No. 25-538

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Melanio L. Valdellon, III and Ellen C. Valdellon,

Debtors,

PHH Mortgage Corporation and
Wells Fargo Bank, N.A., as Indenture Trustee under the
Indenture Relating to the IMPAC CMB Trust Series 2005-6,

Defendant - Appellants,

v.

Melanio L. Valdellon, III and Ellen C. Valdellon,

Plaintiff - Appellees.

On Appeal from the Bankruptcy Appellate Panel
for the Ninth Circuit,
Case No. EC-24-1086-GCB and the
United States Bankruptcy Court for the Eastern District of California
(Hon. Christopher D. Jaime)
Case Nos. 3:14-bk-14-22555 and 3:21-ap-21-08008

RESPONSE BRIEF
OF MELANIO L. VALDELLON, III AND ELLEN C. VALDELLON, APPELLEES

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1. RULE 26.1 DISCLOSURE STATEMENT

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4 - JURISDICTIONAL STATEMENT

The BAP's Order, holding that WF/PHH can be held liable for violation of 11 U.S.C. §524(i), is final because the BAP rejected WF/PHH's asserted defenses. Here, the BAP rejected WF/PHH's 2 defenses: 1. That WF/PHH cannot be held liable because its "lien rides through bankruptcy unaffected". This issue on appeal is included in WF/PHH's Appellants Opening Brief at p. 17, Statement of Issue #1. The BAP found that WF/PHH is bound by the terms of Valdellons' Chapter 13 Plan, thereby rejecting WF/PHH's defense. The second defense raised on appeal is whether the Court should reverse the BAP's ruling and dismiss Valdellons' Second Amended Complaint "due to the lack of clarity in the law". See Statement of Issue #3, Appellants Opening Brief at page 18.

With respect to WF/PHH's defenses, the BAP order is a final order, adjudicating the validity of WF/PHH's defenses, thereby fixing the possibility of an obligation by holding they are bound by the Plan. WF/PHH argues the rejection of its defense was erroneous. They argue "BAP's holding that a loan must be deemed and treated as fully cured is contrary to existing law that liens pass through bankruptcy unaffected". Opening Brief at p. 32 - 33. The rejection of WF/PHH's defenses that they "cannot be held liable for a violation of the discharge injunction" is what makes the BAP's order a final order.

This Court applies a four-part test to determine whether the Court of Appeals has jurisdiction over an appeal from a BAP decision that remands to the Bankruptcy Court for further substantive proceedings. The four factors are "(1) the need to avoid piecemeal litigation; (2) judicial efficiency; (3) the systemic interest in preserving the Bankruptcy Court's role as the finder of fact; and (4) whether delaying review would cause either party irreparable harm." In re *Gugliuzza*, 852 F.3d at 894 (quoting In re *Perl*, 811 F.3d 1120, 1126 (9th Cir.

2016).

Here, the first factor slightly favors dismissal as it may avoid piecemeal litigation by requiring the packaging of all issues after the completion of fact finding and conclusion of law by the Bankruptcy Court. It is unknown if there will be any additional issues that will be appealed after the case is remanded. This case is in the very early stages. The Bankruptcy Court has barely begun its fact finding process with the parties still in their discovery period, but additional fact finding is not necessary to determine the validity of the defenses raised.

But, Second Factor, "Judicial efficiency", weighs in favor of finding jurisdiction. The issues presented on appeal at Issue #1 and Issue #3 appear to be questions of law, the result of which determines whether WF/PHH can be held liable for violation of 11 U.S.C. §524(i), as ordered by the BAP. Finding jurisdiction could both reduce the workload on the Bankruptcy Court and the appellate Courts by preventing the need for the parties to climb back up the appellate ladder to assert the same appeals that are before the court now.

The third factor, the systematic interest in preserving the Bankruptcy Court's role as finder of fact is neutral or favors jurisdiction. Here, the primary issues on appeal are questions of law. If this Court to takes jurisdiction and makes a ruling on the present appeal, such a ruling may assist the Bankruptcy Court in its fact finding process upon further remand. Given the posture of the case and the issues presented, finding jurisdiction will not interfere with the Bankruptcy Court's role as the fact finder, but assists the court in moving to the next stage of proceedings.

The parties have identified no irreparable harm, other than protracted litigation costs and the possibility of the loss of witnesses, including Mr. Valdellon who now suffers from significant chronic medical conditions, including stage 4 kidney disease and blindness.

This Court find has jurisdiction to affirm BAP's Order, including the rejection of WF/PHH's defenses included in Appellant' (WF/PHH's) Statement of Issues #1 and #3. Valdellons ask the Court to affirm the BAP's holding that WF/PHH are bound by the terms of the Chapter 13 Plan and can be held liable for violations of 11 U.S.C. §524(i).

5 - RESTATEMENT OF ISSUES PRESENTED

1. Did the BAP correctly rule that a creditor may be liable, under 11 U.S.C. §524(i), for willful failure to credit Plan payments when it disregards the cure effectuated by a completed Chapter 13 Plan when the Plan provides for payment of the claim pursuant to the cure and maintain provisions of 11 U.S.C. §1322(b)(5)?

Valdellons answer: Yes. The BAP correctly rejected WF/PHH's claimed defenses and found that WF/PHH can be liable under 11 U.S.C. §524(i).

2. Did the BAP correctly hold that Valdellons' Plan is not in default where they received a discharge after completion of their Chapter 13 Plan?

Valdellons answer: Yes. The Plan was not in default when completed.

3. Is there an objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order and 11 U.S.C. §524(i) where claim 9-1 is provided for in the Chapter 13 Plan pursuant to 11 U.S.C. §1322(b)(5); and, after entry of the Order of Discharge, the creditor rejected payments and commenced foreclosure proceedings based upon an alleged delinquency the creditor claims is due to an underpayment of pre-petition arrears and ongoing monthly maintenance payments paid by the Trustee through the Chapter 13 Plan?

Valdellons answer: NO.

4. Did the BAP correctly hold that the broad equitable power in the Bankruptcy Court's civil sanctioning authority is sufficient to compensate debtors for damages incurred by violations of the discharge injunction, including emotional distress

damages?

Valdellons answer: Yes, the BAP correctly ruled.

6. STATEMENT OF THE CASE

First, Chapter 13 Debtors, the Valdellons, bring to the attention of the Court a creditor that, after completion of Valdellons' Chapter 13 Plan and entry of a Discharge Order, commenced foreclosure proceedings to collect a debt they allege was underpaid by the Chapter 13 Trustee. Valdellons have alleged in the Second Amended Complaint (SAC) that "Wells Fargo" and "PHH" (collectively referred to as WF/PHH) (See infra at 6B) have failed to credit Plan payments pursuant to the terms of Valdellons' Chapter 13 Plan, which constitutes a violation of the Court's June 1, 2020 Order of Discharge and related injunctions through 11 U.S.C. §524(i). See SAC at 3-ER-536, Count 1, ¶¶139 through 206, at 549 through 558 and ¶¶ 5, 10 - 15 and 26 - 138 at 537- 549.

The District Court has already recognized, and the BAP agreed that:

> Indeed, this is: '[O]ne of the classic situations that led to the adoption of §524(i): a chapter 13 debtor makes all the required payments on long-term debt required through the life of his confirmed plan, receives a discharge, and then is told that his mortgage is in default, he owes additional charges, and is threatened with foreclosure. Often, this is the same scenario that drove him to bankruptcy in the first place. Section 524(i) presents a remedy for such cases.' See 3-ER-583, lines 6 - 14.

One of the main purposes of Valdellons' Chapter 13 case was to stop a foreclosure, pay the arrears on mortgage (Claim 9-1, infra), resolve the dispute regarding the amount of those arrears, and resume ongoing monthly payments on the loan. (Second Modified Plan or "Plan" at 5-ER-1011 - 1017). Valdellons believed that any disputes related to their mortgage were resolved through their Chapter 13 case. Documents supporting resolution of the issues include the Notice of Final Cure ("NOFC"), 5-ER-990 - 991, Response to Notice of Final Cure ("RNOFC"), 5-ER-987 - 989; and the Order of Discharge, 5-ER-984 - 985.

Through the bankruptcy process, the Trustee cured all of the arrears and made

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all of the ongoing maintenance payments on Claim 9-1 through the September 2019 due date. See NOFC at 5-ER 990 - 991. See also Trustee Final Reports, Notice of Trustee's Final Report, and Order Discharging Trustee at BK Docket, 6-ER 1200 - 1201, docket 127, 129, 131, 132, 138, 139, 140, 141, 145, 146. WF/PHH agreed that as of October 18, 2019 all arrears were cured and ongoing payments were current through October 2019 with the next payment due November 1, 2019. See RNOFC at 5-ER 987 - 989.

Valdellons made all ongoing maintenance payments to WF/PHH from October 2019 until WF/PHH rejected and intentionally destroyed the July 2020 and August 2020 payments alleging such were insufficient to cure the default. See Feezer Declaration at 4-ER-691, paragraph 12 and letters at page 780 - 783 and 373 - 375. See complaint at 3-ER-536 - 566, ¶¶ 126, 127, and 49 through 75. See also I below.

