Dated: March 08, 2021
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re CHANDRA LYNETTE BERRY, Debtor.	Case No. 11-28881-L Chapter 7
CHANDRA LYNETTE BERRY, Movant, v. WELLS FARGO HOME MORTGAGE, as servicer for THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., and FAY SERVICING, LLC, as servicer for NRZ INVENTORY TRUST and U.S. BANK N.A., as Trustee, Respondents.	Amended Motion for Contempt Sanctions [Dkt. No. 81] Objection [Dkt. No. 89] Notice of Filing [Dkt. No. 91] Motion to Dismiss/Withdraw [Dkt. No. 92] Notice of Written Argument [Dkt. No. 99]

ORDER ON AMENDED MOTION TO HOLD WELLS FARGO BANK THE SERVICER ON BEHALF OF BANK OF NEW YORK MELLON, AND FAY SERVICING, LLC THE SERVICER ON BEHALF OF NRZ INVENTORY TRUST AND U.S. BANK N.A. AS TRUSTEE IN CONTEMPT AND FOR SANCTIONS FOR VIOLATIONS OF DEBTOR'S DISCHARGE INJUNCTION

BEFORE THE COURT are the Debtor's *Amended Motion to Hold Wells Fargo Bank the Servicer on behalf of Bank of New York Mellon, and Fay Servicing, LLC the Servicer on behalf of*

NRZ Inventory Trust and U.S. Bank N.A. as Trustee in Contempt and for Sanctions for Violations of Debtor's Discharge Injunction, filed January 21, 2021 [Dkt. No. 81] (the "Amended Motion for Sanctions"); Fay Servicing LLC's *Objection to Motion for Contempt,* filed February 10, 2021 [Dkt. No. 89]; Fay Servicing LLC's *Notice of Filing,* which included the omitted exhibit to its objection, filed February 11, 2021 [Dkt. No. 91]; Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A.'s *Motion and Memorandum of Law in Support of Motion to Dismiss,* filed February 11, 2021 [Dkt. No. 92]; and the Debtor's *Notice to the Court of Debtor's Written [Oral] Argument for Good Cause Shown,* filed after oral argument on February 23, 2021, because the Debtor experienced technical difficulties on the day of argument. [Dkt. No. 99]. The certificate of service for the Amended Motion for Sanctions shows no service upon Respondent U.S. Bank, N.A. No proof appears in the record concerning its activities and no specific relief was sought by the Debtor with respect to U.S. Bank, N.A. The court heard oral argument for and against the Amended Motion for Sanctions with respect to Wells Fargo and Fay Servicing on February 18, 2021. Having heard the arguments of the Debtor and counsel and reviewed the exhibits presented by the parties, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor commenced her case by filing a voluntary petition under Chapter 7 of the Bankruptcy Code on August 30, 2011. [Dkt. No. 1].

Among her assets was a house located at 6215 Malloch Drive, Memphis, Tennessee (the "Property"). [Dkt. No. 1, Schedule A].

The Property was encumbered by two liens, the first scheduled at $263,000, serviced by American Servicing Center, the second scheduled at $22,000, serviced by Greentree. [Dkt. No. 1, Schedule D].

America's Servicing Company, as servicer for The Bank of New York Mellon Trust Company, National Association f/k/a/ The Bank of New York Trust Company, N.A., as successor to JPMorgan Chase Bank, N.A., f/k/a/ JPMorgan Chase Bank, as Trustee for RASC 2004-KS9 ("Trustee BNY Mellon"), sought and received relief from the automatic stay. [Dkt. Nos. 14 and 22].

The *Discharge of Debtor* and *Final Decree* were entered December 14, 2011. [Dkt. Nos. 24 and 25].

At some point that does not appear from the record, Wells Fargo became the servicer of the first mortgage loan.

Wells Fargo completed foreclosure and sale of the first mortgage loan on May 8, 2015. [Dkt. No. 81, ¶ 7].

The Property was conveyed to Trustee BNY Mellon by Trustee's Deed on May 13, 2015. [Dkt. No. 46, Exhibit 11].

Trustee BNY Mellon filed a detainer action in Shelby County General Sessions Court and obtained a Writ of Possession on August 25, 2015. [Dkt. No. 52, Ex. 1].

The Debtor filed a Notice of Appeal on September 2, 2015. [Dkt. No. 52, Ex. 1].

The Debtor surrendered possession of the Property in June 2018 as the result of a settlement. [Dkt. No. 81, ¶ 14-15].

The Debtor has at all times maintained that the foreclosure was unlawful. [Dkt. No. 81, ¶ 18].

On April 10, 2020, Trustee BNY Mellon recorded an assignment of the original Deed of Trust executed by the Debtor to NRZ REO VII LLC. [Dkt. No. 52, Exhibit 4]. The Debtor

maintains that this transfer was made by Wells Fargo, but no proof of that appears in the record and Wells Fargo denies it. [Dkt. No. 81, ¶¶ 21, 25; Dkt. No. 92, ¶13].

The Debtor maintains that the debt was sold to NRZ on August 13, 2020, for a profit of $177,000.00, but no proof of that appears in the record. [Dkt. No. 81, ¶¶ 20, 25].

The Debtor's *pro se* motion to reopen her bankruptcy case was granted by order entered January 8, 2021. [Dkt. No. 74].

The Amended Motion for Contempt was filed January 21, 2021.

