ex. QQQ-001
15 ("when our attorney received a letter from b/a stating they
16 wanted to work with us on a modification, they had already sold
17 our house when they sent that email! I hope God is watching! I
18 predicted they wouldn't work with us, I didn't predict they would
19 sell our home while in bk! Wow, I need professional help to get
20 past this! What a horrid pit in my stomach. My head hurts so
21 badly too! We were just were [sic] instructed by b/a to submit
22 another loan modification. ahhhhhhh really, we don't own the
23 house any longer!!!!!!!!!!!!!!!!!!!!!! I hate them!"). The court
24 believes, and so finds as fact, this testimony.

25 ⁹⁶From the Renée Sundquist Journal:

26 "[August 2010] [Son] noticed someone across the street and
27 said 'someone is casing the joint' Where did he hear that.
28 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."

29 Renée Sundquist Decl. ¶¶ 125-27. The court believes, and so
30 finds as fact, this testimony.

31 ⁹⁷From the Renée Sundquist Journal:

32 "May 2011 the doorbell rings m[y] heart races. I am in the
33 rental and still react with horror.

34 ...
35 March 2012 I am having a hard time living in the house.
36 Every time the doorbell rings I hide in my closet under my
37 hanging clothes."

1 of Post-Traumatic Stress Disorder.⁹⁸

2 Suicidal thoughts began to be articulated in her journal and
3 became more frequent.⁹⁹

4 The cutting is evident in the journal and worsened as time

5
6 Renée Sundquist Decl. ¶¶ 254-55 & 313-14. The court believes,
and so finds as fact, this testimony.

7 ⁹⁸From the Renée Sundquist Journal:

8 "[2015] Met with the doctor today, she says I have PTSD and
9 its not weird that when the doorbell rings I hide in the
closet"

10 Renée Sundquist Decl. ¶¶ 489. The court believes, and so finds
11 as fact, this testimony. If there needs to be another trial
12 following an appeal, the medical evidence is likely to be robust.

13 ⁹⁹From the Renée Sundquist Journal:

14 "[Feb. 2012] Thought of driving off a cliff today [today] as
I went to pick up [sons]"

15 "Strange day; could not talk to anyone I have lost my life."

16 "[2013] My life is stuck like I am in quicksand but not
17 going under to die and finally done with this pain."

18 "I thought a long while about killing myself tonight. I
19 feel so sad, I would miss my family so much, I just don't
20 know how to get through this bank crap, it seems it won't
ever end."

21 "[June 2014] There was blood all over the bathroom. Erik
22 tried to help, I feel my life is gone."

23 "If I were to die tonight I know I would regret all the time
24 lost worrying about this stupid house, and how wrong the
situation is, but we are so broken."

25 Renée Sundquist Decl. ¶¶ 312, 325, 408, 412, 442 & 468; accord,
26 B of A Ex. SSS-001 ("Thought about driving off the cliff today as
I went to pick up [sons] from school. I will never be okay that
27 the bank took moments from me while my Mom died. I will never
forgive myself that my Mom worried one second about what the bank
28 of holy hell was doing. At least my Mom doesn't have to deal
with hearing about their crap anymore."). The court believes,
and so finds as fact, this testimony.

1 passed.¹⁰⁰ And, was corroborated by Erik Sundquist in his

2
3 ¹⁰⁰From the Renée Sundquist Journal:

4 "[Dec. 2012] Trying not to cut myself."

5 "July 2013 My head and the cutting is so bad I need a
6 break."

7 "Sometimes getting a migraine and sadly cutting myself is
8 the only relief from this horrible bank pain."

9 "So very sad, I cut myself after the doorbell rang and the
10 delivery of this paperwork. I hate that this is happening.
11 Cutting is the only way the pain from the bank stops and all
12 [of] the sudden I have physical pain from the cutting. This
13 cannot be my life. It's almost like [I] am looking at
14 myself from afar. My arm stings in the shower. The cuts
15 are bad. Blood everywhere."

16 "[Nov. 2013] Lots of cutting today, crumbling under bank
17 pressure."

18 "[Dec. 2013] took [?] upset the cutting is awful our family
19 is falling apart."

20 "[Jan. 2014] Received an email from Trustee Sale, I cut
21 myself so bad today. The bad news has to stop, I hate all
22 my scars, and dream I could have them treated some day. I
23 am so embarrassed and people judge you, good thing I don't
24 see my friends anymore. I will never wear shorts again."

25 "June 2014 Today was awful I am getting a headache and cut
26 myself so bad it took so long to stop bleeding. There was
27 blood all over the bathroom. Erik tried to help, I feel my
28 life is gone."

"[Nov. 2014] The doorbell rang today, Erik cautiously open
door it is an orange slip. I hid in the bathroom and cut
myself."

"[Jan 2015] The doorbell rang today another orange note. I
tried so hard not to cut myself today but after the note
came it was too much."

"March 2015 the doorbell rang and I ignored it. Later in
the day I got the orange slip off the door, I threw it in
Erik's office. Too much too long blood all over the
bathroom floor."

1 testimony, which the court believed.

2 This emotional distress is the human cost proximately
3 resulting from the conduct of Bank of America in stringing out
4 the Sundquists and constitutes § 362(k)(1) actual damages.

5 Nor can Bank of America's conduct be chalked off to low-
6 level employees who were not paying attention. Rather, the
7 record implicates senior executives. There are a number of
8 communications to the Sundquists from the office of the Bank of
9 America Chief Executive Officer. Those communications disclaimed
10 responsibility for its illegal foreclosure in violation of the
11 automatic stay and its refusal to adjust for the ensuing
12 consequences.

