

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 14-22555-B-13
)
 MELANIO L. VALDELLON and ELLEN) Adversary No. 21-2008
 C. VALDELLON,)
) DC No. PHH-3
)
 Debtor(s).)

MELANIO L. VALDELLON and ELLEN)
 C. VALDELLON,)
)
 Plaintiff(s),)

v.)
)
 WELLS FARGO BANK, N.A.; PHH;)
 IMPAC CMB TRUST SERIES 2005-6;)
 WELLS FARGO BANK, N.A., AS)
 TRUSTEE OF THE IMPAC CMB TRUST)
 SERIES 2005-6,)
)
 Defendant(s).)

ORDER ON RECONSIDERATION AND AMENDED OPINION

Mark A. Wolff, Wolff & Wolff, Elk Grove, CA, for plaintiffs.

Robert W. Norman, Jr., Neil J. Cooper, Houser LLP, Irvine, CA, for defendants.

CHRISTOPHER D. JAIME, Bankruptcy Judge:

ORDER ON RECONSIDERATION

After the court issued its opinion, a dismissal order, and a judgment on April 30, 2024, Plaintiffs Melanio L. Valdellon and Ellen C. Valdellon ("Plaintiffs") filed a motion for

1 reconsideration on May 14, 2024. Adv. Docket 141. Filed within
2 fourteen days after entry of the opinion, dismissal order, and
3 judgment Plaintiffs' motion for reconsideration is governed by
4 Federal Rule of Civil Procedure 59(e) applicable by Federal Rule
5 of Bankruptcy Procedure 9023. First Avenue West Building, LLC v.
6 James (In re Onecast Media, Inc.), 439 F.3d 558, 561-62 (9th Cir.
7 2006). No response is necessary. See Perez-Reyes v. National
8 Distribution Centers, LLC, 2018 WL 7077183 (C.D. Cal. Feb. 8,
9 2018) (granting ex parte application under Rule 59(e)).

10 As a result of Plaintiffs' timely Rule 59(e) motion, the
11 opinion, dismissal order, and judgment of April 30, 2024, are not
12 yet final. In re Sundquist, 570 B.R. 92, 95 (Bankr. E.D. Cal.
13 2017). The procedural consequence of Plaintiffs' timely motion
14 is to suspend the time for appeal until fourteen days after entry
15 of the order disposing of the motion for reconsideration. Fed.
16 R. Bankr. P. 8002(b)(1)(B). Until the motion for reconsideration
17 is decided, this court continues to have jurisdiction over the
18 entire dispute. Sundquist, 570 B.R. at 95. Indeed, as the
19 United States Supreme Court explained in Banister v. Davis, 590
20 U.S. 504, 516 (2020): "A Rule 59(e) motion briefly suspends
21 finality to enable a district court to fix any mistakes and
22 thereby perfect its judgment before a possible appeal."

24 There are four grounds on which a Rule 59(e) motion may be
25 granted: (1) to correct manifest errors of law or fact upon which
26 the judgment rests; (2) to present newly discovered or previously
27 unavailable evidence; (3) to prevent manifest injustice; or (4)
28 if amendment is justified by an intervening change in controlling
law. Allstate Insurance Company v. Herron, 634 F.3d 1101, 1111

1 (9th Cir. 2011). Plaintiffs' motion relies exclusively on the
2 first ground.

3 Plaintiffs' motion for reconsideration is **ORDERED GRANTED IN**
4 **PART** and the opinion of April 30, 2024, is **AMENDED** as follows:
5 (1) to clarify that Plaintiffs' claim for emotional distress
6 damages is dismissed with prejudice to the extent it is based on
7 a violation of 11 U.S.C. § 524(i)-which treats a violation of its
8 terms as a violation of the discharge injunction in 11 U.S.C. §
9 524(a) (2)-and dismissed without prejudice to the extent it is
10 based on facts or conduct that do not constitute a violation of
11 §§ 524(i) and/or 524(a) (2); and (2) to correct and amend the
12 factual predicate for dismissal of Plaintiffs' § 524(i) claim but
13 not change the with prejudice dismissal of the claim. All other
14 relief requested in the motion is **ORDERED DENIED**.

15 An amended dismissal order and an amended judgment will
16 issue.
17

18 **FURTHER ORDERED** that Plaintiffs have fourteen days from the
19 entry of this order and amended opinion, the amended dismissal
20 order, and the amended judgment to file any appropriate appeal.
21

22 **AMENDED OPINION**

23 **I.** 24 **Introduction**

25 A bankruptcy discharge operates as an injunction against the
26 collection of a discharged debt as a personal liability of the
27 debtor. See 11 U.S.C. § 524(a) (2).¹ A violation of the
28

¹Section 524(a) (2) states as follows

1 discharge injunction is an act of civil contempt for which the
2 bankruptcy court may award compensatory damages as are necessary
3 or appropriate to enforce the discharge injunction or remedy its
4 violation. See 11 U.S.C. § 105(a).² This opinion holds that the
5 compensatory damages a bankruptcy court may award to enforce the
6 discharge injunction or remedy its violation-either directly or
7 under 11 U.S.C. § 524(i) which treats a violation of its terms as
8 a violation of the discharge injunction-do not include emotional
9 distress damages.³ Taggart v. Lorenzen, 139 S. Ct. 1795 (2019),
10

11 (a) A discharge in a case under this title- ... (2)
12 operates as an injunction against the commencement or
13 continuation of an action, the employment of process,
14 or an act, to collect, recover or offset any such debt
as a personal liability of the debtor, whether or not
discharge of such debt is waived[.]