Facts Unique to Wells Fargo

Wells Fargo sent written notice to the Debtor dated August 27, 2020, that servicing of the loan was being transferred to Fay Serving ("Notice of Servicing Transfer"). [Dkt. No. 81, Exhibits, p. 2-3 of 67]. The following paragraph appears immediately after the Debtor's address and before the salutation:

> PLEASE NOTE: This notice is being provided for informational purposes only. As a result of at least one bankruptcy case filing that included the above referenced account, Well Fargo Home Mortgage is NOT attempting in any way to violate any provision of the United States Bankruptcy Code or to collect a debt (deficiency or otherwise) from any customer(s) who is impacted by an active bankruptcy case or has received a discharge, where the account was not otherwise reaffirmed or excepted from discharge. THIS IS NOT A BILL OR A REQUEST FOR PAYMENT AS TO THESE CUSTOMER(S).

The Debtor responded to the Notice of Servicing Transfer with a letter dated September 15, 2020 (the "First Dispute Letter"). [Dkt. No. 81, Exhibits, pp. 32-33 of 67]. In the First Dispute Letter, the Debtor informed Wells Fargo that she had received a discharge in December 2011, that the property was foreclosed in May 2015, and that she had vacated the property in June 2018. The Debtor stated, "[Y]our communication is in violation of the bankruptcy injunction and Fair Debt Collection Practices Act (FDCPA)." Wells Fargo responded to the First Dispute Letter by letters dated September 22, 2020, October 5, 2020, October 20, 2020 (two letters), October 26, 2020, and

October 27, 2020. [Dkt. No. 81, Exhibits, pp. 6, 25-30 of 67]. The first five of these letters did no more than acknowledge receipt of the First Dispute Letter. The sixth letter dated October 27, 2020, acknowledged that the Property was foreclosed and reiterated that servicing of the mortgage was transferring from Wells Fargo Home Mortgage to Fay Servicing, LLC. [Dkt. No. 81, Exhibits, pp. 29-30].

On September 27, 2020, Wells Fargo sent the Debtor a Final Escrow Review Statement. [Dkt. No. 81, Exhibits, p. 7 of 67]. The statement contains the following language directly below the Debtor's address:

> **PLEASE NOTE:** ***If you are presently seeking relief (or have previously been granted relief) under the United States Bankruptcy Code, this statement is being sent to you for informational purposes only.***

On October 5, the Debtor sent Wells Fargo and Bank of New York Mellon a letter informing them that the debt was discharged December 2011, that "Wells Fargo conducted a wrongful foreclosure" in May 2015, and that the property was surrendered in June 2018 (the "Second Dispute Letter"). [Dkt. No. 81, Exhibits, pp. 34-36 of 67]. Wells Fargo responded to the Second Dispute Letter with an acknowledgement dated October 30, 2020, and status updates dated November 13 and November 30. [Dkt. No. 81, Exhibits, pp. 58, 63, and 62 of 67].

Facts Unique to Fay Servicing

At some point Fay Servicing sent the Debtor an undated **NOTICE OF SERVICE TRANSFER** informing her that servicing of her mortgage loan was transferred from Wells Fargo to Fay Servicing effective September 17, 2020. [Dkt. No. 81, Exhibits, p. 11 of 67]. The notice states in part:

> The servicing of your mortgage loan is being transferred, effective 09/17/20. This means that after this date, a new servicer will be collecting your mortgage loan payments from you. Nothing else about your mortgage loan will change.

> Well Fargo Home Mortgage (WFHM) is now collecting your payments. Wells Fargo Home Mortgage (WFHM) will stop accepting payments from you after 09/16/20.
>
> Fay Servicing, LLC will collect your payments going forward. Your new servicer will start accepting payments from you on 09/17/20.
>
> Send all payments due on or after 09/17/20 to Fay Servicing, LLC at this address: [deleted].

At the bottom of the page, in much smaller type, appears this disclaimer (the "Fay Servicing Bankruptcy Disclaimer I"):

> Fay Servicing LLC is a debt collector, and information you provide to us will be used for that purpose. To the extent your original obligation was discharged, or is subject to an automatic stay under the United States Bankruptcy Code, this is being provided for informational purposes only and does not constitute an attempt to collect a debt or impose personal liability.

Attached to this Notice of Servicing Transfer or perhaps in separate correspondence, Fay Servicing sent the Debtor a document styled, **"Important bankruptcy information below. Please read this page carefully before continuing."** [Dkt. No. 81, Exhibits, p. 15 of 67]. This document provides the following information:

> Throughout this Welcome Kit, and on all future written correspondence from Fay Servicing, LLC you will see the following disclaimer on the bottom of each page:
>
> > ***Fay Servicing LLC is a debt collector, and information you provide to us will be used for that purpose. To the extent your original obligation was discharged, or is subject to an automatic stay under the United States Bankruptcy Code, this is being provided for informational purposes only and does not constitute an attempt to collect a debt or impose personal liability.***
>
> If your original obligation has been discharged, this statement means that Fay Servicing, LLC acknowledges you are no longer personally responsible for repaying the mortgage debt. This Welcome Kit and future written correspondence from Fay Servicing, LLC may contain information regarding the current status of the mortgage and the outstanding amount of the debt. **Please understand that these are not demands for payment.**

> However, you may still make voluntary payments towards the debt. These voluntary payments may prevent foreclosure and allow you to remain in your home. Alternatively, if you do not wish to remain in the home, but would like to avoid foreclosure, Fay Servicing, LLC may be able to offer you other liquidation options. The information contained in this Welcome Kit and in all our written correspondence is intended to assist you in making this decision. In the coming days and weeks, you may also receive telephone calls from your Fay Servicing, LLC Account Manager. These calls are for informational purposes only and meant to assist you in making this decision.
>
> If you do not want to be contacted by Fay Servicing, LLC please contact us immediately by phone at 1-800-495-7166 or by mail at P.O. Box 814609, Dallas, TX 75381-4609 Attn: Customer Service Department. We will cease all further communications upon your request.