13 The Bank of America executive staff even lied to the CFPB in
14 an astonishingly brazen manner, denying the existence of the
15 Sundquist state-court litigation. Their appeal was then pending
16 at the California Third District Court of Appeal and was soon to
17 be decided in their favor on such questions as whether they had
18 stated a claim for fraud.

19 This court finds as fact that Bank of America's brazen
20 conduct towards the Sundquists, done in a heartless manner and in
21 their plain view, inflicted a significant emotional toll on Renée
22 Sundquist. This emotional distress would not have occurred but
23 for Bank of America's course of conduct following upon its
24 violation of the automatic stay.

25

26 _____
"July 2015 doorbell rang, I cut."

27

28 Renée Sundquist Decl. ¶¶ 328, 365, 385, 399-402, 434, 435, 438-
43, 461, 480, 486-87, 490. The court believes, and so finds as
fact, this testimony.

1 While evidence probative of the appropriate amount of
2 emotional distress damages is thin, the fact of severe emotional
3 distress is so clear that this court can make an award. As with
4 other damage components in this case, the amount of the award
5 will be less than what likely would have been awarded if the
6 evidentiary record had been more complete.¹⁰¹

7 The emotional distress damages for Renée Sundquist are
8 \$200,000.00.

9
10 2

11 Erik Sundquist ultimately was driven by Bank of America's
12 conduct, and its effect upon his wife, to attempting suicide.

13 In testimony that the court believed, he related how he felt
14 driven to act and how one of his school-age sons helped locate
15 him before it was too late.¹⁰²

16 His wife's journal captures the incident from her
17 perspective.¹⁰³

18
19 ¹⁰¹If the case were to need to be retried, the Sundquist
evidence likely would be considerably more robust.

20
21 ¹⁰²A plausible case could be made that the two Sundquist
minor children also suffered emotional distress as a proximate
22 result of Bank of America's stay-violating conduct. However,
they are not, at least not as yet, parties. If this case were to
23 need to be retried following an appeal, it is conceivable that
they might be permitted to intervene.

24 ¹⁰³From the Renée Sundquist Journal:

25 " [2015] Yesterday was worst day Erik sends me a text, I love
26 you and the boys goodby. I freaked, he turned off his
phone. I screamed for [son] to help find him. He was able
27 to find him through his IPAD. We drove madly to where we
would see he was. We could see he went into a CVS and came
28 out. We get to the car and he is asleep, groggy, alive. I
am screaming and crying, [son] is crying. [Son] gets in car

1 The court finds as fact that the Bank of America ordeal

2
3
4 with Erik and talks to him for a long time. I sat on the
pavement staring."

5 Renée Sundquist Decl. ¶¶ 470-78; accord, B of A Ex. VVV-001
6 ("Yesterday was one of the worst days of my life. Dear God.
7 Erik and I were just in a horrid place in the morning, too much
8 stress, were are both so ready to move on from the current state
9 of house and lawsuit limbo. I texted him awful stuff about the
10 past five years, at some point, when I can't call up the bank of
11 holy hell and scream, I guess I decided to scream in a text to
12 Erik. I received a text from him later in the afternoon where he
13 apologized for our life, and wrote he would always love me and
14 the boys and then wrote goodbye. Oh my God! My life stopped.
15 That moment - where you read the word 'goodbye', all of a sudden
16 I couldn't hear, I couldn't breathe, I couldn't think, and I most
17 certainly couldn't move! After the longest 20 seconds of my life
18 I screamed for [son] and immediately asked him to text his
19 father. I knew instinctively this was my only hope for Erik to
20 read a text message from his son, and my only hope for Erik not
21 to hurt himself. Oh my God is all I was thinking. Oh my
22 God!!!!!! I didn't tell [son] much, other than we need to find
23 Dad quick. [Son] knew I was serious. What seemed like hours, no
24 response from Erik, we figure out his phone was shut off!!! [Son]
25 then ran to the car where he started tracking Erik's ipad
26 location, we could see he was in a CVS drug store. Dear Lord.
27 Usually Erik and I are always so mad at [Son] with all his
28 technology, yesterday I was so grateful he had the knowledge to
track his dad. Erik's location started moving, and eventually we
could tell he drove and parked nearby, our worst nightmare, what
did he buy in CVS and will we get there in time before he
swallows too much? Oh my God! It is truly so hard to write in
words what that 20 minute car ride felt like while imagining Erik
did something horrible to himself. What seemed like forever, we
finally got to the parking lot and saw Erik's car, as we pull up
he was asleep. I just remember screaming and pounding on his
window, thank God he could open the window, but had taken way too
much of something. I just kept screaming, finally he showed me
the bottle of pills, my god, I am thinking at least he is awake
and breathing. [Son] is crying, I am screaming, we ascertain what
Erik has swallowed, oh my god, what a mess. Just in time, we are
unclear just what he was prepared to continue ingesting if we
didn't find him. I just sat and sobbed. Really, what can I
write, no words can explain what I was feeling, what a complete
mess!!! [Son] jumped in Erik's car and sat there for over an
hour, I am not entirely sure of all the [exhibit ends in mid-
sentence])" The court believes, and so finds as fact, this
testimony.

1 occasioned by its unrepentant disregard of the consequences of
2 its illegal violation of the automatic stay was a material factor
3 in the emotional state of mind that brought Erik Sundquist to the
4 brink of suicide. This emotional distress would not have
5 occurred but for Bank of America's course of conduct following
6 upon its violation of the automatic stay.