WF/PHH do not claim any mistake on their part, rather they claim the right to collect amounts they claim they were underpaid by the Chapter 13 Trustee for pre-petition arrears and ongoing maintenance payments. WF/PHH boldly claim the right to collect amounts they allege were underpaid during the Chapter 13 process based upon their lien rights. See SAC at 3-ER 536 - 566 at paragraph 176 through 182. See also Feezer Declaration 4-ER 690, line 23 through 691, line 16; Discharge Reconciliation Analysis Checklist at 3-ER 504 - 507; Response to Interrogatory 8 at SER-35, line 14 through 36, line 2; and Response to Interrogatory 10 at SER-37 - 38. See also section "6(O)" below.

6A. The claim that is the subject of this appeal - "Claim 9-1"

The claim at issue is a promissory note executed by Melanio Valdellon and which is secured against real property commonly known as 1300 Stoneridge Way,

Roseville CA 95661 ("Property")[1] by a deed of trust ("Deed of Trust") and a pre-bankruptcy loan modification agreement. The claim is identified as Claim number 9-1 on the claims register in Valdellons' Chapter 13 bankruptcy case ("Claim 9-1") SAC at 3-ER 537, ¶¶ 3, 5, and 560 ¶¶ 216, 218, and 220. Adjustable Rate Note at 4-ER 692 - 699 and 3-ER 508 - 514; Deed of Trust at 4-ER 699 - 714; Loan modification at 3-ER-531 - 535. Claim 9-1 and related claim supplements are found at Claims Register, 6-ER-12006 - 1210.

6B. The parties to this appeal:

1. Melanio L. Valdellon and Ellen C. Valdellon are married co-debtors who filed and completed a Chapter 13 bankruptcy case. See Voluntary Petition at 6-ER-1062 - 1122; SAC at 3-ER-536 - 538, ¶1, ¶2, and ¶18. Response to Interrogatory No. 17 at SER-42 - 44.

2. The holder of Claim 9-1 is Wells Fargo Bank, N.A. as the trustee of the IMPAC CMB Trust Series 2005-6 (Wells Fargo). See Feezer Declaration at 4-ER-689 - 691; SAC at 3-ER-538, ¶¶11, 12, 13 and 14. Response to Request for Admissions No. 1 at ER-1238.

3. PHH Mortgage Corporation services Claim 9-1 on behalf of Wells Fargo. (PHH). PHH is the successor to Ocwen Loan Servicing. Ocwen serviced Claim 9-1 at the time this case was filed. Ocwen merged into PHH on or about June 1, 2019 and servicing transferred from Ocwen to PHH, effective June 1, 2019. See Feezer Declaration 4-ER-689 - 691; SAC at 3-ER-538, ¶¶ 10, 11, 12, 13, and 14. See also Transfer of Claim Other Than For Security at 5-ER-986; Request For

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[1]The Bankruptcy Court found that Valdellons' Stoneridge Way property was not their principal residence on the date of Valdellons' Chapter 13 case, March 13, 2014. Such finding was made in the Court's Order Denying Plaintiffs' Motion To Exclude Evidence. 4-ER-675, line 27 through 676 line 2.

Special Notice at Bankruptcy Docket 6-ER-1189 - 1205, at page1191, Docket entry 14; See also response to Interrogatory No. 17 at SER-42 - 44. (Hereinafter "WF/PHH" or "Defendants" shall collectively refer to Wells Fargo, its agents, attorneys, and its servicer(s)).

6C. Valdellons' Chapter 13 case:

Valdellons obtained confirmation of a Chapter 13 Plans which provide for the cure and full payment of pre-petition defaults as well as payment of ongoing post-petition payments on Claim 9-1, pursuant to 11 U.S.C. §1322(b)(5). The operative Plan at the time of the entry of the Court's June 1, 2020 Order of Discharge was Valdellons' June 15, 2018 Second Modified Chapter 13 Plan, which was confirmed on August 24, 2018 (Plan or Chapter 13 Plan); See Plan at 5-ER-1011 - 1017; Order Confirming at 5-ER-1009 - 1010; See also SAC at 3-ER-539, ¶¶ 26, 27, 28, and 29. Each of Valdellons' confirmed Plans were model Plans in the Bankruptcy Court for the Eastern District of California.

Each of Valdellons' confirmed Plans provided for payment of Claim 9-1 as a long-term claim, a Class 1 secured claim, i.e., where pre-petition arrears and ongoing post-petition mortgage payments were to be paid in full through the Chapter 13 Trustee. See Plan at 5-ER-1011 at p. 1012 - 1013; See also SAC at 3-ER-539, ¶¶ 22, 23, 28 and 29.

6D. Valdellons' Chapter 13 Plan contains specific language regarding the treatment of claims, including the curing of arrears and crediting of payments.

Valdellons' Plan contains specific language dictating the manner in which payments are to be credited. Valdellons' Plan provides for the cure of pre-petition arrears and maintenance of ongoing monthly payments, as well as the mechanism to determine, correct, or adjust the amount to be paid for pre-petition arrears and

the amount to be paid for maintenance payments during the Chapter 13 Plan. See Plan at 5-ER-1011 - 1017; Order Confirming at 5-ER-1009 - 1010; See Eastern District of California General Orders, GO17-03 and GO18-03 at https://www.caeb.uscourts.gov/LocalRulesAndGeneralOrders.

1. **The proof of claim, not the Plan, controls the amount and classification of claims.** Valdellons' Plan provides at Section 3 Claims and Expenses at 3.01 and 3.02 that the claim, not the Plan or schedules determines the amount to be paid to a creditor. See Plan at 5-ER-1011- 1012 at section 3, which provides:

> 3.01. With the exception of the payments required by sections 3.03, 3.07(b), 3.10, and 4.01, a claim will not be paid pursuant to this plan unless a proof of claim is filed by or on behalf of a creditor, including a secured creditor.
> 3.02. **The proof of claim, not this Plan or the schedules, shall determine the amount and classification of a claim** unless the court's disposition of a claim objection, valuation motion, or lien avoidance motion affects the amount or classification of the claim. [emphasis added]

2. **Valdellons' Plan provides for full payment of arrears and directs the manner in which arrears are cured and payments should be applied by holders of Class 1 claims**. See Plan at 5-ER-1011, at 1012, Section 3.07(a) the Plan provides:

> (a) Cure of arrears. **All arrears on Class 1 claims shall be paid in full by Trustee.** The equal monthly installment specified in the table below as the "arrearage dividend" shall pay the arrears in full.
> (1) Unless otherwise specified below, interest will accrue at the rate of 0%.
> (2) **The arrearage dividend must be applied by the Class I creditor to the arrears**. If this plan provides for interest on the arrears, the arrearage dividend shall be applied first to such interest, then to the arrears. [emphasis added]

3. **Valdellons' Plan provides for post-petition ongoing payments to be made by the Trustee**. At See Plan at 5-ER-1011, at 1012, Section 3.07(b)(1) and (2), the Plan provides:

> "(b) Maintaining payments. Trustee shall maintain all post-petition monthly payments to the holder of each Class 1 claim whether or not this plan is

confirmed or a proof of claim is filed.
(1) Unless subpart (b)(1)(A) or (B) of this section is applicable, the amount of a post-petition monthly payment shall be the amount specified in this plan.
(A) **If the amount specified in the plan is incorrect, the Class 1 creditor may demand the correct amount in its proof of claim. Unless and until an objection to such proof of claim is sustained, the trustee shall pay the payment amount demanded in the proof of claim**.
(B) Whenever the post-petition monthly payment is adjusted in accordance with the underlying loan documentation, including changes resulting from an interest rate or escrow account adjustment, the Class 1 creditor shall give notice of the payment change pursuant to Fed. R. Bankr. P. 3002.1(b). Notice of the change shall not be given by including the change in a proof of claim. Unless and until an objection to a notice of payment change is sustained, the trustee shall pay the amount demanded in the notice of payment change.
(2) **If a Class 1 creditor files a proof of claim or a notice of payment change pursuant to Fed. R. Bankr. P. 3002.1(b) demanding a higher or lower post-petition monthly payment, the plan payment shall be adjusted accordingly.** [emphasis added]

4. **Valdellons' Plan provides for the manner in which post-petition monthly payments shall be applied.**

Valdellons' Plan provides at Section 3.07(b)(7) that "Post-petition monthly payments made by Trustee and received by the holder of a Class 1 claim **shall be applied as if the claim was current and no arrearage existed** on the date the case was filed." See Plan at 5-ER-1011, at 1013, Section 3.07(b)(7).

5. **Valdellons' Plan provides for the modification of Class 1 claims to cure arrears.**

The Plan provides at Section 3.07(c) that: "Each Class 1 creditor shall retain its lien. **Other than to cure of arrears, this plan does not modify Class 1 claims**." [emphasis added] See Plan at 5-ER-1011, at 1013, Section 3.07(c).

6E. Notice of the Chapter 13 bankruptcy case and each of the Plans served upon all creditors, including PHH/WF.