At the bottom of this page, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer I.

On September 28, 2020, Fay Servicing sent the Debtor a letter informing her of options available to her if she was having trouble making her mortgage payments. [Dkt. No. 81, Exhibits, p. 8 of 67]. The letter tells her that she may "Refinance your loan with us or with another lender; Modify your loan terms with us; or Payment Forbearance, Repayment Plan and/or Deferment Plan, which temporarily gives you more time to make your monthly payment." The letter continues with "non-retention options" such as a sale, short sale, or deed in lieu of foreclosure. At the bottom of the notice, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer I.

On September 28, 2020, Fay Servicing also sent the Debtor a **Fair Debt Collection Practices Act (FDCPA) Validation Notice.** [Dkt. No. 81, Exhibits, p. 9 of 67]. This notice shows a "Current Monthly Payment Amount: $2,468.76"; a "Payment Due Date: 10/01/2006"; and provides a "Summary of Total Debt," which concludes with "**Total Amount of Debt:** $779,660.50." At the bottom of the notice, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer II as follows:

> Fay Servicing LLC is a debt collector, and information you provide to us may be used to collect a debt. However, if you have filed for bankruptcy, we will fully respect any applicable automatic stay, modification or discharge. Further, if you

> filed for Chapter 7 bankruptcy, received a discharge, and this loan was not reaffirmed in the bankruptcy case, we will exercise only in rem rights as allowed under applicable law and will not attempt any act to collect, recover, or offset the discharged debt as your personal liability.

On September 28, 2020, Fay Servicing also sent the Debtor a document entitled **"Making Mortgage Payments"** which set out options for making mortgage payments. [Dkt. No. 81, Exhibits, p. 66 of 67]. At the bottom of the notice, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer I.

On September 28, 2020, Fay Servicing also sent the Debtor a letter captioned, **"Request for Taxpayer Identification Number and Certification (Form W-9)."** [Dkt. No. 81, Exhibits, p. 67 of 67]. It informs the Debtor that "IRS regulations require that we issue Form 1098 to our customers each year and that we obtain and maintain accurate records for this purpose." At the bottom of the letter, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer I.

On September 30, 2020, Fay Servicing sent a second **Fair Debt Collection Practices Act (FDCPA) Validation Notice** and a second letter explaining that the September 28, 2020, FDCPA Validation Notice contained typographical calculation errors reflecting an incorrect total amount of debt. [Dkt. No. 81, Exhibits, pp. 10 and 16 of 67]. This notice shows "**Total Amount of Debt:** $786,573.19." The higher total results from the addition of "Late Charges" in the amount of $6,912.69. At the bottom of the letter, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer II.

On October 5, the Debtor sent Fay Servicing a letter captioned "**CEASE AND DESIST"** (the "Cease and Desist Letter"). [Dkt. No. 81, Exhibits, pp. 37-39 of 67]. The Debtor informed Fay Servicing of her receipt of its "September 28, 2020 Welcome Kit, September 29, 2020 Letter Offering Payment Options, September 30, 2020 September 28, 2020 Fair Debt Collection Practice Act (FDCPA) Validation Notice, September 30, 2020 Notice of Servicing, September, September

30, 2020 Fair Debt Collection Practices Act (FDCPA) Validation Notice, and phone message during the week of September 21, 2020 [sic]." The Debtor further stated that the debt was "DISPUTED," that the debt was discharged in December 2011, that a copy of the Bankruptcy Discharge was enclosed, that the property was foreclosed in May 2015, and surrendered in June 2018. The Debtor stated that the communications from Fay Servicing were false and misleading and caused the Debtor loss of sleep. Fay Servicing was directed to "**CEASE and DESIST** any and all future written and verbal communications and file the requested Release of Mortgage to clear the title and place the property on the market for sale."

On October 10, 2020, Fay Servicing sent the Debtor a **Mortgage Statement** informing her that the **Total Amount Due** was $440,061.71, and that the **Payment Due Date** was 11/01/2020. [Dkt. No. 81, Exhibits, p. 13 of 67]. This document includes an ****Account History**** showing "payments due" and "unpaid balance[s]" for May 1 through October 1, 2020. This document contains the following **Bankruptcy Message** at the top left under the Debtor's name and address:

> **Our records show that either you are a debtor in bankruptcy or you discharged personal liability for the mortgage loan in bankruptcy.**
>
> We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.
>
> If you want to stop receiving a mortgage statement, you must submit a written request to the following address: [deleted]
>
> If you later want to resume receiving a mortgage statement, you must submit a written request to the same address. Please be aware that we must comply with any order entered by the court in your bankruptcy case that requires us to cease providing a mortgage statement.