7 While evidence probative of the appropriate amount of
8 emotional distress damages for Erik Sundquist is thin, the fact
9 of severe emotional distress is so clear that this court can make
10 an award. As with other damage components in this case, the
11 amount of the award will be less than what likely would have been
12 awarded if the evidentiary record had been more complete.¹⁰⁴

13 The emotional distress damages for Erik Sundquist are
14 \$100,000.00.

15

16

VI

17 Congress authorized punitive damages under § 362(k)(1) in
18 "appropriate" cases when individuals are victimized by willful
19 violation of the automatic stay.

20

21

A

22 Unlike most punitive damages situations, this is a federal
23 punitive damages statute. Congress has given no specific
24 guidance about punitive damage boundaries under that statute
25 other than that they be awarded "in appropriate circumstances."
26 11 U.S.C. § 362(k)(1).

27

28 ¹⁰⁴If the case were to need to be retried, the Sundquist
evidence likely would be considerably more robust.

1 Some threshold basics have been identified. An
2 "appropriate" case for punitive damages under § 362(k)(1) entails
3 some showing of reckless or callous disregard for the law or for
4 rights of others. Bloom, 875 F.2d at 228.

5 Proof of conduct that is malicious, wanton, or oppressive
6 suffices to satisfy Bloom's "reckless-or-callous-disregard"
7 standard. Snowden, 769 F.3d at 657.

8 Beyond these basics, there is comparatively little judicial
9 precedent grappling with complexities of this punitive damages
10 statute. While there are plentiful small-case decisions, there
11 is a paucity of larger cases that have necessitated probing the
12 depths of punitive damages under § 362(k)(1).

13 In other words, at this late date there is still much about
14 the law of § 362(k)(1) punitive damages that amounts to writing
15 on a clean slate.

16 By any measure, this case presents an "appropriate" case for
17 punitive damages as authorized by § 362(k)(1). The magnitude of
18 the case requires more careful consideration of punitive damages.

19
20 B

21 The leading Supreme Court cases involve common law punitive
22 damages. Philip Morris USA v. Williams, 549 U.S. 346 (2007);
23 State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408
24 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). None
25 of these cases deal with a federal punitive damages statute.
26 They are, nevertheless, instructive to the extent that Congress
27 has not dictated a different result.

28 Three guideposts mark the way: (1) the degree of

1 reprehensibility of the defendant's misconduct; (2) the disparity
2 between the actual or potential harm suffered by the plaintiff
3 and the punitive damages award; and (3) the difference between
4 the punitive damages awarded and the civil penalties authorized
5 or imposed in comparable cases. State Farm, 538 U.S. at 418,
6 citing Gore, 517 U.S. at 575.

7
8 1

9 The first Supreme Court guidepost focuses on degree of
10 reprehensibility. This case may constitute the paradigm case of
11 the "reckless or callous" disregard for the law and for the
12 rights of others and of malicious, wanton, or oppressive conduct
13 contemplated by Bloom and Snowden in order to present an
14 "appropriate" case for § 362(k)(1) punitive damages.

15
16 a

17 Black-letter law provides that § 362 automatically stays
18 foreclosures and stays subsequent acts to implement foreclosures.

19 Case law in this circuit establishes that all acts in
20 violation of the stay are void from the outset, not merely
21 voidable. E.g., Schwartz, 954 F.2d at 572-73. Similarly,
22 subsequent dismissal of a case does not ratify an act that was
23 void from the outset. 40235 Washington St. Corp., 329 F.3d at
24 1080 n.2. And, liability continues until a stay violation has
25 been corrected. Snowden, 769 F.3d at 659 & 662.

26 It is beyond cavil that Bank of America, as a sophisticated
27 creditor (indeed, one of the most sophisticated creditors
28 operating in the United States economy), knew and knows the

1 black-letter statutory law and the concomitant case law.

2

3

b

4 Bank of America's actions, however, tell a story that smacks
5 of cynical disregard for the law when dealing with the
6 Sundquists.

7

8 Let us enumerate the ways in which Bank of America
9 intentionally disregarded the law in the course of the Sundquist
10 saga.

10

11 Knowing of the existence of the automatic stay, Bank of
12 America nevertheless foreclosed on the Sundquist residence.

12

13 Knowing of the existence of the automatic stay, Bank of
14 America nevertheless recorded a trustee's deed transferring title
15 to itself.

15

16 Knowing of the existence of the automatic stay, Bank of
17 America nevertheless filed an unlawful detainer action in state
18 court.

18

19 Knowing of the existence of the automatic stay, Bank of
20 America nevertheless conducted open and notorious harassing
21 inspections of the Sundquist residence, including, by way of
22 example, terrorizing one of the Sundquists' minor children by
23 beating on a sliding door in the rear of the house and demanding
24 entry and, by way of further example, openly and notoriously
25 tailing Sundquist vehicles to their garage at the residence.

25

26 Knowing of the existence of the automatic stay, Bank of
27 America nevertheless gave notices in the state-court unlawful
28 detainer action consistent with imminent eviction that panicked
the Sundquists into moving into leasehold premises.

1 Knowing that the foreclosure was void as a violation of the
2 automatic stay, Bank of America nevertheless failed to inform the
3 Sundquists before they vacated the premises in panic that it
4 realized the foreclosure was void and must be rescinded.

5 Knowing that its state-court unlawful detainer action was
6 void as a violation of the automatic stay, Bank of America
7 nevertheless failed to dismiss the unlawful detainer action
8 before the Sundquists vacated the premises in panic.

9 Knowing that the foreclosure was void as a violation of the
10 automatic stay and must under Bank of America's written
11 procedures be rescinded "immediately," Bank of America dallied
12 nearly four months before recording the rescission.

13 Knowing that the foreclosure was void as a violation of the
14 automatic stay and must be rescinded, Bank of America failed to
15 inform either the Sundquists or their counsel that it would be
16 taking such action. In fact, Bank of America never would have
17 informed them if the Sundquists and their counsel had not
18 inquired of Bank of America about the state of title.