All creditors had opportunity to object to Plan confirmation and Plan terms and take other appropriate actions to file claims, amend claims, supplement claims, object to the Trustee's final report, object to discharge or move to revoke the order

of discharge or confirmation. All creditors, including WF/PHH and their attorney were provided notice of Valdellons' Chapter 13 Bankruptcy case and the various Chapter 13 Plans, which were confirmed by the Court. The Bankruptcy Court docket for this case shows WF/PHH was served with numerous documents, including for example: a. Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines BK Docket 6-ER-1191, Dockets 16, 18, 19. b. Motions to Confirm their various Chapter 13 Plans. See Proof of Service of motion to confirm April 24, 2014 Plan BK Docket 6-ER-1192, Docket 36; Proof of Service of Motion to Confirm First Modified Plan at BK Docket 6-ER-1195, Docket 66, Proof of Service of Motion to Confirm Second Modified Plan at BK Docket 6-ER-1198, Docket 106. c. Trustee reports, d. NOFC, e. Notice of intent to enter discharge.

WF/PHH participated in Valdellons' Chapter 13 case by filing seven (7) claim supplements, a Notice of Transfer of Claim and a Response to Notice of Final Cure. See claims register at 6-ER-1208 - 1209. SAC at 3-ER-539 - 540, ¶ 30 - 40.

6F. Pre-petition arrears were cured and paid by the Chapter 13 Trustee pursuant to the confirmed Plan and claim filed on Wells Fargo's behalf.

Pursuant to Valdellons' confirmed Chapter 13 Plan, the Chapter 13 Trustee paid the $19,140.48 pre-petition arrears alleged in Claim 9-1. The amounts paid by the Chapter 13 Trustee are memorialized in multiple court filings and correspondence. See NOFC at 5-ER-990 - 991; RNOFC at 5-ER-987 - 989; Trustee's Report and Accounts, Notice, and Order Approving Trustee's Report at BK Docket 6-ER-1200 - 1201 Docket 127, 129, 131, 132, 138, 139, 140, 141, 145, 146.

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6G. Post-petition ongoing payments were made by Chapter 13 Trustee through September 2019.

The Chapter 13 Trustee made ongoing post-petition payments from the commencement of the Chapter 13 case through and including the payment due September 1, 2019.[2] The Chapter 13 Trustee adjusted the amount paid for ongoing monthly payments pursuant to the Plan and claim supplements filed by WF/PHH. Payments made by the Chapter 13 Trustee are memorialized in various documents. See Trustee's September 25, 2019 correspondence regarding claim 9-1 3-ER- 499; NOFC at 5-ER-990 - 991; RNOFC at 5-ER-987 - 989; Response to Interrogatory Nos. 8 and 9 at SER-35 - 37. See Plan. The Chapter 13 Trustee's accounting of post-petition payments is found at Jan P. Johnson's Chapter 13 Standing Trustee's Report and Account at BK Docket, 6-ER-1200 - at Dockets 127, 129, 138, 139, 145, 146.

WF/PHH acknowledged under penalty of perjury that as of October 18, 2019, when payments are credited as required by Valdellons' Chapter 13 Pan, pre-petition arrears are paid in full and the ongoing monthly payments have been maintained through October 2019 with the next payment being due November 1, 2019. See RNOFC at 5-ER-987 - 989.

6H. Valdellons completed their Chapter 13 Plan and received a discharge.

In connection with the Plan completion process and entry of the Order of Discharge, WF/PHH was provided multiple opportunities to object to the entry of a discharge order or to contest the amounts paid under the Plan. See June 1, 2020

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[2] It remains unknown why the Chapter 13 Trustee demanded payments solely to make ongoing mortgage payments which fell due after the completion of Valdellons' 60 month Chapter 13 Plan. Valdellons hired attorney Mark A. Wolff of Wolff & Wolff to oppose the Chapter 13 Trustee's Motion To Dismiss Case. Valdellons disputed then and now that they were delinquent in payments due under their 60 month Chapter 13 Plan.

Order of Discharge 5-ER-984 - 985; Notice of Intent to Enter Chapter 13 Discharge at BK Docket, 6-ER-1201, Docket 147; Notice to Debtor of Completed Plan Payments at 5-ER-992 - 997.

6I. Valdellons made ongoing payments from October 2019 until PHH rejected and intentionally destroyed the July 2020 and August 2020 payments.

Valdellons alleged and have shown they made all ongoing monthly payments due from October 2019 until WF/PHH rejected and intentionally destroyed their July 2020 and August 2020 payments. Valdellons alleged the amount of the monthly payments due from October 2019 through August 2019 in their SAC at 3-ER-547 - 548, ¶¶ 126 and 127. Debtors painstakingly showed that they made each monthly payment due and supported their allegations with exhibits including cancelled checks, bank statements, admissions, and monthly statements, and discovery responses. See SAC at 3-ER-541 - 543, ¶¶ 49 through 75. See Exhibits to SAC at 3-ER-297 - 376, Exhibits 1 - 21.

After entry of the Court's June 1, 2020 Order of Discharge and subsequent case closing on June 15, 2020, PHH intentionally destroyed Valdellons' July 2020 payment (check 105) and August 2020 payment (check 106), alleging each were "insufficient to cure the default." See Feezer Declaration at 4-ER-691, paragraph 12 and PHH correspondence at 4-ER-780 - 783 and 373 - 375. See complaint at 3-ER-536 - 566, ¶¶ 126, 127, and 49 through 75.

6J. Billing statements and other documents sent to Valdellons by PHH show misapplication of payments.

Valdellons have provided the Court with documents evidencing how WF/PHH have credited payments for collection purposes. While the bankruptcy accounting was evidenced by the NOFC and RNOFC, WF/PHH's collection (and crediting for

collection purposes) is shown by monthly billing statements, a Customer Account History, rejection of payments, demand letters, foreclosure proceedings, and even WF/PHH admissions (Section 6K).

1. Monthly billing statements show failure to credit payments in the manner required by the Plan, as follows:

a. WF/PHH credited funds to pre-arrears that were not designated by the Trustee for payment of arrears in violation of Section 3.07 of Valdellons Plan. See Section 6D(2), supra. The monthly statements that show WF/PHH credited, from Trustee payments, more money to pre-petition arrears than was paid by the Chapter 13 Trustee for pre-petition arrears.

The Chapter 13 Trustee paid $19,140.48 on account of pre-petition arrears. See NOFC at 5-ER 990 - 991; See also Trustee's Final Report at BK Docket 6-ER-1199 - 1201; See also Claim 9-1 at 5-ER-1046 - 1049 and Claim Register at 6-ER-1206 - 1210.

Wells Fargo and PHH credited more than the $19,140.48 paid by the Chapter 13 Trustee on account of pre-petition arrears. For example, $19,211.02 was credited to pre-petition arrears on PHH's 1/17/19 monthly statement. See 1/17/19 statement at 4-ER-755 (and 380). Further, statements dated 8/16/19. 9/16/19, 10/16/19 and 11/18/19 show that Creditor applied $20,623.04 to pre-petition arrears instead of the $19,140.48 paid by the Chapter 13 Trustee. See SAC at 3-ER-658 - 660, ¶¶ 159 through 172. See statements at 4-ER-763, 768, 773, 778 (and 384 - 402).

b. Ongoing maintenance payments were credited to pre-petition arrears, thereby causing what seemed to be a "delinquency" in post-petition ongoing payments. Since some of the ongoing monthly payments were being credited to pre-petition arrears, this incorrect application of funds caused a delinquency in the

ongoing monthly payments. Valdellons have alleged WF/PHH credited post-petition maintenance payments made by the Chapter 13 Trustee in amounts contrary to the terms of Valdellons' confirmed Chapter 13 Plans. See SAC at 3-ER-549 - 553, ¶¶ 139 through 172.

The Trustee was paying pre-petition arrears and ongoing monthly payments on Claim 9-1. Since WF/PHH credited to pre-petition arrears more than was designated by the trustee for payment to pre-petition arrears, WF/PHH must have credited ongoing payments to pre-petition arrears in violation of Plan terms. See Section 6(d). See SAC-551 - 553, ¶¶ 159 through 172. See also monthly statements at ER-380 - 400.

c. Statements show failure to reconcile collection with bankruptcy accounting and to give effect to the cure, payment of arrears, and payment of ongoing monthly payments by Trustee.

The monthly mortgage statements evidence the manner in which WF/PHH is collecting. The collection as shown through the monthly statements, however, was not properly reconciled to give effect to the Plan's payment of arrears, curing of arrears, and maintenance of payments by the Trustee. Ongoing payments made by the trustee "shall be applied as if the claim was current and no arrearage existed on the date the case was filed." Section 6D4, above.

The monthly statements noted large unpaid post-petition balances ranging from $6,959.40 to $18,521.90 that are not consistent with payments made by the Chapter 13 Trustee. The statements showing large post-petition arrears are dated both before and after Plan completion, WF/PHH's RNOFC, and entry of the Order of Discharge. See for example the statement dated 1/17/19 showing a post-petition past due amount of $12,020.39. See Statement at 4-ER-756 or 3-ER-380. See generally Sections 6(D) and 6(i) above and Feezer Declaration and exhibits at

4-ER-690, line 23 through 691, line 16.