15 11 U.S.C. § 524(a) (2).

16 ²Section 105(a) states as follows:

17 (a) The court may issue any order, process, or judgment
18 that is necessary or appropriate to carry out the
19 provisions of this title. No provision of this title
20 providing for the raising of an issue by a party in
21 interest shall be construed to preclude the court from,
22 sua sponte, taking any action or making any
determination necessary or appropriate to enforce or
implement court orders or rules, or to prevent an abuse
of process.

23 11 U.S.C. § 105(a).

24 ³Section 524(i) states as follows:

25 The willful failure of a creditor to credit payments
26 received under a plan confirmed under this title,
27 unless the order confirming the plan is revoked, the
28 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

1 in which the United States Supreme Court stated that the "old
2 soil" of injunction enforcement and the "traditional principles"
3 of civil contempt apply "straightforwardly" to the discharge
4 injunction compels this result.

5 The remainder of this opinion explains why a claim alleged
6 under § 524(i) fails as a matter of law and as implausible. And
7 the opinion explains why, without a § 524 claim, this court lacks
8 jurisdiction over remaining non-core state law claims under 28
9 U.S.C. § 1334 or, even if jurisdiction exists or is ever found to
10 exist, the court would abstain under 28 U.S.C. § 1334(c) (1).⁴
11

12 **II.**

13 **Background**

14 Defendants Wells Fargo Bank, N.A., as Indenture Trustee
15 Under the Indenture Relating to the IMPAC CMB Trust Series
16 2005-6, and PHH Mortgage Corporation (collectively,
17 "Defendants"), move to dismiss Plaintiffs' *Second Amended*
18 *Complaint for 1. Violations of 11 U.S.C. 524(i) [sic]; 2.*
19

20 the act of the creditor to collect and failure to
21 credit payments in the manner required by the plan
22 caused material injury to the debtor.

23 11 U.S.C. § 524(i).

24 ⁴Section 1334(c) (1) states as follows:

25 (c) (1) Except with respect to a case under chapter 15
26 of title 11, nothing in this section prevents a
27 district court in the interest of justice, or in the
28 interest of comity with State courts or respect for
State law, from abstaining from hearing a particular
proceeding arising under title 11 or arising in or
related to a case under title 11.

28 U.S.C. § 1334(c) (1).

1 *Intentional Infliction of Emotional Distress*; 3. *Contract Actions*
2 *or Declaratory Relief*; and 4. *Unlawful Fraudulent and Unfair*
3 *Business Acts and Practices (California Business and Professions*
4 *Code 17200 et seq, 17203 [sic])* ("SAC" or "second amended
5 complaint"). For the reasons explained below, Defendants' motion
6 will be granted. The § 524(i) claim in Count 1 will be dismissed
7 with prejudice. The intentional infliction of emotional distress
8 claim in Count 2 will be dismissed with prejudice to the extent
9 it is based on a violation of § 524(i)-which treats a violation
10 of its terms as a violation of the discharge injunction in §
11 524(a)(2)-and dismissed without prejudice to the extent not based
12 on facts or conduct which violate §§ 524(i) and/or 524(a)(2).
13 The remaining state law claims in Counts 3 and 4 will be
14 dismissed without prejudice.

15
16 A. *The Loan and the Property*

17 The subject of this adversary proceeding is a loan that Mr.
18 Valdellon obtained in 2005 secured by real property located in
19 Roseville, California.⁵ SAC ¶¶ 3, 9-13; Valdellon v. Wells Fargo
20 Bank, N.A., et al. (In re Valdellon), 2024 WL 404404, at *1 (E.D.
21 Cal. Feb. 2, 2024). Defendant PHH has been the servicer of the
22 loan since 2019. SAC ¶¶ 10, 39; Bankr. Docket 135. Defendant
23 Wells Fargo Bank, N.A., as Indenture Trustee, is the owner of the
24 loan. SAC ¶¶ 11-12.

25
26
27 ⁵At the inception of this adversary proceeding, Plaintiffs
28 asserted that the property was their principal residence when
they filed their bankruptcy petition. Plaintiffs' New York state
tax returns established that Plaintiffs were New York residents,
and they claimed state tuition tax benefits based on New York
residency, when they filed their petition. See Adv. Docket 48.

1 B. *Plaintiffs' Chapter 13 Bankruptcy Case and This*
2 *Adversary Proceeding*

3 Plaintiffs were debtors in the parent chapter 13 case. They
4 filed a chapter 13 petition and an initial sixty-month chapter 13
5 plan on March 13, 2014. SAC ¶¶ 16, 18, 19; Bankr. Dockets 1, 7.
6 The first plan payment was due "not later than the 25th day of
7 each month beginning the month after the order for relief under
8 chapter 13." Bankr. Dockets 7 at § 1.01, 105 at § 2.01.