19 Knowing that the foreclosure was void as a violation of the
20 automatic stay and that it had been rescinded, Bank of America
21 failed for approximately three months after recording the
22 rescission of the trustee deed of foreclosure to inform either
23 the Sundquists or their counsel that it had restored them to
24 title.

25 Knowing that the foreclosure was void as a violation of the
26 automatic stay and must be rescinded, Bank of America failed
27 promptly to dismiss the state-court unlawful detainer action
28 seeking to enforce the void foreclosure.

1 Knowing that the foreclosure was void as a violation of the
2 automatic stay and had been rescinded, Bank of America failed for
3 an additional two months after recording the rescission of the
4 trustee deed of foreclosure to dismiss the state-court unlawful
5 detainer action seeking to enforce the void foreclosure.

6 Knowing that there was a pending appeal in a California
7 state court, the office of the Chief Executive Officer of Bank of
8 America responded to an official inquiry by the Consumer
9 Financial Protection Bureau by falsely stating that no litigation
10 was pending and that the court papers requested by the CFPB did
11 not exist.

12 Knowing that HOA charges were incurred during the period
13 that Bank of America held title to the residence, Bank of America
14 refused to pay those charges and continues to demand that the
15 Sundquists reimburse it for the HOA charges that it did pay.

16 Knowing that a \$20,000.00 charge was levied by the HOA
17 because Bank of America did not water the lawn and shrubbery
18 during the period that Bank of America held title to the
19 residence and that the Sundquists had vacated at the demand of
20 Bank of America and in fear of Bank of America's threatened
21 eviction, Bank of America refuses to make any adjustment and
22 insists that the \$20,000.00 charge is the Sundquists' problem.
23 Bank of America's refusal has precipitated a hateful animus of
24 the HOA towards the Sundquists.

25 For these reasons, Bank of America has been acting toward
26 the Sundquists in knowing and reckless disregard of the § 362
27 automatic stay. Further, this conduct has been callous; nay,
28 cruel.

1 In the calculus of reprehensibility, Bank of America's
2 intentional conduct adds up to reckless and callous disregard for
3 the rights of others. Bloom, 875 F.2d at 228. It has been
4 wanton and oppressive. Snowden, 769 F.3d at 657. This equates
5 with a high degree of reprehensibility. State Farm, 538 U.S. at
6 418, citing Gore, 517 U.S. at 575.

7
8 2

9 Passing on to the second Supreme Court guidepost, the
10 disparity between actual harm and the punitive damages award,
11 this is a case of substantial actual harm where simplistic ratios
12 are of limited utility.

13 The high degree of reprehensibility, coupled with the
14 significant involvement by the office of the Bank of America
15 Chief Executive Officer, calls for punitive damages of an amount
16 sufficient to have a deterrent effect on Bank of America and not
17 be laughed off in the boardroom as petty cash or "chump change."

18 It is apparent that the engine of Bank of America's problem
19 in this case is one of corporate culture. The evidence is
20 replete with so many communications from the office of Bank of
21 America's Chief Executive Officer that the oppression of the
22 Sundquists cannot be chalked off to rogue employees betraying an
23 upstanding employer. This indicates that the engine is driven by
24 direction from senior management.

25 Nor can Bank of America hide behind some alleged fiduciary
26 duty to a third-party investor that constrains its ability to do
27 the right thing. Bank of America owned the Sundquist mortgage
28 for its own account. When it foreclosed, it noted that there was

1 no investor to notify.

2 It follows that a sum greater than a modest multiple of the
3 actual damages suffered by the Sundquists is necessary to serve
4 the deterrent function.

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7 The Supreme Court's third guidepost focuses upon the
8 relationship between the punitive damages awarded and the civil
9 penalties authorized or imposed in comparable cases.

10 It happens that Bank of America has a long rap sheet of
11 fines and penalties in cases relating to its mortgage business.
12 In March 2012, Bank of America agreed to pay \$11.82 billion to
13 settle litigation prosecuted by federal and state regulators
14 regarding its foreclosure and mortgage servicing practices. In
15 June 2013, Bank of America agreed to pay \$100 million to settle
16 litigation regarding mortgage loan origination issues. In
17 December 2013, Bank of America agreed to pay \$131.8 million to
18 settle litigation with the Securities Exchange Commission
19 regarding the structuring and sale of mortgage securities to
20 institutional investors. In March 2014, Bank of America was
21 fined \$9.5 billion by the Federal Housing Finance Agency for
22 defrauding Fannie Mae and Freddie Mac regarding mortgage-backed
23 securities.

24 In an environment in which Bank of America has been
25 settling, i.e. terminating exposure to higher sums, for billions
26 and hundreds of millions of dollars, a few million dollars
27 awarded as § 362(k)(1) punitive damages award in a real case
28 involving real people, in which the human element of the

1 consequences of Bank of America's behavior comes to the fore for
2 the first time is appropriate and proportional.

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5 After Gore and State Farm, the Supreme Court ruled in
6 Williams that adequate notice of punitive damages is essential
7 and that punitive damages awarded under state law must be focused
8 on redressing harm caused to the parties before the court, not to
9 other persons. Harm to others is relevant mainly to the question
10 of degree of reprehensibility. Williams, 549 U.S. at 355.

11 Bank of America had ample notice in this case that
12 substantial punitive damages might be awarded. It was taking the
13 position that any stay violation liability terminated at the
14 dismissal of the Sundquist chapter 13 case and no later than the
15 time of the rescission of the foreclosure sale. On multiple
16 occasions during pretrial conferences, this court, as prospective
17 trier of fact, noted to counsel for Bank of America that it
18 needed to be mindful that substantial damages, actual and
19 punitive, might be awarded if the facts alleged and the
20 Sundquists' theory of the case were to turn out to be correct.