The statements showing post-petition arrears continued even after crediting the final payments from the Chapter 13 Trustee. See January 2020 statements at 3-ER-411, 414, 416 and 418; 2/26/20 statement at 4-ER-421; 3/16/20 statement at 4-ER-424; 8/17/20 statement at 4-ER-431; 9/18/20 statement at 4-ER-433; 10/16/20 statement at 4-ER-436; 11/16/20 statement at 4-ER-439. The statements show that after completion of the Chapter 13 Plan no adjustments were made by WF/PHH. The statements **should reflect crediting of ongoing monthly maintenance payments from the Chapter 13 Trustee through and including September 2019 to be consistent with the NOFC and RNOFC.**

Defendants do not dispute that statements were sent showing large delinquencies or that the delinquencies are inconsistent with the accounting required by the plan as evidenced by the NOFC and RNOFC. On the contrary, Defendants allege that the statements somehow put Valdellons on notice that there was a problem. Response to Admissions, Nos. 28 - 35 at SER-17 - 20; Response to Interrogatory Nos. 14 at SER-39 - 41.

Despite their RNOFC, WF/PHH continues to collect thousands of dollars for amounts they allege were underpaid by the Chapter 13 Trustee prior to September 2019. See Jan P. Johnson's September 25, 2019 correspondence at 3-ER-499; Trustee's NOFC at 5-ER-990 - 991; RNOFC at 5-ER-987 - 989.

2. WF/PHH's Customer Account Activity Statement and December 8, 2020 "Response Letter" show that WF/PHH did not credit payments in the manner required by the Plan.

WF/PHH credited payments made directly by Valdellons after October 1, 2019 to payments already made prior to October 1, 2019 by the Chapter 13 Trustee See SAC at 3-ER-550 - 555, ¶ 181, 182, 183, 184, 185 (and generally at ¶ 148 - 185).

PHH's December 8, 2020 "Response Letter" (See 3-ER-498 - 502) acknowledges Valdellons' bankruptcy and provided Valdellons with a copy of the Chapter 13 Trustee's September 25, 2019 correspondence and a Customer Account Activity Statement for 2019 and 2020, showing how it is crediting payments. See 3-ER-500 - 502.

The Customer Activity Statement at 3-ER-500, transactions dates 10/15/19 and 10/16/19; 11/20/19 and 11/21/19; 12/24/19 and 12/26/19 show how WF/PHH is crediting payments. Each of these transactions is based upon direct payments made by Valdellons and acknowledged as received by PHH in their responses to Debtors' Requests to Admit.

The Activity Statement shows the October 2019 payment was first applied to a suspense account, then applied to the due date of 2/1/19; the November 2019 payment was similarly first applied to a suspense account, then applied to the due date of 3/1/19 and the December 2019 payment was also first applied to a suspense account, then applied to the due date of 4/1/19. See Customer Activity Statement at 3-ER-500.

The customer activity statement for 2020 at 3-ER-501, shows a similar rolling delinquency after application of the final Trustee payment. See for example, transactions dated 2/24/2020 and 2/26/2020 where Valdellons February 2020 payment was applied to November 1, 2019. This pattern follows with Valdellons March 2020 payment being applied to the due date of December 1, 2019 and April 2020 payment being applied to January 2020 due date.

If WF/PHH had credited the payments in the manner required by the Plan, WF/PHH would **not** have credited Valdellons direct payments to payments due before October 1, 2019 because such payments were already paid by the Chapter

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13 Trustee. So, the application of direct payments to months paid by the Chapter 13 Trustee shows that WF/PHH **did not credit the Trustee payments for at least the months of February 2019 through September 2019** in the manner required by the confirmed Plan. (See 6J and 6K, above).

3. Rejection of July 2020 and August 2020 payments show that payments were not properly credited in the manner required by the Chapter 13 Plan.

Where the Trustee paid the arrears in full and all ongoing monthly payments through September 2019 and where Valdellons paid all monthly payments from October 2019 until rejected by WF/PHH in July and August of 2020, there should be no delinquency to be collected.

WF/PHH do not deny intentionally destroying Valdellons' July 2020 and August 2020 payments due to an alleged delinquency. See Feezer Declaration at 4-ER-691 correspondence at 781 - 783. The act of rejecting payments and alleging a delinquency resulting from alleged underpayment of payments made by the Chapter 13 Trustee, must result from a failure to apply payments in accordance with the Chapter 13 Plan. Debtors have shown that the delinquency alleged is not a result of missed direct payments after completion of the Plan. See Sections 6G, 6H, 6I, 6J, and 6K, above).

4. WF/PHH was aware of the manner in which payments should be credited under the Plan.

Creditors' own documentation shows that they were aware of the manner in which payments should be applied as evidenced by their RNOFC and Discharge Reconciliation Analysis Checklist. 3-ER-504- 507. WF/PHH now disagree with the result of the bankruptcy case and their own RNOFC. WF/PHH have chosen to unilaterally determine the amounts paid in the bankruptcy case were simply wrong and that they can collect more money. See also Creditor's process that resulted in

RNOFC at Interrogatory No. 8 at SER-35 - 36; Interrogatory No. 10 at SER-37; Interrogatory No. 19 at SER-44 through 46.

6K. WF/PHH admissions in these proceedings

1. Wells Fargo argues the proof of claim "understated arrears as $19,140.48" in opposition to Valdellons' Motion To Exclude Evidence. See Opposition to Motion To Exclude. 4-ER-789, lines 6 - 8 and 789 - 790.

2. WF/PHH have acknowledged that the dispute relates to payments that were due prior to October 1, 2019. See Feezer Declaration at 3-ER-690 - 691, and generally Wells Fargo's argument at page 4-ER-793 - 795, that "The accuracy of the Response to Notice of Final Cure is a Known and Prominent Issue".

3. Wells Fargo argues that "Borrower was on notice concerning the post-petition balance since before the Response to Notice of Final Cure was filed,..." See Opposition at 4-ER-793, line 10 - 18.

4. Wells Fargo alleges its RNOFC is wrong. In Response to Request for Admission No. 9 at ER-1241 - 1242 Wells Fargo:

> admits that the Response to Notice of Final Cure filed on October 18, 2019 in the E.D. Cal. Bankr. Case No 14-22555 has the check box next to "Creditor states that the debtor(s) are current with all postpetition payments consistent with §1322(b)(5) of the bankruptcy code including all fees, charges, expenses, escrow, and costs" checked and that it further states "The next postpetition payment from the debtor(s) is due on 11/1/2019." **However, Defendant denies the accuracy of those statements and denies that the payments received kept the loan current post-petition**.(emphasis added)

5. Throughout these proceedings Defendants have argued that they are not bound by the Chapter 13 Plan, Order of Discharge, and Response To Notice of Final Cure.

> Notwithstanding the proof of claim Plaintiffs filed on Defendants' behalf or the Plan's treatment of that claim, Defendants' lien was unaffected. Had there been no claim filed, the subject Deed of Trust would nonetheless secure all pre-petition and post-petition amounts due on the

> loan....Defendants' lien was unaffected by the bankruptcy and, because there are amounts due that caused the loan to be in default, defendants were entitled to avail themselves of their rights, including the in rem foreclosure remedy, after the bankruptcy closed. Foreclosing is not a violation of the discharge injunction"

See WF/PHH's Memorandum at 2-ER 280, lines 1 - 11 and 15 - 25. And Reply at Adversary Docket, Docket 67, page 8, line 27 through page 9, line 4 wherein WF/PHH state:

> "Plaintiffs' problem appears to be the inability to conceive how they could both (1) pay as provided for in the Plan and (2) still be in default on the Loan, despite it being readily explained as the Plan understating the amounts owed. Just because Defendants were bound to accept insufficient payment while the Plan was in effect does not mean that the other amounts due and owing simply disappeared"

It is true, Valdellons do not understand how they could be in default after completing their Chapter 13 Plan where the Chapter 13 Trustee paid all arrears and ongoing maintenance payments on Claim 9-1. Valdellons established the default was not a result of a post Plan delinquency. WF/PHH had numerous opportunities to raise any disputes about the Plan, the amount to be paid under it and the entry of a discharge order.

Here, WF/PHH chose to do nothing to assert their current position during the bankruptcy. Now WF/PHH wants to ignore the bankruptcy and their own statements under penalty of perjury to collect amounts it unilaterally decided were underpaid by the Chapter 13 Trustee.

In PHH/WF's Motion To Dismiss Valdellons' Second Amended Complaint, PHH/WF argue:

> It is well established that **Defendants' lien rides through the bankruptcy unaffected and any action taken to foreclose is a preserved in rem remedy**. Since Plaintiffs fail to plead - and cannot establish- that their default arose because of misapplied payments (**rather than underpayment during the bankruptcy**), they cannot establish any purported misapplication had a material impact on them.
> See Motion at 2-ER-294, lines 3 - 8.

PHH/WF's action and statements in this case make it clear that they believe

they are simply not bound by the terms of Valdellons confirmed Plan and that they can collect such amounts they allege were underpaid during the bankruptcy process. District Court Judge Daniel J Calabretta has already rejected this argument. See District Court Opinion at 3-ER-580 line 9 through 583 line 2.

6L. Collection actions, demands, and foreclosure

Following the intentional destruction of Valdellons' July 2020 monthly payment, WF/PHH commenced collection activity, including but not limited to:

1. Sending correspondence on July 30, 2020 which stated: " This is an official notice that, according to our records, the mortgage payment is past due" See SAC at 3-ER-545, ¶ 97;

2. Costs added to Claim 9-1 totaling $1,355.68. See SAC at 3-ER-545, ¶ 98 and 99.

3. PHH Mortgage sent correspondence dated September 25, 2020. See SAC at 3-ER-545 - 546, ¶ 104.

4. PHH Mortgage sent Valdellons a "Reinstatement Quote". See SAC at 3-ER-546, ¶ 107 and Reinstatement Quote at 3-ER-495 - 496.