9 Plaintiffs filed a first amended plan on April 24, 2014.
10 SAC ¶ 20; Bankr. Dockets 31-36. The first amended plan was
11 confirmed on August 1, 2014. SAC ¶ 21; Bankr. Docket 49.

12 To adjust payments for certain tax debts, Plaintiffs filed a
13 first modified plan and a motion to confirm it on July 21, 2015.
14 SAC ¶ 24; Bankr. Dockets 61-66. The first modified plan was
15 confirmed on December 10, 2015. SAC ¶ 25; Bankr. Dkt. 68.

16 Plaintiffs defaulted on payments required by the first
17 modified plan because, on November 29, 2017, the chapter 13
18 trustee ("Trustee") filed a *Notice of Default and Application to*
19 *Dismiss* which stated as follows:

20 Debtor has failed to make all payments due under the
21 plan. As of November 28, 2017, payments are delinquent
22 in the amount of \$4,574.00. In order to discharge this
23 Notice of Default, you must cure this delinquency **AND**
24 make all subsequent payments that are due within the
25 next 30 days. Because your next payment of \$2,798.00
26 will become due on December 25, 2017, the **TOTAL amount**
27 **you must pay by December 29, 2017 is \$7,372.00.**

28 Bankr. Docket 70 (emphasis in original).

The Trustee also filed a motion to dismiss Plaintiffs'
chapter 13 case on May 11, 2018. Bankr. Docket 92. Although
Plaintiffs opposed the Trustee's motion on June 4, 2018, they
nevertheless agreed with the Trustee and proposed to file a

1 second modified plan before the motion to dismiss was heard.
2 Bankr. Docket 98.

3 Plaintiffs filed a second modified plan on June 15, 2018.
4 SAC ¶ 26; Bankr. Dockets 101-106. The second modified plan was
5 confirmed on August 24, 2018. SAC ¶ 27; Bankr. Docket 110. The
6 second modified plan is Plaintiffs' operative confirmed chapter
7 13 plan for purposes of this adversary proceeding. Valdellon,
8 2024 WL 404404 at *1.

9 All of Plaintiffs' confirmed chapter 13 plans provided for
10 payment of Defendants' claim as a Class 1 secured claim over a
11 sixty-month period, *i.e.*, prepetition arrears and ongoing
12 postpetition mortgage payments were paid through the Trustee
13 according to § 1322(b)(5).⁶ SAC ¶¶ 28, 29, 146-148. The amount
14 of arrears to be paid under the second modified plan (and all
15 plans prior) was \$19,140.48, as stated in a July 10, 2015, proof
16 of claim. SAC ¶¶ 162-163; Bankr. Claims Register, Claim 9-1.
17

18 Following confirmation of the second modified plan,
19 Plaintiffs again defaulted so, on September 9, 2019, the Trustee
20 moved to dismiss Plaintiffs' chapter 13 case. Bankr. Dockets
21 117-121. The motion to dismiss cited two grounds as cause for
22

23 ⁶Section 1322(b)(5) states as follows:

24 (b) Subject to subsections (a) and (c) of this section,
25 the plan may – ... (5) notwithstanding paragraph (2) of
26 this subsection, provide for the curing of any default
27 within a reasonable time and maintenance of payments
28 while the case is pending on any unsecured claim or
secured claim on which the last payment is due after
the date on which the final payment under the plan is
due[.]”

11 U.S.C. § 1322(b)(5).

1 dismissal: (1) “[t]he debtors [were] delinquent to the trustee in
2 the amount of \$10,246.37 which represent[ed] approximately 3 plan
3 payments,” Bankr. Docket 117 at ¶ 1; and (2) the “commitment
4 period exceed[ed] the permissible limit imposed by 11 U.S.C.
5 Section 1325(b)(4). The Debtor [sic] is currently in month 66 of
6 a 60 month plan.” Id. at ¶ 2.

7 The Trustee’s motion to dismiss was set for hearing on
8 September 24, 2019. Bankr. Docket 118. However, Plaintiffs
9 apparently cured the payment default sometime after the motion
10 was filed and before it was heard because the motion was
11 withdrawn on September 24, 2019. Bankr. Docket 128.

12 Three days later, on September 27, 2019, the Trustee filed a
13 *Notice to Debtor of Completed Plan Payments and Obligation to*
14 *File Documents* which stated “the Chapter 13 Trustee has
15 determined that the Debtor has completed the payments required by
16 the confirmed plan.” SAC ¶ 42; Bankr. Docket 130. On that same
17 date, September 27, 2019, the Trustee also filed a *Notice of*
18 *Final Cure Payment* which stated that “the amount required to cure
19 the default in [Claim 9] has been paid in full.” SAC ¶ 43;
20 Bankr. Docket 125.

21 Defendants apparently agreed with the Trustee’s final cure
22 notice because on October 18, 2019, they filed a *Response to*
23 *Notice of Final Cure* in which they stated, under penalty of
24 perjury, “[c]reditor agrees that the debtors have paid in full
25 the amount required to cure the prepetition default on the
26 creditor’s claim” and “[c]reditor states that the debtor(s) are
27 current with all postpetition payments consistent with §
28 1322(b)(5) of the Bankruptcy Code including all fees, charges,

1 expenses, escrow, and costs. The next postpetition payment from
2 the debtor(s) is due on: 11/1/2019[.]” SAC ¶ 45-47; Claims
3 Register, Claim 9-1.