On October 12, 2020, the Debtor sent Fay Servicing another letter captioned "**DEBT DISPUTE,"** informing it that she had received "debt collection Notices" with respect to the

Property and asking that Fay Servicing provide eight items of documentation including a copy of the promissory note. [Dkt. No. 81, Exhibits, p. 40 of 67].

On October 19, 2020, the Debtor sent Fay Servicing another letter captioned **"THIRD NOTICE OF DISPUTE/PROPERTY OCCUPANCY/AND TO CEASE AND DESIST."** [Dkt. No. 81, Exhibits, p. 41 of 67]. This letter references receipt of October 5, 2020 correspondence informing her of the inspection of the Property. The letter reiterates that the Property was foreclosed in May 2015 and physical possession was surrendered to Well Fargo and Bank of New York Mellon in June 2018. The letter further states, **"THE PROPERTY WAS SURRENDERED TO WELLS FARGO AND BANK OF NEW YORK MELLON FOLLOWING ITS MAY 2015 WRONGFUL FORECLOURE AND HAS BEEN VACANT/UNOCCUPIED SINCE JUNE 2018 AFTER IT PURSUED AND RECEIVED PHYSICAL POSSESSION. THE PROPERTY WAS NEVER ABANDONED."** The Debtor demands that Fay Servicing "Cease and Desist any and all future communications."

On October 19, 2020, the Debtor sent Fay Servicing another letter captioned **"FOURTH NOTICE OF DISPUTE AND CEASE AND DESIST."** [Dkt. No. 81, Exhibits, p. 42 of 67]. This letter references receipt of the Mortgage Statement stating that there was an amount due of $440,061.71. The letter informs Fay Servicing that it is "in violation of the Fair Debt Collection Practices Act (FDCPA) and bankruptcy code." The letter states, "[Y]ou continue to cause injury by unlawfully attempting to collect the discharged debt on a foreclosed property through your communications. Again, please be reminded to Cease and Desist any and all future communications."

On October 19, 2020, the Debtor sent Fay Servicing a third letter captioned **"FIFTH NOTICE OF DISPUTE OF HAZARD INSURANCE COVERAGE AND TO CEASE AND**

DESIST." [Dkt. No. 81, Exhibits, p. 43 of 67]. This letter was sent in response to a "Hazard Insurance Notice" for the Property. It informs Fay Servicing that the Property was foreclosed in May 2015 and possession was surrendered in June 2018. It states, **"I DO NOT OWN THE PROPERTY, AND I DO NOT HAVE PHYSICAL POSSESSION OF THE PROPERTY."** It continues: "hazard insurance is the sole responsibility of the current owner."

On October 19, 2020, the Debtor sent Fay Servicing a fourth letter captioned **"RELEASE OF MORTGAGE."** [Dkt. No. 81, Exhibits, p. 44 of 67]. In this letter, the Debtor recites the history of her discharge and the foreclosure of the mortgage on the Property and requests a Release of Mortgage "as required by the law."

On October 26, 2020, Fay Servicing sent the Debtor a letter addressed: "Dear Appelant or Complaintant [sic]." [Dkt. No. 81, Exhibits, p. 21 of 67]. The letter informs the Debtor that her correspondence (presumably the Cease and Desist Letter of October 5, 2020) has been received and that a response is expected within thirty days. It also informs the Debtor that if, at the end of that time, it had not been able to resolve her matter, it would provide written status updates every fifteen days. At the bottom of this letter appears Fay Servicing Bankruptcy Disclaimer I.

On October 28, 2020, Fay Servicing sent the Debtor a letter (the "Notice of Default"), two days after it acknowledged receipt of the Cease and Desist Letter from the Debtor, which states in part: "This letter is formal notice by Fay Servicing, LLC, the Servicer of the above-referenced loan, on behalf of NRZ Inventory Trust U.S. Bank National Association as trustee, that you are in default under the terms of the documents creating and securing your Loan described above, including the Note and Deed of Trust/Mortgage/Security Deed … for failure to pay amounts due….Failure to cure the default on or before [December 2, 2020] may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding where applicable,

and sale of the property." It then lists more than a page of "monthly payments due" before concluding with the **"TOTAL AMOUNT YOU MUST PAY TO CURE DEFAULT: $542,350.79."** [Dkt. No. 81, Exhibits, pp. 22-24 of 67]. Toward the end of this three-page document, however, appears the following disclaimer:

> **To the extent your obligation has been discharged or is subject to the automatic stay in a bankruptcy case, this notice is for informational purposes only and does not constitute a demand for payment or an attempt to collect a debt as your personal obligation. If you are represented by an attorney, please provide us with the attorney's name, address, and telephone number.**
>
> **Fay Servicing, LLC is a debt collector, this is an attempt to collect a debt and any information obtained will be used for that purpose.**
>
> **Unless you notify us within thirty (30) days after receiving this notice that you dispute the validity of this debt or any portion thereof, we will assume this debt is valid. If you notify us in writing within thirty (30) days from receiving this notice that you dispute the validity of this debt or any portion thereof, we will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such judgment or verification. Upon your written request within thirty (30) days after the receipt of this letter, we will provide you with the name and address of the original creditor, if the original creditor is different from the current creditor.**

On November 2, 2020, the Debtor sent Fay Servicing a letter captioned **"SIXTH NOTICE OF DISPUTE OF DEBT'S VALIDITY."** [Dkt. No. 81, Exhibits, p. 45 of 67]. This letter recites that the Debtor received correspondence from Fay Servicing October 26, 2020, and October 28, 2020, and a telephone message left sometime on or about October 27, 2020. The Debtor reiterates her request that Fay Servicing cease and desist further communications and its actions to collect. The letter informs Fay Servicing that its actions, including "attempting to collect the discharged debt and phone message threat of your intent to file suit, and improperly sending a false Notice of Default to initiate foreclosure proceeding on a property that foreclosed several years ago and was surrendered in June 2018," is in violation of the Bankruptcy Code.