5. On October 16, 2020, PHH Mortgage sent a monthly mortgage statement alleging an amount due totaling $17,583.23. See SAC at 3-ER-546,¶ 108. There is no way the Valdellons could owe $17,582.23 when they made, and PHH cashed, all payments due through June 2020. The only amounts that would be due through November 1, 2020 are the July and August 2020 payments which were rejected, plus the subsequent payments that would come due for September, October and November payments. Since the monthly payments for July 2020 through November 2020 were each $2,391.03, the total amount due should be $11,955.15 ($2,391.03 x 5).

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6. On or about October 29, 2020, PHH Mortgage caused a "Notice of Default and Election To Sell Under Deed of Trust" to be filed with the Placer County Recorder in California. See SAC at 3-ER-546, ¶ 112; Notice of Default and Election To Sell at 3-ER-476 - 484.

7. On or about October 30, 2020, PHH Mortgage sent correspondence to Valdellons indicating "Immediate Action Required To Avoid Foreclosure". See SAC at 3-ER-546, ¶ 113; Document at 3-ER-486 - 488.

6M. Valdellons made numerous attempts to have their payments credited in accordance with the terms of their Chapter 13 Plan to no avail.

The Valdellons Second Amended Adversary Complaint details the numerous attempts made by Valdellons to get PHH/WF to credit payments received from the Chapter 13 Trustee as required by their Plan and to remove the delinquency from their account. Valdellons sent letters to PHH, PHH's bankruptcy attorney, sent faxes, made phone calls, set appointments, and provided copies of checks. Much of Valdellons communications with PHH/WF are detailed in the complaint at 3-ER-545 - 548, ¶ 100, 101, 104 through 128; Additionally, the Valdellons supported their claims with documents as exhibits at 3-ER-443 - 502.

6N. Valdellons suffered damages as a result of failure to properly apply payments

1. WF/PHH added $9,492.89 to the amount Valdellons must pay on Claim 9-1, by alleging "past due payment(s)" in the amount of $9,492.89. See 8/17/20 statement at 3-ER-431 and 3/16/20 statement showing $9,279.20 alleged past unpaid amount at 3-ER-424.

2. WF/PHH added $2,181.81 in costs and expenses to the loan as a result of the failure and refusal to credit payments in accordance with Valdellons' confirmed Chapter 13 Plan. SAC at 3-ER-547, ¶ 125; Reinstatement Quote at 3-

ER-495 - 49.

3. Valdellons have been and continue to be materially injured by the crediting of payments contrary to the terms of Valdellons Chapter 13 Plan. This has resulted in increased principal and interest that Valdellons are being required to pay on Claim 9-1 in the amount of $4,710.83. See SAC at 3-ER-556 - 557, ¶ 204, 205, 206.

4. Valdellons have incurred out of pocket costs, including attorney fees, postage, fax costs, and copy costs of no less than $10,050.00. See SAC at 3-ER-548, ¶ 129. Valdellons are continuing to incur attorney fees and costs related to this matter and the enforcement of the terms of the note and deed of trust. See SAC at 3-ER-548, ¶ 130.; See March 15, 2021 Disclosure of Compensation of Attorney at BK Docket, 6-ER-1202, Docket 157; Disclosure of Compensation of Attorney at BK Docket, 6-ER-1202, Docket 164.

5. Valdellons have experienced and continue to experience emotional distress and great stress which has exacerbated certain medical conditions to worsen and which resulted in physical injury and other symptoms including headaches, stomach aches, nausea, irritability, nervousness, restlessness, sleeplessness, distractedness, and other symptoms. SAC at 3-ER-548 - 549, ¶ 131 through137. "[C]orroborating evidence may not be necessary to prove emotional distress where the violator engaged in egregious conduct and significant emotional distress is readily apparent." *Dawson v. Wash. Mut. Bank, (in re Dawson)*, 390 F.3d 1139, 1149-50 (9th Cir. 2004) . Appellants continue to suffer emotional distress and would have never envisioned this nightmare of a case with their mortgage company lasting more than five years after the completion of their Chapter 13 Plan.

6. Valdellons have spent considerable time reviewing documents and

correspondence as well as attempts to work with PHH to have their payments applied in accordance with the terms of the Chapter 13 case. They have gone beyond the call of duty in attempting to get their account corrected prior to seeking relief from the Bankruptcy Court. SAC at 3-ER-548 - 549, ¶ 132, 133, 134, 135, 136, 137 and 138.

7. SUMMARY OF ARGUMENT

There is *no fair grounds for doubt* that it is improper for WF/PHH to collect from Valdellons amounts it alleges were underpaid by the Chapter 13 Trustee for pre-petition arrears and ongoing maintenance payments when Valdellons' Chapter 13 Plan provided for WF/PHH's Claim 9-1 pursuant to 11 U.S.C. §1322(b)(5). The Plan contains specific language regarding the manner in which payments are to be credited, and Valdellons received a discharge after completion of their Chapter 13 Plan. WF/PHH is bound by the terms of Valdellons' Chapter 13 Plan pursuant to 11 U.S.C. §1327 and 11 U.S.C. §524(i).

Valdellons have presented a case in the form of a Second Amended Complaint (SAC at 3-ER-536) supported by admissions, monthly account statements, correspondence, cancelled checks, bank statements, collection letters, foreclosure Documents, and other correspondence. (Exhibits to SAC at 3-ER-297 - 535).

Violations of 11 U.S.C. §524(i) are enforced through the Court's powers of civil contempt. The BAP properly found WF/PHH can be held liable for a violation of 11 U.S.C. §524(i) as they are bound by the terms of Valdellons' Chapter 13 Plan and rejected WF/PHH's defenses to liability as a matter of law.

Valdellons' allegations show clear and convincing evidence that WF/PHH's collection actions are in violation of 11 U.S.C. §524(i) and the Chapter 13 Plan because payments were not credited in the manner required. Valdellons have met their burden and the burden shifts to WF/PHH.

Valdellons request that the BAP's order be affirmed and that the rejection of WF/PHH's defenses both be explicitly rejected.

8. ARGUMENT

Valdellons bring to this Court a very serious problem - a problem with the Bankruptcy Court's orders being ignored. We have a creditor, WF/PHH, that

disagrees with the results of a Chapter 13 and insists, based upon its lien rights, that it can collect amounts it now claims were underpaid by the Trustee in the bankruptcy. WF/PHH act as though they are exempt from following the Order of Discharge, 11 U.S.C. §524(i), and the Order Confirming Chapter 13 Plan.

We have a sophisticated lender with many thousands of loans involved in the bankruptcy process that systematically disregards the rights of borrowers and ignores the rights of Debtors in Chapter 13 cases. See SAC at 3-ER-552 - 557, ¶¶163 - 206. Response to Interrogatory 8 at SER-35 - 36; Response to Interrogatory 10 at SER-37. See also Discharge Reconciliation Analysis Checklist 3-ER-504 - 507.

8A. Valdellons have stated a claim for violation of 11 U.S.C. §524(i).

1. Elements for cause of action under 524(i)

There are two requirements to establish a violation of section 524(i): 1. Willful failure to credit payments received under a confirmed Plan, and 2. Material injury to the debtor. *Ridley v M & T Bank* (In re *Ridley*), 572 B.R. 352, 361 (Bankr. E.D. Okla. 2017).

11 U.S.C. §524(i) provides that:

> (i)The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), **shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.** (Emphasis added)

The latter half of section 524(i) sets out the requirements for finding a violation of the discharge injunction as: 1. The act of the creditor to collect and failure to credit payments in the manner required by the Plan, and 2. Material injury as a result.

Here, Valdellons show that WF/PHH did take actions to collect based upon the

failure to credit payments in the manner required by the Plan and material injury as a result. The actions to collect included the rejection of the July and August 2020 monthly payments, demands for payment of additional amounts, and the commencement of foreclosure proceedings. See Section 6(i) and (L). The collection is a direct result of WF/PHH's failure to credit payments in the manner required by the Plan. See Section 6(J) and (K). WF/PHH's actions caused material injury and damages in that the amount being collected is more than the WF/PHH is entitled to receive under the Plan. See Section 6N above.

2. 11 U.S.C. §524(i) is enforced by the Power of Civil Contempt

A. The power of Civil Contempt under 11 U.S.C. §105

Bankruptcy courts have the power of civil contempt under 11 U.S.C. §105 and Federal Rule of Bankruptcy Procedure 9020. *Caldwell v Unified Capital Corp.* (In re *Rainbow Magazine, Inc.*), 77 F3d 278, 284 - 285 (9th Cir. 1996). In civil contempt proceedings, "[t]he moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the Court". *Knupfer v Lindblade* (In re *Dyer*), 322 F.3d 1178, 1190 - 1191 (9th Cir. 2003) quoting *Renwick v Bennett* (In re *Bennett*), 298 F.3d 1059, 1069 (9th Cir. 2002).