4 With plan payments completed, and with Defendants apparently
5 in agreement that with the completion of plan payments all
6 prepetition arrears were cured and postpetition payments were
7 current, the Trustee filed a final report and account on February
8 21, 2020. Bankr. Dockets 138, 139. The final report and account
9 was approved, and the Trustee was relieved of further obligations
10 in Plaintiffs’ chapter 13 case, on May 12, 2020. Bankr. Dockets
11 145, 146. Plaintiffs’ discharge was entered on June 1, 2020.
12 SAC ¶ 48; Bankr. Docket 149. Plaintiffs’ chapter 13 case was
13 closed on June 15, 2020. Bankr. Docket 151.

14 Facing a foreclosure, SAC ¶¶ 96, 107, 113, 125, 234, 206,
15 Plaintiffs reopened their chapter 13 case on January 20, 2021,
16 Bankr. Docket 154, and filed the initial complaint in this
17 adversary proceeding on January 21, 2021. Adv. Docket 1.
18 Defendants were served with a copy of the initial complaint and a
19 reissued summons on January 27, 2021. Adv. Docket 9. Defendants
20 filed an answer on March 24, 2021, Adv. Docket 19, and an amended
21 answer on April 9, 2021. Adv. Docket 23.

22 Because the court was unable to comprehend the initial
23 complaint which it characterized as a “shotgun pleading,” on June
24 28, 2021, the court ordered Plaintiffs to file an amended
25 complaint that separately identified each claim, Adv. Docket 47,
26 which they filed on July 13, 2021, Adv. Docket 59, and which
27 Defendants promptly moved to dismiss on July 26, 2021. Adv.
28 Docket 62. Following an opposition from Plaintiffs and a reply

1 from Defendants, on August 20, 2021, the court issued an order
2 granting Defendants' motion to dismiss. Plaintiffs' claims under
3 §§ 524(a) and (i) and an emotional distress claim based on the §
4 524 claims were dismissed with prejudice, and all remaining state
5 law claims were dismissed without prejudice. Adv. Docket 68. A
6 corresponding judgment was entered on August 20, 2021. Adv.
7 Docket 70.

8 Plaintiffs appealed the dismissal order and judgment on
9 September 1, 2021. Adv. Docket 75. Defendants elected to have
10 the appeal heard by the District Court and, on September 28,
11 2021, the appeal was transferred from the Ninth Circuit
12 Bankruptcy Appellate Panel to the District Court. Adv. Docket
13 87. The District Court heard oral argument on November 16, 2023,
14 and on February 2, 2024, it issued an order affirming in part and
15 reversing in part this court's decision of August 20, 2021. Adv.
16 Docket 102; see also Valdellon, 2024 WL 404404. The District
17 Court affirmed dismissal with prejudice of Plaintiffs' § 524(a)
18 claim and concluded that dismissal of Plaintiffs' § 524(i) claim
19 was also proper based on how the claim was pled. See Adv.
20 Dockets 114 at 6:3-10, 116 at 6:6-15. However, on de novo
21 review, the District Court stated it would have granted
22 Plaintiffs leave to amend the § 524(i) claim although leave was
23 never requested and amendment was never explained. Valdellon,
24 2024 WL 404404 at *8. The District Court remanded for that
25 purpose and to allow this court to consider an amended § 524(i)
26 claim in the first instance. Id. ("The Bankruptcy Court has not
27 yet considered Debtors' allegations that payments made by the
28 trustee under the Plan were misapplied and should give rise to a

1 section 524(i) claim.”). Remand also included leave to re-allege
2 the emotional distress claim that was dismissed with prejudice
3 because it was based on the same factual allegations as the § 524
4 claims and the remaining state law claims that were dismissed
5 without prejudice. Id. at *9-*10.

6 Plaintiffs filed a second amended complaint on March 1,
7 2024. Adv. Docket 106. Like its predecessors, the second
8 amended complaint is a morass of allegations. It also completely
9 disregards the “short and plain statement” directive. See Fed.
10 R. Civ. P. 8(a); Fed. R. Bankr. P. 7008. Plaintiffs apparently
11 require two hundred and forty-eight paragraphs spread over
12 thirty-one pages to allege four “Counts.”

13 Plaintiffs served Defendants with the second amended
14 complaint on March 1, 2024, Adv. Dockets 107-109, and Defendants
15 again promptly moved to dismiss it on March 13, 2024. Adv.
16 Docket 112. Plaintiffs filed an opposition on April 2, 2024,
17 Adv. Docket 116, and Defendants filed a reply on April 9, 2024.
18 Adv. Docket 119. The parties also filed supplemental points and
19 authorities addressing the emotional distress claim in Count 2.
20 Adv. Dockets 125, 127. The motion to dismiss was heard on April
21 30, 2024. Appearances were noted on the record.

22 The specifics of each Count, and the reasons for their
23 respective dismissals, are discussed in Section IV, infra.

24
25
26 **III.**
27 **Legal Standard**

28 A complaint may be dismissed for “failure to state a claim
upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6);

1 Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be
2 based on either a lack of a cognizable legal theory or the
3 absence of sufficient facts alleged under a cognizable legal
4 theory." Johnson v. Riverside Healthcare System, LP, 534 F.3d
5 1116, 1121 (9th Cir. 2008).