In addition to the reference of a telephone message threatening to file suit in the November 2 letter, the sworn Declaration of the Debtor states that there were eight telephone calls from Fay Servicing over a period of three months. [Dkt. No. 81, p. 22 of 26, ¶ 12].

On November 9, 2020, Fay Servicing sent the Debtor a letter captioned, **"Second and final notice – please provide hazard insurance information for [the Property].** [Dkt. No. 81, Exhibits, pp. 59-60 of 67]. Among other things, it states: **"Because hazard insurance is required on your property, we plan to buy insurance for your property.** You must pay us for any period during which the insurance we buy is in effect for which you do not have insurance." This letter contains no bankruptcy disclaimer.

On November 21, 2020, the Debtor received a second **Mortgage Statement** from Fay Servicing dated November 10, 2020, indicating that the "**Amount Due"** on her mortgage loan was $442,550.47, and that the "Payment Due Date" was December 1, 2020. [Dkt. No. 81, Exhibits, p. 64 of 67]. This statement contains the same **Bankruptcy Message** as the first, indicating that Fay Servicing knew that the Debtor was either a debtor in bankruptcy or had discharged her personal liability for the mortgage loan. It again indicates that the Debtor could request in writing that all communication stop. At this time, the Debtor had already sent seven letters to Fay Servicing directing it to stop communicating with her.

On December 10, 2020, the Debtor received a letter from Fay Servicing dated December 4, 2020, informing her that it was continuing its research into her Notice of Error. [Dkt. No. 81, Exhibits, p. 61 of 67]. This is the last communication from Fay Servicing that appears among the exhibits attached to the Debtor's Amended Motion.

The last communication from Fay Servicing in the record is a letter submitted by Fay Servicing as an exhibit to its Objection to the Debtor's Amended Motion. In the letter, dated

December 28, 2020, Fay Servicing acknowledges receipt of six of the Debtor's letters and provides responses to the concerns she raised in the letters. [Dkt. No. 91, Ex. A]. The letter contains Fay Servicing's summaries of the Debtor's "specific concerns" and its Responses:

> **a. In your letters, you state that you received a mortgage statement stating that the amount of $440,061.71 is due and a Hazard Insurance Notice after the property was foreclosed, and also request various documents regarding Fay's right to collect on the loan.**
>
> After conducting a reasonable investigation, Fay determined that when this loan was transferred to Fay, the boarding instructions did not list this loan correctly as a Real Estate Owned (REO) property. Therefore, the billing statement and hazard insurance notices were mailed out in error.
>
> We sent these statements to you for informational and compliance purposes only. It is not an attempt to collect a debt against you. As requested, we will cease all communications with you.
>
> Fay has corrected the system to reflect this property as an REO property. No further statements will be mailed to you going forward. We are sorry for any inconvenience this may have caused you.
>
> In addition, it was discovered that the loan was transferred to Fay in error, and has been transferred back to the proper servicer. The current servicer for this loan is as follows: [deleted].
>
> **b. You state that you received a Hazard Insurance Notice although no longer the owner of the property.**
>
> After review of the loan, there was no evidence of a Hazard Insurance Notice being mailed to your attention. Our records indicate that Force-Placed Insurance has expired as of September 17, 2020.

At the bottom of the page, in much smaller type, appears Fay Servicing Bankruptcy Disclaimer I.

JURISDICTION, VENUE, AND AUTHORITY

Jurisdiction over a contested matter arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy

judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The discharge injunction arises under the Bankruptcy Code. 11 U.S.C. § 524(a)(2). Motions arising out of alleged violations of the discharge injunction are thus core proceedings. *See* 28 U.S.C. § 157(b)(1). The bankruptcy court has authority to enter a final order determining that a violation of the discharge injunction has occurred and imposing appropriate sanctions. *See* 11 U.S.C. § 105(a) and 28 U.S.C. § 157(b)(1). Venue of this contested matter is proper to the Western District of Tennessee because this matter arises in a bankruptcy case pending in this district. *See* 28 U.S.C. §1409(a).

CONCLUSIONS OF LAW

Legal Standards

Under section 524(a)(2) of the Bankruptcy Code, the discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). A safe harbor is provided at section 524(j), which provides:

> (j) Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—
>
> (1) such creditor retains a security interest in real property that is the principal residence of the debtor;
>
> (2) such act is in the ordinary course of business between the creditor and the debtor; and
>
> (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