The United States Supreme Court has held that "A court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct." *Taggart v Lorenz*, 139 S. Ct. 1795, 1799 (2019). "In other words, civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful". Id. But "[t]he Taggart refinements of the civil contempt standard in the bankruptcy discharge context did not otherwise alter a movant's threshold burden on going forward." *Mellem v Mellem* (In re *Mellem*), 625 B.R. 172, 178 (9th Cir.

2021).

Contempt requires proof a creditor had knowledge of a bankruptcy court order and secondly that contemnors intended the conduct that violated the order. *Zilog, Inc v Corning*, (In re *Zilog, Inc.*), 450 F.3d 996, 1007 (9th Cir. 2006).

Here, Valdellons have shown clear and convincing evidence that WF/PHH have violated 11 U.S.C. §524(i) and the specific language of the Chapter 13 Plan. As discussed above and below at Sections 6(D), (J) and (K), Valdellons have outlined the specific language of the Chapter 13 Plan which mandates the manner in which payments are credited, the completion of their Chapter 13 Plan and entry of the Order of Discharge.

WF/PHH's actions, position, and alleged defenses are outrageous, egregious and a blatant violation of Valdellons' rights and their Chapter 13 Plan. Court, including the Bankruptcy Court, have the power to issue orders both to compel compliance as well as to compensate Valdellons for losses and damages sustained as a result of the noncompliance.

8B. BAP properly found WF/PHH may be liable, under 11 U.S.C. 524(i).

1. Creditors are bound by the terms of a Chapter 13 Plan per 11 U.S.C. §1327 and §524(i).

The provisions of a confirmed Plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the Plan and whether or not such creditor has objected to, has accepted, or has rejected the Plan. 11 U.S.C. §1327. The United States Supreme Court has acknowledged that:

> When the Bankruptcy Court confirms a plan, its terms become binding on debtor and creditor alike. 11 U.S.C. §1327(a). Confirmation has preclusive effect, foreclosing relitigation of 'any issue actually litigated by the parties and any issue necessarily determined by the confirmation order.' 8 Collier 1327.02[1][c], at 1327-6; See also U.S. Aid Funds, Inc v Espinosa, 559 U.S. 260, 275, (2010) (finding a confirmation order 'enforceable and binding' on a creditor notwithstanding legal error when the creditor 'had notice of the error and failed to object or timely appeal')"

Bullard v Blue Hills Bank, 575 U.S. 496, 502 (2015)

Accordingly, "creditors are limited to those rights that they are afforded by the plan, [and] they may not take actions to collect debts that are inconsistent with the method of payment provided for in the plan" *United States v Richman* (In re *Talbot*), 124 F.3d 1201, 1209 (10th Cir. 1997)(quoting 8 COLLIER ON BANKRUPTCY P 1327.02[1] (Lawrence P. King ed., 15th ed. 1996). The provisions of a confirmed Chapter 13 Plan bind the debtor and creditor and the binding effect of a confirmed Plan encompasses all issues that were or could have been litigated by the parties. See Fla Dep't of Revenue v Gonzales (In re Golzalez), 832 F. 3d 1251, 1258 (11th Cir. 2016).

2. Valdellons pled the specific language of the Plan that directs the manner in which payments on Claim 9-1 are to be credited. (Section 6D).

Here, Valdellons Chapter 13 Plan modified the note underlying Claim 9-1 to provide: The manner in which the amount of pre-petition arrears is to be determined; The manner in which pre-petition arrears could be collected; The manner in which post-petitition ongoing payments are to be credited; and The Curing of arrears. See Section 6(D).

3. Valdellons have shown the collection and crediting of payments contrary to the Plan.

i. Plan provides for pre-petition arrears to be paid only by Trustee.

A. Creditor admits that is collecting "underpayment of pre-petition arrears" from Valdellons. See Section K above. Since all arrears on Class 1 Claims shall be paid in full by Trustee, collection of pre-petition arrears from Valdellons after the completion of the Chapter 13 Plan is therefore a violation of the Plan terms and 11 U.S.C. §524(i). See Section 6(D) and Plan at Section 3.07(a).

B. The monthly statements show that WF/PHH credited more to pre-petition arrears than was paid by the Chapter 13 Trustee. Under the Plan, pre-petition arrears may only be collected from the Chapter 13 Trustee with funds designated for arrears. WF/PHH credited ongoing payments to pre-petition arrears which caused a delinquency in ongoing payments. See Section 6(J)

ii. The Plan requires that ongoing maintenance payments "shall be applied as if the claim was current and no arrearage existed on the date the case was filed."

A. Mortgage statements show large rolling delinquencies and never show delinquencies cured. From January 2019 (prior to Plan completion) through Plan completion, RNOFC, and entry of discharge July 2020 delinquency never cured. Collection never reconciled with NOFC and RNOFC after Plan completion. See above at Section 6D1, 6D2, 6D5, 6F and 6J. This is further confirmed by WF/PHH admissions that they disagree the trustee paid all pre-petition arrears and ongoing monthly payments despite their RNOFC. See Section 6(K).

B. WF/PHH credited some of the post-petition ongoing payments made by the Chapter 13 Trustee to pre-petition arrears thereby causing default. See Section 6D and 6J, above.

C. WF/PHH failed to reconcile it actual collection with the crediting of payments as required by the Chapter 13 Plan. The rolling delinquencies starting prior to Plan completion and continuing past the entry of the Order of Discharge show that WF/PHH did not give Valdellons the curative effect required by the Chapter 13 Plan. See

Section 6J2 above.

iii. Customer Activity Statements show WF/PHH did not credit ongoing monthly payments made by the Chapter 13 Trustee to appropriate months.

As discussed above at Section 6J4 and 6J5, WF/PHH's account activity statement show that Valdellons October 2019 payment was credited to the payment due date of February 2019. Similarly, Valdellons November 2019 and December 2019 payments were credited to due dates of March 2019 and April 2019.

If creditor had properly credited trustee payments Valdellons would already have received credit for the February, March, and April 2019 payments because the Trustee paid ongoing payments through September 2019. See Section 6(G).

4. Both the BAP and District Court before it found Valdellons' damage allegations sufficiently pled.

Valdellons alleged they suffered damages as a result of the failure to credit payments in accordance with the Plan. (Section 6N, above) The District Court has already recognized the sufficiency of the damages alleged. See 3-ER-583, lines 3 - 5. Valdellons have similarly alleged damages in the SAC at 3-ER-556 - 557, ¶¶ 204, 205, 206.

C. The BAP properly held that Valdellons' Plan is not in default where the Court entered an Order of Discharge.

The factual finding made by the Bankruptcy Court, nearly four years after the entry of the Order of Discharge, that there is an "incurable default" in Valdellons' Plan, based solely upon allegations in a motion which was withdrawn and dismissed in Valdellons' underlying Chapter 13 case, is improper for several reasons.

1. Res Judicata effect of Discharge and bankruptcy proceedings.

Res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from re-litigating all issues connected with the action that were or could have been raised in that action. See In re *Baker*, 74 F.3d 906, 910 (9th Cir. 1996); *Rein v Providian Financial Corp*. 270 F.3d 896 (9th Cir. 2001).

The question of whether the Plan was in default is an issue that was or could have been raised prior to or in connection with the entry of the Order of Discharge. The doctrine of res judicata prohibits the re-litigation of this issue due to the entry of the Order of Discharge and the withdrawal and dismissal of the Chapter 13 Trustee's Motion To Dismiss case. See Minutes at 5-ER-998 and Order of Discharge at 5-ER-984 - 985.

Similarly, whether the Chapter 13 Trustee paid pre-petition arrears in full and whether he paid ongoing monthly payments through September 2019 are issues that were decided in the NOFC/RNOFC process.

2. Even if the court had allowed the Plan to be impermissibly extended beyond 60 months, the Plan must be enforced per *United Student Aid Funds, Inc. v Espinosa* 559 US 260 (2010).

3. Improper finding of facts in connection with a motion to dismiss under FRCP 12(b)(6) notice and opportunity present material and argument.

The Bankruptcy Court based its findings solely on allegations in a motion, which was withdrawn and dismissed. In connection with the Trustee's Motion To Dismiss, the Bankruptcy Court specifically authorized the "case to proceed". See Minutes at 5-ER-998. Valdellons were not given any opportunity to present evidence or arguments on the issue of whether the Plan was in default at the time of the Trustee's motion as required by FRCP 12(d).

The finding of an incurable default and ineligibility to enforce the terms of the Order of Discharge are contrary to the allegations in the complaint. The Bankruptcy Court went beyond reviewing the complaint to determine whether valdellons sufficiently pled a cause of action. The Court's finding of an "incurable default" goes beyond the scope of a motion under FRCP 12(b)(6).

The court erred by treating the 12(b)(6) as a motion for summary judgment without providing the Valdellons the opportunity to present all the material that is pertinent to the motion per FRCP 12(d).

Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal under Rule 123b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory. *Somers v Apple, Inc*., 729 F.3d 953, 959 (9th Cir. 2013). "To survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its fact.'". *Ashcroft v Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009). The court is to "accept all factual allegations in the complaint as true and construe the pleadings in a light most favorable to the nonmoving party." *Outdoor Media Group, Inc. V City of Beaumont*, 506 F.3d 895, 899 - 900 (9th Cir. 2007).