6 "To survive a motion to dismiss, a complaint must contain
7 sufficient factual matter, accepted as true, to 'state a claim to
8 relief that is plausible on its face.'" Ashcroft v. Iqbal, 556
9 U.S. 662, 678 (2009) (quoting Bell Atlantic Corporation v.
10 Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial
11 plausibility when the plaintiff pleads factual content that
12 allows the court to draw the reasonable inference that defendant
13 is liable for the misconduct alleged." Id. (citing Twombly, 550
14 U.S. at 556).

15 In ruling on a Rule 12(b)(6) motion to dismiss, the court
16 accepts all factual allegations as true and construes them, and
17 reasonable inferences drawn from them, in a light most favorable
18 to the non-moving party. Arizona Students' Association v.
19 Arizona Board of Regents, 824 F.3d 858, 864 (9th Cir. 2016).
20 Legal conclusions are not accepted as true. Iqbal, 556 U.S. at
21 678.

22 The court may also consider limited materials outside the
23 pleadings. These include documents attached to the complaint,
24 documents incorporated by reference in the complaint, and matters
25 subject to judicial notice. Swartz v. KPMG LLP, 476 F.3d 756,
26 763 (9th Cir. 2007) (per curiam). The latter includes the
27 court's own records. Kelly v. Johnston, 111 F.2d 613, 615 (9th
28 Cir. 1940).

1 **IV.**
2 **Analysis**

3 A. *Count 2 - Intentional Infliction of Emotional Distress*
4 *Based on a Violation of § 524(a)(2) Under § 524(i)*

5 Count 2 alleges a claim for intentional infliction of
6 emotional distress "based upon the same common factual
7 allegations as Count 1." SAC ¶ 208. Count 1 alleges that
8 Defendants violated § 524(i) which treats a violation of its
9 terms as a violation of § 524(a)(2). To the extent Count 2 seeks
10 emotional distress damages for a violation of the discharge
11 injunction it fails as a matter of law. Plaintiffs may not
12 recover emotional distress damages based on a violation of the
13 discharge injunction either directly or through § 524(i).

14 One court recently observed that "[t]here is a disagreement
15 among courts across the circuits on whether damages for emotional
16 distress may be awarded in cases involving the violation of the
17 discharge injunction." In re Weaver, 2023 WL 3362064, at *7
18 (Bankr. E.D. Mich. May 10, 2023).⁷ The Ninth Circuit has not
19 directly addressed the issue.

20 There is inconsistency on this issue within the Ninth
21

22 ⁷Circuit decisions are also sparse. The First Circuit in
23 United States v. Torres (In re Torres), 432 F.3d 20, 31 (1st Cir.
24 2005), stated that "sovereign immunity bars awards for emotional
25 distress damages against the federal government under § 105(a)
26 for any willful violation of § 524, and that immunity is not
27 waived by § 106" and "recognizing a waiver of sovereign immunity
28 for emotional distress damages in this case would run afoul of §
106(a)(5), which forbids the creation of any substantive claim
for relief 'not otherwise existing under this title, the Federal
Rules of Bankruptcy, or non-bankruptcy law.'" In Green Point
Credit, LLC v. McClean (In re McClean), 794 F.3d 1313, 1325 (11th
Cir. 2015), the Eleventh Circuit allowed emotional distress
damages for a discharge injunction violation based on a § 362
analysis by analogy. More on this later.

1 Circuit. For example, Idaho bankruptcy courts have held that
2 emotional distress damages are not available for violations of
3 the discharge injunction. In re Pohlman, 2018 WL 3854137, at *6
4 (Bankr. D. Idaho Aug. 10, 2018); In re Urwin, 2010 WL 148645, at
5 *8 (Bankr. D. Idaho Jan. 14, 2010). But this is an exception to
6 the general practice by courts in the Ninth Circuit which is to
7 award emotional distress damages by analogizing discharge
8 injunction violations-and awards of compensatory damages
9 thereunder-to violations of the automatic stay-and awards of
10 compensatory damages thereunder. See In re Feldmeier, 335 B.R.
11 807, 813 (Bankr. D. Or. 2005) ("Although the Ninth Circuit has
12 not spoken on this issue, I believe its opinion on the
13 availability of emotional distress damages for violation of the
14 automatic stay is instructive."). Two opinions illustrate this
15 practice and its corresponding analysis.
16

17 The bankruptcy court in In re Nordlund, 494 B.R. 507 (Bankr.
18 E.D. Cal. 2011), concluded that emotional distress damages were
19 recoverable for the creditor's violations of the discharge
20 injunction. It reached its decision by relying on the automatic
21 stay violation analysis in Knupfer v. Lindblade (In re Dyer), 322
22 F.3d 1178 (9th Cir. 2003), and Feldmeier, supra, to conclude that
23 to the extent emotional distress damages are compensatory damages
24 recoverable for violations of the automatic stay, by analogy,
25 they are similarly recoverable for violations of the discharge
26 injunction. Id. at 522-23.