21 By nevertheless choosing to go to trial, Bank of America
22 knowingly assumed the risk of substantial punitive damages.¹⁰⁵

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24 ¹⁰⁵Williams also prompts a clarification of the record. In
25 the course of ruling on evidentiary objections during the bench
26 trial, this court noted that the Sundquists' testimony about Bank
27 of America's loss and mishandling of their many loan modification
28 applications was consistent with testimony that this court had
heard literally hundreds (perhaps thousands) of times regarding
various mortgage lenders since the onset of the mortgage crisis
and the Great Recession. See, e.g., In re Roderick, 425 B.R.
556, 560 (Bankr. E.D. Cal. 2010) (Wells Fargo Home Mortgage). In
context, this court was noting on the record for the benefit of

C

1
2 A conceptual problem arises at this juncture regarding how
3 punitive damages are awarded.

4 It is settled that, in addition to extra recompense for
5 plaintiffs, punitive damages serve legitimate governmental and
6 societal interests in punishing unlawful conduct and deterring
7 its repetition. Gore, 517 U.S. at 568; Newport, 453 U.S. at 266-
8 68; Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). But,
9 how are those societal interests to be vindicated?

10 To the extent that legitimate societal interests are to be
11 served, the remedy needs to fit the wrong. The award should be
12 sufficient to serve those interests, which may be an "eye-
13 popping" sum in the view of bystanders not possessed of great
14 wealth.

15 When a large award is necessary, the problem arises of why
16 plaintiffs should be allowed to appropriate to themselves
17 unrestricted use of the governmental and societal component of a
18 large punitive damages award - beyond a few multiples of
19 compensatory damages.

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23 Bank of America's counsel that the Sundquist testimony about
24 their own experience was not inherently incredible to the trier
25 of fact and needed to be taken seriously as Bank of America
26 cross-examined and presented its defense. It was probative of
27 witness credibility and invited refutation, which was not
28 forthcoming. Mindful of Williams, 549 U.S. at 355, this court
emphasizes that it is not punishing Bank of America for what it
may have done to other people. This court's knowledge of Bank of
America's loan modification practices, gained in open court with
Bank of America as a party, served two evidentiary purposes in
this trial: (1) relevant to degree of reprehensibility; and (2)
probative of credibility.

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This case illustrates the problem. Simplistic damage multiples that are not tied to economic reality would produce punitive damages that do not accurately serve their purposes.

In 2015, Bank of America earned net income of \$15,900,000,000 and paid its top seven executives \$80,500,000, which sum included \$50,000,000 to the positions of Chief Executive Officer, Chief Operating Officer, and Head of Global Wealth and Investment Management. 2016 Proxy Statement, Bank of America, at pp. ii & 39 (March 17, 2016).¹⁰⁶

To award punitive damages measured by a conventional multiplier of three to six times of the Sundquist compensatory damages would be laughed off in Bank of America's boardroom as a mere "cost of doing business" payable out of the petty cash account.

If the punitive damages award does include an amount sufficient to serve the legitimate societal interests justifying punitive damages but can only be directed to the Sundquists, the award to them would be greater than what principles of fairness would justify.

Conversely, why should Bank of America be permitted to evade the appropriate measure of punitive damages for its conduct? Not being brought to book for bad behavior offensive to societal norms merely incentivizes future bad behavior.

¹⁰⁶The equity-based compensation is subject to clawback for "detrimental conduct." 2016 Proxy Statement, Bank of America, at p. 49.

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Several responses to the problem of economically efficient allocation of punitive damages have emerged in recent years.¹⁰⁷

The Ohio Supreme Court, dealing with Ohio law, treated society as a de facto party. It recognized that there is a "philosophical void between the reasons we award punitive damages and how the damages are distributed" and ordered a remittitur according to which it reduced a \$49 million punitive damages jury award for bad faith denial of coverage to a cancer victim down to \$30 million on the condition that the excess over \$10 million (plus attorney's fees) be distributed to a cancer research fund sponsored by the State of Ohio. Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 77, 102-04, 2002-Ohio-7113, 781 N.E.2d 121, 144-45 (Ohio 2002).

The Ohio judicial innovation redirecting part of a punitive damages award to a public purpose linked to the defendant's bad conduct was a matter of Ohio common law. As such, it was justified by the "common law evolution" rationale. See Li v. Yellow Cab Co., 532 P.2d 1226, 1238-39 (Cal. 1975).

In principle, the realm of federal common law is subject to the same common law evolution doctrine.

Legislatures have also innovated with enactment of so-called split recovery statutes.¹⁰⁸ According to these schemes, which are

¹⁰⁷See Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347 (2003). See also, Note, Uncle Sam and the Partitioning Punitive Problem: A Federal Split Recovery Statute or a Federal Tax, 40 PEPP. L. REV. 785 (2013); Note, An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation, 105 HARV. L. REV. 1900 (1992).

¹⁰⁸See Note, 40 PEPP. L. REV. at 802-05.

1 designed to ameliorate the perceived problem of the plaintiff
2 windfall, the lion's share of punitive damages are redirected to
3 public purposes for the benefit of society.

4 An example relevant in this judicial circuit is Engquist v.
5 Oregon Dep't of Agriculture, 478 F.3d 985 (9th Cir. 2007). The
6 Ninth Circuit affirmed, against challenges under constitutional
7 and common law theories, Oregon's statutory allocation of 60
8 percent of a punitive damages award in a tort case to the Oregon
9 Criminal Injuries Compensation Account pursuant to state statute.
10 Or. Rev. § 31.735; Engquist, 478 F.3d at 999-1007.