4. Finding of an "incurable default" is clearly erroneous on the facts of this case.

a. Trustee was demanding more money than was due under the terms of Valdellons' 60 month Plan in his Motion To Dismiss.

Through his Motion To Dismiss, the Trustee shows Valdellons had made payments totaling $166,184.21 and that he was demanding total payments of $176,430.58. Under the Plan, Valdellons were only obligated to pay $164,549.21

($124,758.21 + $6,626.00 + $33,165.00 [$3,685.00 x 9]) (compare Plan at 5-ER-1011 - 1017; Trustee Motion on BK Docket, 6-ER-1189 - 1205, Docket numbers docket 127, 129, 131, 132, 138, 139, 140, 141, 145, 146; and Opinion at 1-ER-190, line 21 through 195, line 12.

b. Trustee was demanding money solely to make ongoing mortgage payments on claim 9-1 that fell due after Valdellons' 60 month Plan period.

As discussed above, the Trustee's allegation of default was a default only in such amounts necessary to pay ongoing maintenance payments on claim 9-1 for the months of May through September 2019. At the time of the Trustee's motion, the Trustee had already paid amounts due under the 60 month Plan and additionally, paid the ongoing maintenance payment on claim 9-1 for the month of April 2019.

c. The Trustee was not alleging a default in making the final three payments (58th, 59th, 60th) due under the Plan, the Trustee was demanding amounts solely to pay ongoing payments on Claim 9-1, which fell due after Valdellons' 60 month Plan term. (See Trustee's Motion, Declaration, and Exhibits at Bankruptcy Docket, 6-ER-Docket 117, 119, and 120. See also Plan at 5-ER--1011 - 1017.)

At the time of the Trustee's motion, the trustee had already made all payments to creditors required in Valdellons 60 month Plan. The Trustee was not alleging Valdellons failed to make the payments due for months 58, 59, and 60. At the time of his motion, he had paid all amounts required by the confirmed Plan.

5. The Bankruptcy Court erred when it found "the only logical conclusion is that Plan payments were properly credited". 2-ER-196, lines 14 - 18 and 195, line 13 through 197, line 2

The Bankruptcy Court misconstrues the significance of the NOFC and RNOFC. The NOFC and RNOFC are documents that show how payments are *to*

be credited as required by the Chapter 13 Plan, not how they were actually credited by WF/PHH. The monthly mortgage statements and collection notices show how PHH *actually credited payments received from the Trustee under the Plan and how they were actually collecting.*

6. The Bankruptcy Court erred when it found that "post-plan payments, or payments Plaintiffs began making directly to Defendants beginning October 2019 are not payments "under a plan" within the meaning of §524." Order on Reconsideration and Amended Opinion at 2-ER-194 - 195.

As claim 9-1 was provided for in Valdellons Chapter 13 Plan pursuant to 11 U.S.C. §1322(b)(5), all payments made, even direct payments, are "under the plan". See *Derham-Burk v Mrdutt* (In re *Mrdutt*), 600 B.R. 72 (BAP 9th Cir. 2019)

7. Valdellons did not plead an incurable default in the SAC, Valdellons pled that Trustee paid ongoing payments on Claim 9-1 through September 2019. See SAC at 550, ¶146 and 148.

D. There is No objectively reasonable basis for concluding that WF/PHH's conduct might be lawful under the discharge order and 11 U. S. C. 524(i) where the claim is provided for in a Chapter 13 Plan pursuant to 11 U.S.C. §1322(b)(5).

1. Valdellons' Plan provided for claim 9-1 pursuant to 11 U.S.C. §1322(b)(5) with specific Plan provisions directing the manner in which payments are to be credited.

WF/PHH is bound by the terms of the Chapter 13 Plan. See Section 8(B)(1).

2. The caselaw cited by WF/PHH is unavailing as here the Plan treats Claim 9-1 pursuant to 11 U.S.C. §1322 (b)(5).

Creditors place a bewildering amount of reliance on In re *Brawders*, 503 F3d 856 (9th Cir. 2007) and *Dewsnup v Timm*, infra, for the proposition that "it is

established law that Creditor's fully secured lien passed through bankruptcy unaffected and secured all sums due on the loan." Appellants Opening Brief at page 32 - 33, 36. Or, as stated in their Statement of Issues #1, "... where existing law provides that liens pass through bankruptcy unaffected, regardless of the plan and proof of claim, and regardless of the plan's and proof of claim's accuracy?" Appellants Opening Brief at page 17. WF/PHH also alleges "it is black-letter law that pre-existing liens pass through bankruptcy unaffected unless action is taken to avoid them. See *Dewsnup v Timm*, 502 U.S. 410, 418 (1992), In re *Schlegel*, 526 B.R. 333, 342 (9th Cir BAP 2015); *Farray v Sanderfoot*, 500 U.S. 291, 297 (1991)" Opening Brief at page 38- 41.

WF/PHH rely on these case to support their two defenses: 1. Their lien rides through theory, where they argue the lien rides through the bankruptcy unaffected and they can ignore the bankruptcy proceeding results. (Issue #1) And 2. "... Due to a lack of clarity in the law, Creditors had an objectively reasonable basis for asserting that Debtors' loan was in default following their bankruptcy discharge?" Opening Brief at page 18, Statement of Issue #3.

The cases cited by WF/PHH do not deal with 11 U.S.C. §524(i) or chapter 13 cases which provide for a secured claim pursuant to 11 U.S.C. §1322(b)(5). All of the cases cited by WF/PHH are distinguished from the present case. For Example, *Dewsnip v Timm*, supra involved a chapter 7 case; *Farrey v Sanderfoot*, supra, deals with lien avoidance; and, *In re Bisch*, 159 B.R. 546 (9th Cir. BAP 1993), involved a chapter 13 case where lien of the IRS was not provided for by plan. These cases are a far cry from this case where Valdellons' confirmed Chapter 13 Plan contained very specific language regarding the manner in which payments are to be credited. WF/PHH had notice and failed to take actions or object.

Similarly off the mark, In re *Schlegel*, supra was a chapter 13 case, but the issue

was whether a chapter 13 Plan may be dismissed for the debtors' failure to pay both the required Plan payment and the stated percentage dividend to unsecured nonpriority creditors during the applicable commitment period. And *Johnson v Home State Bank*, 501 U.S. 78 (1991) dealt with the ability of a debtor to reorganize a secured claim after receiving a discharge in a Chapter 7 case. Debtors can restructure a secured debt even though they do not have personal liability.

Creditors' claims can be modified through a Chapter 13 case, even liens where the debtor does not have personal liability. While secured creditors are not required to participate in a Chapter 13 case, if they want to be paid or if they want input on the amount they are paid, they should file a claim in the case. Secured creditors rights can be substantially altered through a Chapter 13 case, including: a. collateral valuation pursuant to 11 U.S.C. §506, b. Lien stripping per 11 U.S.C. §522(f), c. cure and maintain pursuant to 11 U.S.C. 1322(b)(5); d. alteration of interest rates, and e. alteration of the term of repayment. See e.g. 11 U.S.C. §1322(b)(2), (3), (5), and (11) and 11 U.S.C. §1322(c). A Chapter 13 Plan may alter the amount a secured creditor is paid and may alter the manner in which it is paid. Liens do not always pass through unaffected. See 11 U.S.C. §1327(b) and (c).

Here, Claim 9-1 was modified by the Plan to cure the arrears and maintain payments as though the loan was current. The Plan provides the exclusive mechanism by which pre-petition arrears are to be paid in full and the Plan provided for the manner in which ongoing payments are to be credited.

While a lien may survive a bankruptcy case, and not all do, the entitlement to payment on the loan, can be forever altered by the terms of a Chapter 13 Plan. Except as provided in the Plan, all property vests in the debtor, free and clear of

liens of creditors, upon confirmation of the Chapter 13 Plan. See 11 U.S.C. §1327(b) and (c).

Here, Valdellons' Plan allowed WF/PHH to retain its lien to collect amounts due under the Plan. The loan was altered by the Chapter 13 Plan in that the arrears were to be cured and the mechanism was established for WF/PHH to be paid in full for all arrears and ongoing monthly payments. One such Plan provision is that pre-petition arrears can **only be collected from the Chapter 13 Trustee**. After the bankruptcy plan is completed and the case is closed, later collection of pre-petition arrears is prohibited, whether it is before or after completion of the Plan, entry of the Discharge, case closing, or the completion of contractual monthly payments remaining due on the loan. The note was modified and the existence of security does not afford rights to collect amounts that can not be collected under the note. WF/PHH do not address the specific language of the Plan or the intent and meaning of 11 U.S.C. §.524(i).

3. Actual collection from Valdellons and crediting of payments by WF/PHH is not consistent with the Trustee's NOFC or the RNOFC filed by WF/PHH.

As shown above at Section 6J and 6K above, the monthly statements show rolling delinquencies long before the completion of the Chapter 13 Plan and continuing after the NOFC, RNOFC and Order of Discharge. WF/PHH never adjusted or reconciled their collection with the curing of arrears or the payment of arrears and payment of ongoing maintenance payments through the Chapter 13 Plan. These payments are evidenced by the NOFC and RNOFC as well as the Trustee's Final Reports.