27 The Ninth Circuit Bankruptcy Appellate Panel reached a
28 similar conclusion based on a similar analysis six years later in
Ocwen Loan Servicing, LLC v. Marino (In re Marino), 577 B.R. 772

1 (9th Cir. BAP 2017), *aff'd in part on other grounds, appeal*
2 *dismissed in part, Ocwen Loan Servicing, LLC v. Marino (In re*
3 *Marino)*, 949 F.3d 483 (9th Cir. 2020), *cert. denied, Marino v.*
4 *Ocwen Loan Servicing, LLC (In re Marino)*, 141 S. Ct. 1683 (2021).
5 In *Marino*, the Ninth Circuit Bankruptcy Appellate Panel wrote as
6 follows:

7 The Ninth Circuit has allowed emotional distress
8 damages for automatic stay violations when the debtor
9 '(1) suffer[s] significant harm, (2) clearly
10 establish[es] the significant harm, and (3)
11 demonstrate[s] a causal connection between that
12 significant harm and the violation of the automatic
13 stay (as distinct, for instance, from the anxiety and
14 pressures inherent in the bankruptcy process).' *Snowden v. Check Into Cash of Wash. Inc. (In re*
15 *Snowden)*, 769 F.3d 651, 657 (9th Cir. 2014) (quoting
16 *Dawson v. Wash. Mutual Bank, F.A. (In re Dawson)*, 390
17 F.3d 1139, 1149 (9th Cir. 2004)) (discussing violation
18 of the automatic stay). The same rule should apply to
19 violations of the discharge injunction. See *In re*
20 *Nordlund*, 494 B.R. at 523 (applying *Dawson's* three-part
21 test to violations of the discharge injunction); *C & W*
22 *Asset Acquisition, LLC v. Feagins (In re Feagins)*, 439
23 B.R. 165, 178 (Bankr. D. Haw. 2010) ('Although *Dawson*
24 considered the remedy for violations of the automatic
25 stay under section 362(k)(1), the same reasoning
26 applies to willful violations of the discharge
27 injunction.').

19 *Id.* at 787.⁸

20 Notably, *Nordlund* and *Marino* predate *Taggart*. That makes a

22 ⁸But see *Rushmore Loan Management Services, LLC v. Moon (In*
23 *re Moon)*, 2021 WL 62629 (9th Cir. BAP Jan. 7, 2021), *appeal*
24 *dismissed*, 2021 WL 3509163 (9th Cir., Apr. 19, 2021). In
25 *Rushmore*, "[t]he [bankruptcy] court declined to award [one of the
26 debtors] emotional distress damages, because she testified that
27 her distress was caused by *Rushmore's* discharge injunction
28 violations, not stay violations." *Id.* at *3. The debtors
"challenge[d] the bankruptcy court's decision to not award
damages for *Rushmore's* violation of the discharge injunction."
Id. at *4. The Ninth Circuit Bankruptcy Appellate Panel
concluded that "[t]he bankruptcy court did not abuse its
discretion by not awarding the [debtors] discharge injunction
violation damages." *Id.* at *10.

1 difference. In several respects, Taggart changes the civil
2 contempt landscape as it pertains to the discharge injunction and
3 the compensatory damages that a bankruptcy court may award to
4 enforce the discharge injunction or remedy its violation.⁹

5 First, in Taggart, the Supreme Court explained critical
6 distinctions between the automatic stay and the discharge:

7 An automatic stay is entered at the outset of a
8 bankruptcy proceeding. The statutory provision that
9 addresses the remedies for violations of automatic
10 stays says that 'an individual injured by any willful
11 violation' of an automatic stay 'shall recover actual
12 damages, including costs and attorneys' fees, and, in
13 appropriate circumstances, may recover punitive
14 damages.' 11 U.S.C. § 362(k)(1). This language,
15 however, differs from the more general language in
16 section 105(a). *Supra*, at 1801. The purposes of
17 automatic stays and discharge orders also differ: A
18 stay aims to prevent damaging disruptions to the
19 administration of a bankruptcy case in the short run,
20 whereas a discharge is entered at the end of the case
21 and seeks to bind creditors over a much longer period.

22 Taggart, 139 S. Ct. at 1803-04.

23 Second, the Supreme Court rejected a proposal by Taggart to
24 apply the standard that governs a determination of whether the
25 automatic stay is violated to a determination of whether the
26 discharge injunction is violated, *i.e.*, "a finding of civil
27 contempt if the creditor was aware of the discharge order and
28

23 ⁹As noted below, Taggart also notes that another purpose of
24 civil contempt is to coerce compliance. See also United States
25 v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947);
26 Doyle v. London Guarantee & Accident Company, Limited, 204 U.S.
27 599, 604-05 (1907). Civil contempt sanctions may therefore
28 include "mild" punitive damages. Lenore L. Albert-Sheridan, dba
Law Offices of Lenore Albert v. State Bar of California (In re
Albert-Sheridan), --- B.R. ---- 2024 WL 1401289, at *20 (9th Cir.
BAP April 2, 2024) (citing Marino, 577 B.R. 788-89 & n.12). This
aspect of civil contempt is not before the court; however, the
court notes that the \$4,500,000.00 in punitive damages demanded
by Plaintiffs are anything but "mild."