11 As a matter of procedure, the Ninth Circuit ruled that for
12 purposes of execution under Federal Rule of Civil Procedure 69(a)
13 it was sufficient for the State of Oregon to be identified in the
14 judgment as a judgment creditor without the need formally to
15 intervene as a party. Engquist, 478 F.3d at 1001.

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VII

18 Having concluded that punitive damages are "appropriate" in
19 this case and having noted a trend toward calibrating punitive
20 damages to serve their intended purposes, the question becomes
21 how to determine the appropriate amount and allocation under the
22 federal punitive damages statute in Bankruptcy Code § 362(k)(1).

23

24

A

25 Congress has given no guidance on the question regarding the
26 federal statutory punitive damages authorized by § 362(k)(1),
27 presumably leaving the answer to trial court decisions filtered
28 through the appellate process.

1 Where Congress authorizes punitive damages in a general
2 manner, as in § 362(k)(1), it may be presumed that it intends
3 that punitive damages be in an amount that serves the full
4 panoply of interests, including societal interests, that are
5 vindicated by punitive damages.

6 In the context of the Bankruptcy Code, a key societal
7 interest underlying § 362(k)(1) is to have a self-executing
8 private law mechanism to enforce the automatic stay that is
9 crucial to effective operation of the bankruptcy system. The
10 statutory punitive damages remedy evinces a public purpose that
11 the automatic stay not be a toothless tiger that can be flouted
12 with impunity.

13 It also may be presumed that Congress meant to tolerate a
14 certain degree of perceived windfall to victims (not always
15 debtors) of willful violations of the automatic stay. One might
16 say that in the ordinary punitive damages situation the perceived
17 plaintiff windfall implicit in punitive damages functions as an
18 acceptable byproduct of the effort and risk of privately
19 enforcing the mandate of Congress. One might even say that the
20 plaintiff is being compensated for acting as the equivalent of a
21 private attorney general.

22

23

B

24 The problem becomes how to deal with the unusual situations
25 in which there is a gap between the large amount of punitive
26 damages that is both necessary and appropriate to serve the
27 purposes intended by § 362(k)(1) as to the wrongdoer and the
28 smaller amount that is appropriate for a plaintiff without

1 conferring an excessive windfall. In other words, how is one to
2 proceed when the punitive damages are not excessive per se, but
3 the windfall to the plaintiff is perceived as excessive?
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6 To let a defendant escape well-deserved punitive damages
7 that are needed to vindicate the societal interests served by the
8 law authorizing the award merely because a plaintiff would be
9 receiving too much money is not a satisfactory answer.

10 Here, the law is poorly developed. Appellate jurisprudence
11 regarding "excessive" punitive damages tends to conflate the
12 distinct concepts of the appropriate amount of the punitive
13 damages award that the defendant's conduct justifies (i.e.
14 whether the award itself is "excessive" in light of the conduct)
15 and of the amount that the plaintiffs ought to be allowed to
16 receive (i.e. whether the non-excessive punitive damages are
17 nevertheless "excessive" in the hands of the plaintiff). This is
18 a byproduct of our case-law system in which appellate courts are
19 prisoners of the facts determined in the trial court in the
20 particular case on appeal and generally decline to consider
21 issues not raised, and arguments not made, at trial.

22 The "excessive punitive damages" cases that have come before
23 the Supreme Court have not been cases that present the issue of
24 the dichotomy between the deserved amount of punitive damages and
25 the amount that is appropriate to leave in the hands of the
26 plaintiff. Yet that is the nub of the problem at hand.

27 A solution based on common sense is to direct to a public
28 purpose the portion of legitimate punitive damages that exceed

1 what private victims ought to be allowed to retain – the societal
2 interest component of punitive damages. This is what the Ohio
3 Supreme Court did as a matter of Ohio common law. Dardinger, 98
4 Ohio St. at 102-04, 781 N.E.2d at 144-45.

5 Under such a solution, the relevant public purpose should be
6 rationally linked to redressing the underlying conduct that
7 warrants punitive damages in the first place.

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10 It is apparent that Bank of America's strategy regarding the
11 Sundquists has been infused with a sense of impunity. The
12 reasons for this attitude of impunity no doubt are complex and
13 overdetermined. The governmental regulatory system has failed to
14 protect the Sundquists. Bank of America held out the Comptroller
15 of the Currency as a source of redress, but that turned out to be
16 a chimera. The Consumer Financial Protection Bureau was thwarted
17 by Bank of America's bald-faced lie that there was no pending
18 litigation with the Sundquists and that there were no litigation
19 papers that could be sent to CFPB.

20 The flaw in the armor of Bank of America's attitude of
21 impunity is the potential for damages in civil litigation. Even
22 there, however, the field is unbalanced. The record reflects
23 that Bank of America has been represented in the Sundquist
24 litigation by first-class law firms. In contrast, the legal
25 representatives serving the Sundquists have not covered
26 themselves in glory.

27 The Sundquists' testimony about their difficulties in
28 locating competent counsel is believable and demonstrates that

1 there is a dearth of consumer lawyers with the resources and
2 skills to be effective when representing consumers against Bank
3 of America.

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6 It follows that the public purpose of the societal component
7 of punitive damages against Bank of America in this case should
8 be focused on consumer law in the form of better education in
9 consumer law and more robust resources for leading public service
10 consumer law organizations.

11 On the education front, the public law schools in the
12 University of California system are the appropriate
13 beneficiaries. There are five such law schools: Berkeley Law
14 School, Hastings College of Law, UC-Davis Law School, UC-Irvine
15 Law School, and UCLA Law School.