Further, where WF/PHH outright admit the amount being collected is for underpayment of pre-petition arrears and ongoing payments by the Chapter 13 Trustee, it is quite troubling. WF/PHH did not, in their RNOFC, dispute the

sufficiency of payments made by the Chapter 13 Trustee as shown in the NOFC. WF/PHH also did not object to the Trustee's Final Report. See Bankruptcy Docket generally.

The evidence before the Court is clear and convincing that WF/PHH are in violation of 11 U.S.C. §524(i) for their failure to reconcile their collection with the Chapter 13 Plan, NOFC, and RNOFC. See Sections 6D through 6N above.

4. WF/PHH had years to alter, amend, increase, adjust, or otherwise dispute the amounts it was paid by the Chapter 13 Trustee, but failed to do so.

The Chapter 13 Plan provided for a number of mechanisms by which WF/PHH could alter the amount it is paid. WF/PHH could have: 1. amended its claim, 2. corrected its claim, 3. objected to its claim, 4. further supplemented its claim, 5. objected to confirmation of the Chapter 13 Plan, 6. objected to the Trustee's Final Report, 7. asserted the alleged delinquency in its RNOFC, 8. objected to the entry of the Order of Discharge, and/or 9. taken action to revoke the order of discharge or order confirming Plan.

It is **not** objectively reasonable for a creditor to **not avail itself** of the opportunities to obtain full payment or dispute the amount being paid through a Chapter 13 Plan, only to later collect amounts it unilaterally decides it was underpaid. Certainly, not where WF/PHH have agreed under penalty of perjury that they were paid all arrears and all ongoing monthly payments through October 2019.

5. Creditor may not collect more than is owed on the note.

When the obligation under the note is modified to change the manner in which pre-petition arrears are paid, as here, a creditor does not have the ability to collect more because it has a lien. The lien only secures the note, when an obligation under the note is satisfied through the Chapter 13 Plan, it can not later be collected

because a creditor retains a lien.

E. The BAP properly held that the broad equitable power in the Bankruptcy Court's civil sanctioning authority is sufficient to compensate for the damages incurred by violations of the discharge injunction, including emotional distress damages.

1. Valdellons did present the Bankruptcy Court's ruling with respect to the ability of the Court to award damages for emotional distress in connection with a claim under 11 U.S.C. 524(i) as an issue in their Opening Brief to the BAP.

Valdellons addressed the Bankruptcy Court's ruling with respect to the ability of the Court to award damages for emotional distress in connection with a claim under 11 U.S.C. 524(i) at page 61 and 62 of their Opening Brief. See 2-ER-152 - 153.

2. The Supreme Court did not address or alter the range of permissible compensatory damages available under civil contempt.

The "old soil" reference by the Court simply refers to the long history of civil contempt sanctions and the body of caselaw that necessarily follows when a statutory term is transplanted from another source. As noted by the BAP, courts have long departed from limiting civil contempt sanctions to pecuniary losses. See *Leman v Krentler-Arnold Hing Last Co*., 248 U.S. 448, 455 - 456 (1932). Existing law related to civil contempt for violating injunctions includes awarding emotional distress damages. See BAP opinion at 1-ER-25 - 30. See for example In re *Marino*, 577, B.R. 787 (allowing emotional distress damages for violation of the automatic stay); *Snowden v Check into Cash of Wash. Inc* (In re *Snowden*), 769 F.3d 651, 657 (9th Cir. 2014); *Dawson v Wash. Mut. Bank., F.A.* (In re *Dawson*), 290 F. 3d 1139, 1149 (9th Cir. 2004).

The losses or damages will necessarily differ based upon the injunction which

has been violated and it is certainly within the realm of possibility that a debtor will be harmed emotionally when there is a violation of the discharge injunction. See In re *Nordlund*, 494 B.R. 507, 523 (Bankr. E.D. Cal 2011).

3. Valdellons adopt the BAP opinion with respect to the availability of emotional distress damages. BAP opinion at 1-ER-25 - 30.

F. Civil contempt sanctions and punitive damages are appropriate.

Punitive damages are an appropriate sanction when the discharge injunction is violated. See *Desert Pine Villas Homeowners Ass'n v. Kabiling (*In re *Kabiling),* 551 B.R. 440 (B.A.P. 9th Cir. 2016); *Nibbelink v. Wells Fargo Bank, Nat'l Ass'n (*In re *Nibbelink),* 403 B.R. 113 (Bankr. M.D. Fla. 2009). Wells Fargo and PHH are sophisticated lenders. Not only have Valdellons shown that notice of the bankruptcy and the Plans was given to creditors, but Valdellons have provided the Court with evidence that Wells Fargo has procedures related to the treatment of claims involved in Chapter 13 bankruptcy proceedings, that such procedures were followed, and WF/PHH are willfully collecting and failing to credit payments in the manner required by the Plan. See Response to Interrogatory 1 at SER-28 - 29; Response to Interrogatory 8 at SER-35 - 36; Response to Interrogatory 10 at SER-37; See also Discharge Reconciliation Analysis Checklist at 3-ER-504 - 507.

It is disturbing that such sophisticated creditors who regularly deal with Chapter 13 cases would take the position that they are simply not bound by the terms of a Chapter 13 Plan and their own statements under penalty of perjury in their RNOFC when their claim is treated pursuant to11 U.S.C. §1322(b)(5).

WF/PHH does not argue its failure to apply payments was a result of a mistake, inadvertence, or error in its procedures. WF/PHH argue that they are simply not bound by the terms of Valdellons' Plan. Such intentional indifference to the

Chapter 13 process for allowing debtors to catch up on mortgage arrears and pay ongoing payments through a plan is unbelievable. Saving real property from foreclosure and rehabilitating the loan is a hallmark of Chapter 13 cases.

WF/PHH's outright disregard of Valdellons' Chapter 13 Plan, Valdellons' rights, the Court's Order of Discharge, and 11 U.S.C. §524(i) is outrageous and egregious. WF/PHH's claims to this Court demonstrate their resilient defiance of 11 U.S.C. 524(i). WF/PHH's interpretation of the law would make a mockery of bankruptcy process. Section 524(i) was adopted precisely to enforce the terms of a Chapter 13 plan in this very situation.

The confirmation and completion of a Chapter 13 Plan as well as the Order of Discharge and 11 U.S.C. 524(i) must have meaning and finality. Where a chapter 13 Plan provides for a claim pursuant to 11 U.S.C. 1322(b)(5) the plan is completed and a discharge is entered, the main purposes of the Chapter 13 case can not later be stripped away simply because a creditor disagrees with the result; especially where they agreed with the result under penalty of perjury!

WF/PHH need to be stopped from collecting unlawfully from Chapter 13 Debtors. The Court has the power to enforce its orders through the civil contempt with sanctions and punitive damages awards. There is no fair grounds for doubt as to the manner in which payments should be credited under the Plan in these circumstances. The Court has the power to issue such orders as are necessary to compel compliance as well as to compensate for damages sustained as a result of non compliance. Further, the Court can issue orders necessary to prevent future non compliance. Should the Bankruptcy Court have any concerns regarding its ability to award damages, sanction, punitive damages, or other awards necessary to compel compliance, prevent future non compliance and compensate Valdellons the District Court can withdraw the reference and conduct further proceedings.

9. SHORT CONCLUSION STATING PRECISE RELIEF SOUGHT

Valdellons respectfully request this Court find it has jurisdiction to affirm BAP's Order.

Valdellons request that the Court:

1. Affirm the BAP's Order and ruling that WF/PHH is bound by the terms of Valdellons' Chapter 13 Plan and can be held liable, under 11 U.S.C. §524(i), when it disregards the cure effectuated by a completed Chapter 13 Plan, including,
   A. the rejection of WF/PHH's Lien theory defense to liability, and
   B. the rejection of WF/PHH's claim that the Law so uncertain that they cannot be held liable for a violation of 11 U.S.C. §524(i).
2. Affirm the BAP's order reversing the Bankruptcy Court's dismissal of Valdellons Second Amended Complaint and hold that Valdellons have presented clear and convincing evidence of a violation of 11 U.S.C. §524(i), sufficient to shift the burden to WF/PHH under *Renwick v Bennett*, supra.
3. Affirm the BAP's order finding the Bankruptcy Court has sufficient sanctioning authority to award damages, including emotional distress damages.
4. Affirm the BAP's ruling that Valdellons' Plan is not in default.
5. Hold that there is no fair grounds for doubt that WF/PHH's collection and crediting of payments is in violation of 11 U.S.C. §524(i).
6. Reverse Bankruptcy Court's holding that payments made directly by Debtor can be relevant in determining whether "payments under the plan" are credited in the manner required by the Plan. And, further hold that ongoing maintenance payments made on 1322(b)(5) claims which are made directly by Chapter 13 Debtors are payments "under the Plan"

7. Awarding Valdellons' attorney fees, costs and expenses for WF/PHH's frivolous appeal to this Court.
8. Remand for further proceedings
9. Grant such other relief as is just and appropriate, including dismissal of the appeal if appropriate.

Respectfully submitted,

Wolff & Wolff

Dated: 11/11/25

By: s/Mark A. Wolff
Mark A. Wolff, attorney for
Melanio L. Valdellon, III and
Ellen C. Valdellon

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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