11 U.S.C. § 524(j).

The United States Supreme Court recently clarified the standard for holding a creditor in contempt for violating the discharge injunction: "[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. Lorenzen,* 139 S.Ct. 1795, 1799 (2019) (emphasis in original). Put another way, "civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful." *Id.* It is not enough to show that the creditor was aware of the discharge order and intended its actions that violated the order. *Orlandi v. Leavitt Family Ltd. Partnership (In re Orlandi),* 612 B.R. 372, 382 (6th Cir. BAP 2020). The aggrieved debtor must show by clear and convincing evidence that the creditor had no objectively reasonable basis to conclude that its conduct might be lawful. *See, e.g., Glover v. Johnson,* 138 F.3d 229, 244 (6th Cir. 1998) ("In a civil contempt proceeding, the petitioner must prove by clear and convincing evidence that the respondent violated the court's prior order."); *In re Cantrell,* 605 B.R. 841, 853 (Bankr. W.D. Mich. 2019) (Debtor required to show violation of discharge injunction by clear and convincing evidence). In a civil contempt proceeding, three elements must be established: "(1) the alleged contemnor had knowledge of the order which he is said to have violated; (2) the alleged contemnor did in fact violate the order; and (3) the order violated must have been specific and definite." *Hunter v. Magack (In re Magack),* 247 B.R. 406, 410 (Bankr. N.D. Ohio 1999) (citing *Glover,* 138 F.3d at 244).

The Debtor's Claims against Wells Fargo

The Debtor alleges that Wells Fargo violated the discharge injunction in two ways: (1) by selling the Debtor's note to NRZ; (2) by communicating with the Debtor about the discharged obligation. Wells Fargo clearly knew that the debt had been discharged because it participated in the foreclosure. And there is no question that the discharge injunction is specific and definite.

Thus, the first and third elements of the *Glover* test are satisfied with respect to Wells Fargo. The court need only determine whether the acts of Wells Fargo violated the discharge injunction.

With respect to the assignment of the Deed of Trust, the question is whether Wells Fargo was the actor. Although the Debtor alleges that Wells Fargo unlawfully sold the mortgage debt to NRZ, nothing in the record suggests that Wells Fargo was ever the owner of the debt. To the contrary, the original proof of claim was filed by America's Servicing Company, as servicer for Trustee BNY Mellon. At an unspecified point, Wells Fargo became the *servicer* of the loan. As the result of the Trustee's sale, the Property was conveyed to Trustee BNY Mellon by Trustee's Deed on May 13, 2015. On April 10, 2020, Trustee BNY Mellon, not Wells Fargo, recorded an assignment of the original Deed of Trust executed by the Debtor to NRZ REO VII LLC. Although the Debtor maintains that this transfer was made by Wells Fargo, the record does not support her statement. The Debtor has failed to provide any evidence that *Wells Fargo* violated the discharge injunction when the Deed of Trust was assigned to NRZ.

With respect to the communications sent to the Debtor by Wells Fargo, it is clear that Wells Fargo was the actor but not clear that its acts violated the discharge injunction. The record reflects that communications by Wells Fargo to the Debtor consisted of (a) Notice of Servicing Transfer; (b) Final Escrow Review Statement; and (c) responses to her inquiries. The Notice of Servicing Transfer contains a disclaimer which includes the following statement: "THIS IS NOT A BILL OR A REQUEST FOR PAYMENT AS TO THESE CUSTOMER(S)." The Final Escrow Review Statement likewise contains the following disclaimer: "**PLEASE NOTE:** ***If you are presently seeking relief (or have previously been granted relief) under the United States Bankruptcy Code, this statement is being sent to you for informational purposes only.*****"** These disclaimers appear in a prominent position immediately after the Debtor's name and address. Neither the Notice of

Servicing Transfer nor the Final Escrow Review contains any language that fairly can be described as a demand for payment. Wells Fargo's responses to the Debtor's First Dispute Letter acknowledged receipt of her letter (September 22, 2020, October 5, 2020, October 20, 2020 (two letters) and October 26, 2020), and acknowledged that the Property was foreclosed and reiterated that servicing of the mortgage was transferred from Wells Fargo to Fay Servicing (October 27, 2020). Similarly, Wells Fargo's responses to the Debtor's Second Dispute Letter merely acknowledged receipt of her letter and informed her of its progress in researching her dispute. The Debtor has pointed to no instance in which Wells Fargo demanded payment or otherwise attempted to collect the discharged debt secured by the Property.

The Debtor's motion with respect to Wells Fargo must fail.

The Debtor's Claims against Fay Servicing

The Debtor alleges that Fay Servicing violated the discharge injunction in its series of communications with her, which she alleges were attempts to collect the discharged debt and initiate a second foreclosure. The Debtor's allegations against Fay Servicing present slightly different issues than those with respect to Wells Fargo. The Debtor alleges that Fay Servicing clearly knew that the debt had been discharged as evidenced by its communications with her. The Debtor alleges that Fay Servicing also knew that the Property had been sold. Fay Servicing says that it had no knowledge of the discharge injunction and that even if it did, its actions did not violate the discharge injunction. Fay Servicing admits, however, that "the billing statement and hazard insurance notices were mailed out in error" because the Property was not identified as Real Estate Owned when the loan was transferred to Fay Servicing for servicing.