16 On the consumer legal front, the appropriate beneficiaries
17 are the National Consumer Law Center and the National Consumer
18 Bankruptcy Rights Center. Both are charitable entities qualified
19 under Internal Revenue Code § 501(c)(3). One is prominent in the
20 field of general consumer rights, the other is prominent in the
21 field of consumer rights in bankruptcy.

22 The problems presented by this case span issues of general
23 consumer law and of consumer bankruptcy law. By channeling to
24 these public academic and consumer advocacy institutions the
25 societal portion of legitimate punitive damages, to be earmarked
26 for consumer law purposes, this court is able to fashion a
27 punitive damages remedy that addresses the enormity of the
28 situation.

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The question becomes how to square this remedy channeling a portion of the punitive damages to public purposes with the operative language of § 362(k)(1): "[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).

At first reading of this statute, one might assume that all damages must go to the injured individual. The phrase "individual injured ... shall recover actual damages, including costs and attorneys' fees" appears to require all actual damages to be paid to the injured individual. Yet, few would doubt that Congress expected the attorneys' fees and costs can be channeled to the professionals involved.

The use of the verb form "may" in the phrase "may recover punitive damages" affords more latitude and can be read to connote another element of discretion contemplated by Congress.

It is noteworthy that the language of the statute does not prohibit a court from putting strings on what may be done with a portion of the amount awarded.

It would not offend the statute to make an award of punitive damages to the injured individual, which damages are ordinarily subject to individual taxation, and then to enjoin the injured individual to deliver a portion of the award, net of taxes, to designated entities that stand for the societal interest component of the punitive damages justly attributable to the conduct of the wrongdoer towards the injured individual.

1 This would achieve full vindication of the individual
2 interests and the societal interests that are being vindicated in
3 a substantial award of punitive damages. From the perspective of
4 the individual, allowing the individual to pocket the societal
5 interest component smacks of too much of a windfall for the
6 individual no matter how deserved the total award may be. From
7 the perspective of the violator, limiting punitive damages to an
8 amount that is not perceived as too big a windfall to stomach
9 enables the wrongdoer to avoid paying the societal component of
10 punitive damages that are genuinely deserved.

11 This court concludes that § 362(k)(1) permits a portion of
12 punitive damages awarded to an individual injured by willful
13 violation of the automatic stay to be channeled, after receipt by
14 the injured individual and payment of taxes incurred by such
15 receipt, to entities that serve the interests of preventing the
16 willful violator's transgressions in the future.

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19 It is appropriate, as an alternative, to give the willful
20 violator the opportunity to earn a remittitur of the channeled
21 portion of the punitive damages.

22 Thus, in lieu of the sums that are channeled to the
23 designated public service organizations, Bank of America may have
24 a remittitur of those sums if it contributes to those same
25 organizations 75 percent of pre-tax designated amounts with no
26 conditions attached to those contributions other than the sums
27 must be used only for education in consumer law and delivery of
28 legal services in matters of consumer law.

1 For example, if the Sundquists are enjoined to deliver to
2 National Consumer Law Center the post-tax remainder of \$10
3 million of the punitive damages awarded to them, then there would
4 be a remittitur of \$10 million on the condition that Bank of
5 America contribute \$7.5 million to National Consumer Law Center
6 to be used only for education in consumer law and delivery of
7 legal services in matters of consumer law.

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VIII

10 The § 362(k)(1) actual damages for the willful stay
11 violation that Bank of America committed and has heretofore
12 declined to remedy total, as described above, \$1,074,581.50.

13 Of the \$1,074,581.50 in actual damages, the Sundquists are
14 enjoined to deliver to their attorney, Dennise Henderson,
15 \$70,000.00 (less sums previously paid to her for this adversary
16 proceeding) on account of attorneys' fees and costs that comprise
17 an item in the actual damages award.

18 The appropriate amount of § 362(k)(1) punitive damages to be
19 awarded to the Sundquists is \$45,000,000.00.

20 Of the \$45,000,000.00 in punitive damages, the Sundquists
21 are enjoined to deliver to:

22 National Consumer Law Center \$10,000,000.00 (minus all
23 taxes, if any, the Sundquists must pay on account of that sum);

24 National Consumer Bankruptcy Rights Center \$10,000,000.00
25 (minus all taxes, if any, the Sundquists must pay on account of
26 that sum);

27 University of California, Berkeley School of Law,
28 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay

1 on account of that sum);

2 University of California-Davis, School of Law, \$4,000,000.00
3 (minus all taxes, if any, the Sundquists must pay on account of
4 that sum);

5 University of California, Hastings College of the Law,
6 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
7 on account of that sum);

8 University of California-Irvine, School of Law,
9 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
10 on account of that sum);

11 University of California-Los Angeles, School of Law,
12 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
13 on account of that sum).

14 It is the intention of this court that the six designated
15 entities shall have standing to participate in requests for post-
16 trial relief in this court and to participate in any appeal from
17 the judgment in this adversary proceeding.

18 There shall be a remittitur of the § 362(k)(1) punitive
19 damages to \$5,000,000.00 if, and only if, Bank of America
20 contributes: \$7,500,000.00 to National Consumer Law Center;
21 \$7,500,000.00 to National Consumer Bankruptcy Rights Center;
22 \$3,000,000.00 to University of California, Berkeley School of
23 Law; \$3,000,000.00 to University of California-Davis, School of
24 Law; \$3,000,000.00 to University of California, Hastings College
25 of the Law; \$3,000,000.00 to University of California-Irvine,
26 School of Law; and \$3,000,000.00 to University of California-Los
27 Angeles, School of Law. All such contributions are to be used
28 only for education in consumer law and delivery of legal services

1 in matters of consumer law and be subject to no other condition
2 imposed by Bank of America.