1 intended the actions that violated the order.” Id. at 1803.
2 Citing distinct and discernable differences between the automatic
3 stay and the discharge injunction, the Supreme Court concluded
4 “[t]hese differences in language and purpose sufficiently
5 undermine Taggart’s proposal to warrant its rejection.” Id. at
6 1804.

7 Third, the Supreme Court in Taggart made it unmistakably
8 clear that a violation of the discharge injunction is an act of
9 civil contempt governed by historical standards. It explained:

10 Here, the statutes specifying that a discharge order
11 ‘operates as an injunction,’ § 524(a)(2), and that a
12 court may issue any ‘order’ or ‘judgment’ that is
13 ‘necessary or appropriate’ to ‘carry out’ other
14 bankruptcy provisions, § 105(a), bring with them the
15 ‘old soil’ that has long governed how courts enforce
16 injunctions.

17 That ‘old soil’ includes the ‘potent weapon’ of civil
18 contempt. *Longshoremen v. Philadelphia Marine Trade*
19 *Assn.*, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236
20 (1967). Under traditional principles of equity
21 practice, courts have long imposed civil contempt
22 sanctions to ‘coerce the defendant into compliance’
23 with an injunction or ‘compensate the complainant for
24 losses’ stemming from the defendant’s noncompliance
25 with an injunction. *United States v. Mine Workers*, 330
26 U.S. 258, 303-304, 67 S.Ct. 677, 91 L.Ed. 884 (1947);
27 see D. Dobbs & C. Roberts, *Law of Remedies* § 2.8, p.
28 132 (3d ed. 2018); J. High, *Law of Injunctions* § 1449,
p. 940 (2d ed. 1880).

29 Id. at 1801.

30 Fourth, and most important, in reference to the “old soil”
31 of civil contempt, the Supreme Court stated that the “traditional
32 civil contempt principles apply straightforwardly to the
33 bankruptcy discharge context.” Id. at 1802.

34 Two salient points emerge from Taggart. First, the place to
35 look to determine if the civil contempt remedy allows bankruptcy
36 courts to award emotional distress damages for violations of the

1 discharge injunction is the "old soil" of injunction enforcement
2 and its "traditional principles" of civil contempt and not § 362
3 by analogy. Second, the duty of the bankruptcy court is to apply
4 the "old soil" and "traditional principles" concepts
5 "straightforwardly" to the discharge injunction.

6 An analysis begins with the recognition that there is no
7 private right action to enforce the discharge injunction. Walls
8 v. Wells Fargo Bank, N.A., 276 F.3d 502, 510 (9th Cir. 2002) ("We
9 cannot say that Congress intended to create a private right of
10 action under § 524, and we shall not imply one."); see also In re
11 Costa, 172 B.R. 954, 965-66 (Bankr. E.D. Cal. 1994) (same).

12 Rather, as the Supreme Court explained in Taggart, the discharge
13 injunction is enforced and its violations are remedied through a
14 civil contempt action under § 105(a). Taggart, 139 S. Ct. at
15 1801; see also Brown v. Transworld Systems, Inc., 73 F.4th 1030,
16 1038 (9th Cir. 2023) ("The appropriate remedy [for a violation of
17 the discharge injunction] is contempt of court against the
18 offending creditor pursuant to 11 U.S.C. § 105(a)."); Renwick v.
19 Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) ("We
20 have recently held that section 524(a) may be enforced by the
21 court's contempt power under 11 U.S.C. section 105(a).").

22 A civil contempt action to enforce or remedy violations of
23 the discharge injunction brings with it potential liability for
24 compensatory damages. Walls, 276 F.3d at 507 ("[C]ompensatory
25 civil contempt allows an aggrieved debtor to obtain compensatory
26 damages, attorneys fees, and the offending creditor's compliance
27 with the discharge injunction."); see also Brown, 73 F.4th at
28 1038 (reaffirming availability of compensatory damages as stated

1 in Walls). But what exactly are compensatory damages? Bohac v.
2 Department of Agriculture, 239 F.3d 1334 (Fed. Cir. 2001), offers
3 the following explanation and notes a critical distinction:

4 Compensatory damages are the damages awarded to a
5 person as compensation, indemnity or restitution for
6 harm sustained by him. Restatement (Second) of Torts §
7 903 (1979). Compensatory damages are divided into two
8 categories: pecuniary and non-pecuniary. *Id.* at §§
9 905 and 906. Non-pecuniary compensatory damages
10 include compensation for bodily harm and emotional
11 distress, and are awarded without proof of pecuniary
12 loss. *Id.* at § 905.