The first *Glover* element requires a debtor to show that a potential contemnor had knowledge of the order it is said to have violated. Fay Servicing initiated written communications

with the Debtor on September 28, 2020. At that time, the fact of the Debtor's discharge in bankruptcy and the fact of the conveyance of the Property to Trustee BNY Mellon by Trustee's Deed were matters of public record. Fay Servicing's first Mortgage Statement, dated October 10, 2020, acknowledged that the Debtor was either a debtor in bankruptcy or had discharged her personal liability for the mortgage debt in bankruptcy. This information imposed a duty upon Fay Servicing to determine the status of the Debtor's bankruptcy case and the status of title to the Property. An online search of the records of the Shelby County Register of Deeds would have revealed the sale of the Property and the fact that the Debtor retained no interest in it. Moreover, Fay Servicing acknowledged receipt of the Debtor's Cease and Desist Letter, dated October 5, 2020, as early as October 26, 2020. In her letter the Debtor clearly states that (1) she had received a discharge in bankruptcy; and (2) the Property had been sold to Trustee BNY Mellon. The Debtor included a copy of her Bankruptcy Discharge in the Cease and Desist Letter. Again, a simple review of the public records would have revealed that the Debtor's statements were true. The court finds that Fay Servicing knew or should have known of the Debtor's discharge and the sale of the Property no later than October 26, 2020. It did eventually acknowledge that the Property was Real Estate Owned, but not until December 28, 2020.

The second *Glover* element requires that the debtor show that the alleged contemnor did in fact violate the order. The *Taggart* requirement is that the debtor not only show that the alleged contemnor intended its action with knowledge of the discharge injunction but that there was *no fair ground of doubt* as to whether the conduct of the alleged contemnor violated the discharge injunction. The discharge injunction bars "an act, to collect, recover, or offset any such [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). The Debtor must

show that there could have no fair ground of doubt that Fay Servicing's communications violated the discharge injunction.

Notwithstanding the Debtor's clear communication of the facts concerning her discharge and the sale of the Property, which was acknowledged by Fay Servicing on October 26, 2020, on October 28, 2020, Fay Servicing sent its Notice of Default, which states in part: "This letter is formal notice by Fay Servicing, LLC, the Servicer of the above-referenced loan, on behalf of NRZ Inventory Trust U.S. Bank National Association as trustee, that you are in default under the terms of the documents creating and securing your Loan described above, including the Note and Deed of Trust/Mortgage/Security Deed … for failure to pay amounts due…. Failure to cure the default on or before [December 2, 2020] may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding where applicable, and sale of the property." It then lists more than a page of "monthly payments due" before concluding with the **"TOTAL YOU MUST PAY TO CURE DEFAULT: $542,350.79."** While it is true that this document also contains a bankruptcy disclaimer near its end, it is very different from the communications provided by Wells Fargo. The disclaimer does not appear until the third page of the document following language that clearly DOES demand payment, and threatens acceleration, foreclosure, and sale for nonpayment. Just beneath the bankruptcy disclaimer appears the Fair Debt Collection Practices disclaimer, which states "this is an attempt to collect a debt." Any fair reading of the Notice of Default would lead to the conclusion that it is, in fact, an attempt to collect a debt.

The Debtor responded to the Notice of Default with another letter to Fay Servicing on November 2, 2020, which references a phone message left on or about October 27, that included a threat of intent to file suit. The sworn Declaration of the Debtor states that there were eight

telephone calls from Fay Servicing over a period of three months, but she does not specify the date or content of any of the other calls.

The Debtor received other correspondence from Fay Servicing after her Cease and Desist Letter. On November 9, Fay Servicing threatened to force place insurance on the Property, which the Debtor clearly did not own, in a letter that contained no bankruptcy disclaimer. On November 10, Fay Servicing sent a second Mortgage Statement that included a demand for payment. Like the first Mortgage Statement, it acknowledged that the Debtor was a debtor in bankruptcy or that she had discharged her personal liability for the mortgage loan. Despite the passage of a month with the information it already had in addition to the information supplied by the Debtor, Fay Servicing either had not determined or continued to ignore the fact that the Property had been sold five years earlier. The second Mortgage Statement again informed the Debtor that she might stop receiving mortgage statements by submitting a written request. The Debtor, of course, had already submitted numerous written demands that Fay Servicing cease and desist from communicating with her about the discharged debt. Fay Servicing acknowledged receipt of the first of these on October 26, some fourteen days before it sent the second Mortgage Statement!

The correspondence sent by Fay Servicing dated December 4, 2020, notified the Debtor that it was *still* researching her Notice of Error. As exasperating as this must have been for the Debtor to receive, this letter at least does not contain a demand for payment. Fay Servicing's final communication, dated December 28, 2020, belatedly acknowledged its errors.

The court takes judicial notice that the records of this Bankruptcy Court and of the Shelby County Register of Deeds are available online. See, *Lewis v. The Money Source, Inc. (In re Lewis),* 621 B.R. 626, 629 (Bankr. M. D. Penn.2020) (Federal Rule of Evidence 201 allows a bankruptcy court to take judicial notice of facts that are not subject to reasonable dispute.). Less than ten

minutes of research is required to confirm the truth of the statements contained in the Debtor's Cease and Desist Letter of October 5. The court finds that the letters of Fay Servicing dated October 28, and November 9, the Mortgage Statement dated November 10, 2020, and the telephone message of October 27, 2020, clearly violated the discharge injunction because they occurred at a time when there was *no fair ground of doubt* that attempts to collect the discharged debt from the Debtor would violate the discharge injunction. Letters sent prior to that time may have resulted from mistake or inadvertence (but do show a notable lack of diligence by Fay Servicing or its client prior to the commencement of Fay Servicing's activities). After receipt of the Cease and Desist Letter, however, which included a copy of the Discharge in Bankruptcy, Fay Servicing could have had no confusion that further attempts to collect the debt would violate the discharge injunction.