3 As intended beneficiaries of the punitive damages award, the
4 National Consumer Law Center, National Consumer Bankruptcy Rights
5 Center, and the five University of California law schools have
6 standing to appear and participate in all post-judgment
7 proceedings and appeals.

8

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IX

10 Finally, there is the question of the Sundquist mortgage,
11 which Bank of America admits that it holds for its own account.
12 The principal balance due is \$584,893.97, with interest accruing
13 from February 1, 2009,¹⁰⁹ at the contract rate of 6 percent.¹¹⁰

14 Throughout, the Sundquists have maintained that they are
15 prepared to honor their legitimate mortgage obligation, but only
16 after the correct amount is determined. Bank of America's
17 intransigence in seeking reimbursement of expenses incurred by
18 Bank of America, such as HOA fees and penalties, during the time
19 that Bank of America held title and the Sundquists were ousted
20 from possession has been the impediment to moving forward.

21 It is now appropriate definitively to state the remaining
22 amount due on the mortgage and additional charges amounts that
23 may be included.

24 In view of Bank of America's pattern of failure to deal with
25 the Sundquists in good faith and with fair dealing, as required

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¹⁰⁹B of A Ex. WWW.

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¹¹⁰B of A Ex. L.

1 by California law, justice requires disapproving all charges and
2 penalties other than interest at the contract rate of 6 percent
3 and reimbursement of taxes actually paid by Bank of America by
4 way of escrow advance.

5 The mortgage is reinstated with the debt fixed at the
6 \$584,893.97 owed as of February 1, 2009, plus interest at 6
7 percent simple interest since February 1, 2009, plus
8 reimbursement of property taxes actually paid by Bank of America
9 since February 1, 2009.

10 The court does not regard this measure as inequitable
11 towards Bank of America. The default occurred solely because
12 Bank of America induced the initial mortgage default as a
13 precondition to discussing mortgage modification. It ignored
14 information that Renée Sundquist's mother was on the sidelines to
15 provide funds to cure any default upon mortgage modification.
16 Thereafter, Bank of America had no compunction about aggressively
17 pursuing foreclosure and unlawful detainer in willful disregard of
18 the automatic stay. It led the Sundquists on a not-very-merry
19 chase by inviting and entertaining mortgage modification
20 applications that it had no intention of granting.

21 When the Bank of America Chief Executive Officer's office
22 became involved, the misconduct strayed across the civil-criminal
23 frontier when the office of the CEO falsely reported to the
24 Consumer Financial Protection Bureau that there had not been a
25 foreclosure and that no active litigation was pending between
26 Bank of America and the Sundquists. The fact of the foreclosure
27 was beyond cavil and an active appeal was under submission and in
28 the process of being decided by the California appellate court.

1 In contrast, the Sundquists have clean hands and are not
2 free riders seeking free lodging.

3 Despite all of Bank of America's bad behavior, it is winding
4 up with the benefit of its mortgage bargain. The mortgage is
5 reinstated with its above-current-market interest rate. The
6 secular rise in real estate values in the Sacramento area since
7 2009 assures that Bank of America is not under-collateralized.
8 There is no reason to expect the mortgage will not be paid.

9 The history of Bank of America's dealings with the
10 Sundquists suggests that it might aggressively seek to collect
11 the mortgage debt and miss no opportunity to declare a default,
12 while simultaneously resisting paying any of the damages awarded
13 in this case until every avenue of appeal is exhausted. That
14 nontrivial possibility warrants supervision by this court of
15 payment of the mortgage until this case ends.

16 Bank of America will be enjoined from requiring payments
17 from the Sundquists (who may make voluntary payments), and
18 enjoined from declaring a default, until 60 days after Bank of
19 America pays the Sundquists the full amount of the actual and
20 punitive damages here awarded.

21 For purposes of enforcing the awards made here, this court
22 retains jurisdiction over the mortgage and related obligations.

23

24 Conclusion

25 Bank of America willfully violated the automatic stay by,
26 among other things, foreclosing on the Sundquist residence,
27 prosecuting an unlawful detainer action, forcing them to move,
28 secretly rescinding the foreclosure, failing to protect the

1 residence from looting, refusing to pay for Sundquist property
2 lost, and subjecting the Sundquists to a mortgage modification
3 charade. Pursuant to § 362(k)(1), Bank of America is liable for
4 all damages incurred between the initial violation of the
5 automatic stay and the time the stay violation is fully remedied
6 (which remedy comes in this decision and accompanying judgment).

7 The actual § 362(k)(1) damages are \$1,074,581.50. The
8 appropriate § 362(k)(1) punitive damages are \$45,000,000.00.

9 The Sundquists are enjoined to deliver \$40,000,000.00 (minus
10 applicable taxes) to public service entities that are important
11 in education in consumer law and delivery of legal services to
12 consumers: National Consumer Law Center (\$10,000,000.00),
13 National Consumer Bankruptcy Rights Center (\$10,000,000.00), and
14 the five public law schools of the University of California
15 System (\$4,000,000.00).

16 Bank of America may have a remittitur of \$40,000,000.00 of
17 the punitive damages if, and only if, it contributes a total of
18 \$30,000,000.00 (to be used only for education in consumer law and
19 delivery of legal services to consumers and be subject to no
20 other condition imposed by Bank of America) to National Consumer
21 Law Center (\$7,500,000.00), National Consumer Bankruptcy Rights
22 Center (\$7,500,000.00), and the five public law schools of the
23 University of California System (\$3,000,000.00 each).

24 This opinion contains findings of fact and conclusions of
25 law. An appropriate Judgment shall be entered.

26

27 Dated: March 23, 2017

28


UNITED STATES BANKRUPTCY JUDGE

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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