The third element of the *Glover* test requires that the debtor show that the order violated must have been specific and definite. The discharge injunction appears in the Bankruptcy Code and has been the subject of extensive litigation over the years. There is no question that it is specific and definite in enjoining any "act[] to collect, recover or offset any [discharged] debt as a personal liability of a debtor."

The Debtor has satisfied each of the *Glover* elements. She has shown by clear and convincing evidence that Fay Servicing willfully violated the discharge injunction applying the *Taggart* standard that there be no fair ground of doubt that the alleged contemnor's actions violated the injunction. Fay Servicing cannot rely upon the safe harbor provided at section 524(j) because its acts were not limited to seeking periodic payments associated with a *valid* security interest in lieu of in rem relief to enforce a lien. *See* 11 U.S.C. § 524(j). If it had promptly consulted the online records of the Shelby County Register of Deeds once it received the Debtor's Cease and

Desist Letter, it would have discovered that the Debtor's statement that the Property had been sold was true. As a result, there was no longer a valid security interest to which Fay Servicing's communications might relate. Moreover, Fay Servicing's communications were not in the ordinary course of dealings between Fay Servicing and the Debtor because there was no previous course of dealing between them. Despite its disclaimers, the letters of Fay Servicing clearly did attempt to collect the discharged debt from the Debtor and to compel her to obtain hazard insurance for the Property that she no longer owned. Finally, there is no safe harbor in the Bankruptcy Code for threatening telephone messages, such as the one the Debtor says she received on October 27, 2020.

Appropriate Sanctions for Violation of the Discharge Injunction

There is no private right of action for violation of the discharge injunction, but a party who violates it is subject to sanctions for contempt of the order of discharge pursuant to section 105 of the Bankruptcy Code. *Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 423-424 (6th Cir. 2000). Section 105(a) permits the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." 11 U.S.C. § 105(a). The sanctions imposed for violation of the discharge injunction may include an award of damages to the debtor, including reasonable attorney fees. *See, e.g., In re Jones,* 603 B.R. 325, 334 (Bankr. E.D. Ky. 2019); *In re Duling,* 360 B.R. 643, 645 (Bankr. N.D. Ohio 2006). In an appropriate case, the court may also impose mild non-compensatory punitive damages for violation of the Bankruptcy Code. *Adell v. John Richards Home Bldg. Co. (In re John Richards Home Bldg. Co.),* 552 Fed. Appx. 401, 415 (6th Cir 2013).

The Debtor asserts that she incurred expenses in the amount of $642.45 for "printing, postage, and travel to the post office from August 2020 through November 2020" for nine dispute

response letters. The Debtor calculated these amounts based on her time ($35 for each of 10 letters); printing ($25); postage ($103.70 certified; $13.75 regular); and travel to and from the post office (10 trips at $15.00 each). The court counts seven letters sent by the Debtor to Fay Servicing beginning October 5 and ending November 2, 2020. Seven tenths of the total amount requested is $449.72. Fay Servicing shall reimburse the Debtor this amount for her expenses.

The Debtor also reasonably claims that the collection efforts of Fay Servicing caused her frustration, anxiety, and loss of sleep. She states that she has been unable to focus on family matters because her attention has been focused on the collection efforts. She claims that her right to privacy was invaded by the transfer of the debt and the use of her personal information by Fay Servicing to communicate with her in writing and by telephone. As punitive damages for her emotional distress, the Debtor asks that she be awarded $1,000 per letter and phone call received and $100 per day from the date of the violation. The court finds these to be mild yet reasonable measures of damages for the Debtor's emotional distress caused by the improper collection actions of Fay Servicing.

There can be no doubt that the communications from Fay Servicing caused the frustration, anxiety, and loss of sleep the Debtor describes. They are full of statements in bold type threatening adverse action of various kinds. The letters dated October 28 and November 9, the Mortgage Statement dated November 10, and the telephone message of October 27, 2020, clearly violated the discharge injunction. Thus, the court finds that the Debtor should be awarded $4,000 for the three written communications and one threatening telephone message. In addition, the court calculates that sixty-three days elapsed between October 26, 2020, when Fay Servicing clearly knew or should have known of the discharge and sale of the Property, and December 28, 2020, when it finally acknowledged its error. During this period, Fay Servicing failed to take effective

corrective action in response to clear proof of the Debtor's discharge and the sale of the Property to prevent further improper communication with the Debtor. Fay Servicing should pay the Debtor $100 per day, or an additional $6,300, for this continuing violation.

CONCLUSION

Based upon the foregoing, the court hereby ORDERS the following:

1. The motion for sanctions against Wells Fargo for violation of the discharge injunction is not well-taken and is **DENIED.**
2. The motion for sanctions against U.S. Bank, N.A., if any, is **DENIED**, for lack of prosecution.
3. The motion for sanctions against Fay Servicing for violation of the discharge injunction is well-taken and is **GRANTED.**
4. Fay Servicing is in contempt of the Discharge Order of this court entered pursuant to section 524(a)(2) of the Bankruptcy Code.
5. As sanctions for this contempt, Fay Servicing is ordered to pay the Debtor $449.72 in actual damages, and $10,300.00 in punitive damages, for a total award of $10,749.72. Fay Servicing shall pay this amount to the Debtor within fourteen days after the entry of this order.

cc: Debtor/Movant
Attorney for Debtor/Movant (if any)
Respondents
Attorney(s) for Respondents (if any)
Chapter 7 Trustee (if any)
United States Trustee