13 Id. at 1341 (internal quotation marks omitted).

14 Fundamental is that the Supreme Court and the Ninth Circuit
15 put emotional distress damages in the *nonpecuniary* category.
16 Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 227
17 (2022) (emotional distress damages are typically awarded “where
18 the injury entails more than a pecuniary loss”); Federal Aviation
19 Administration v. Cooper, 566 U.S. 284, 302 (2012) (referring to
20 “mental and emotional harm” as “nonpecuniary”); United States v.
21 Alvarez, 567 U.S. 709, 749 n.14 (2012) (Alito, J., with whom
22 Scalia, J., and Thomas, J., joined, dissenting) (“the harm
23 remedied by the torts of . . . intentional infliction of
24 emotional distress . . . is often nonpecuniary in nature”); Rouse
25 v. United States Department of State, 567 F.3d 408, 417 (9th Cir.
26 2009) (“The resulting prolonged imprisonment caused Rouse extreme
27 emotional distress and other nonpecuniary harms.”); Farrens v.
28 Meridian Oil, Inc., 852 F.2d 1289, 1988 WL 79482, at *3 (9th Cir.
July 19, 1988) (“Second, the award included nonpecuniary damages
for emotional distress and loss of reputation[.]”).

Characterization of damages for emotional distress as
nonpecuniary is significant because the “old soil” of injunction

1 enforcement and its "traditional principles" of civil contempt
2 did not compensate parties injured by injunction violations or
3 other acts of disobedience of court process for nonpecuniary
4 loss, emotional distress or otherwise. In other words, the
5 historical measure of compensation awarded in civil contempt
6 actions was pecuniary loss.

7 The United States largely adopted the English concept of
8 civil contempt and its associated purposes and remedies. Joseph
9 H. Beale, Jr., Contempt of Court, Criminal and Civil, Harvard Law
10 Journal, Vol. 21, No. 3, 161 at 167-69 (1908). The Supreme Court
11 recognized this, and it recognized that English courts limited
12 compensation for civil contempt to pecuniary loss, in its 1897
13 opinion in Hovey v. Elliott, et al., 167 U.S. 409 (1897), in
14 which it stated as follows:

15
16 The conclusion which we have reached accords with that
17 of Daniell, who, in his Chancery Pleadings and Practice
(volume 1, pp. *504, *505), [notes]:

18 ... the personal and *pecuniary* inconvenience
19 to which a party subjects himself by a
20 contempt of the ordinary process of the
court[.]

21 Id. at 436 (emphasis added).

22 The Supreme Court reiterated this critical point fourteen
23 years later in Gompers v. Buck's Stove & Range Company, 221 U.S.
24 418 (1911), in which it wrote as follows:

25 In this case the alleged contempt did not consist in
26 the defendant's refusing to do any affirmative act
27 required, but rather in doing that which had been
28 prohibited. *The only possible remedial relief for such
disobedience would have been to impose a fine for the
use of complainant, measured in some degree by the
pecuniary injury caused by the act of disobedience.*

1 Id. at 443-44 (emphasis added, citations omitted).¹⁰

2 The weight of authority from other Circuits also supports
3 the conclusion that the civil contempt remedy does not include
4 nonpecuniary compensation for emotional distress. The Eighth
5 Circuit in McBride v. Coleman, 955 F.2d 571 (8th Cir.), cert.
6 denied, 506 U.S. 819 (1992), which dealt with the power of civil
7 contempt more generally, not specifically under §§ 105(a) and
8 524(a)(2), vacated a judgment awarding emotional distress damages
9 and in the course of doing so stated as follows:

10 A special word is in order regarding the award of
11 \$50,000.00 for emotional distress. Even assuming
12 arguendo a causal relationship between the violation of

13 ¹⁰The Supreme Court cited "Rapalje, Contempts, §§ 131-134"
14 to support this passage. The full citation is Stewart Rapalje, *A*
15 *Treatise on Contempt Including Civil and Criminal Contempts of*
16 *Judicial Tribunals, Justices of the Peace, Legislative Bodies,*
17 *Municipal Boards, Committees, Notaries, Commissioners, Referees*
18 *and Other Officers exercising judicial and quasi-judicial*
19 *functions*, L.K. Strouse & Co., Law Publishers (1884). Section
20 131 is captioned "The fine-what included" and refers to the civil
contempt fine imposed for disobedience of an order or decree as
compensation or indemnity for "pecuniary injury." Section 133 is
captioned "Compensation to an injured party" and refers to the
"loss or injury" compensated through civil contempt as a
"pecuniary loss or injury."

21 The Supreme Court also supported the passage with citations
22 to Wells, Fargo & Co. v. Oregon Ry. & Nav. Co., 19 Fed. 20 (Cir.
23 Ct. Or. 1884), Woodruff v. North Bloomfield Gravel-Min. Co. (*In*
24 *re North Bloomfield Gravel-Min. Co.*), 27 Fed. 795 (Cir. Ct. Cal.
25 1886), and Sabin v. Fogarty, 70 Fed. 482 (Cir. Ct. Wash. 1895).
26 The measure of compensation for the civil contempt in each case
27 was pecuniary loss. Wells, Fargo & Co., 19 Fed. at 23; Woodruff,
28 27 Fed. at 799-800; Sabin, 70 Fed. at 485. Notable is that each
opinion is by a federal appellate court in or what was to become
the Ninth Circuit. So not only does the Ninth Circuit's
historical civil contempt precedent align neatly with Supreme
Court authority, but, the Ninth Circuit's historical civil
contempt precedent which recognized pecuniary loss as the measure
of compensation for civil contempt is part of the "old soil" of
injunction enforcement and its "traditional principles" of civil
contempt.

1 the injunction and the harm suffered, we do not believe
2 civil contempt to be an appropriate vehicle for
3 awarding damages for emotional distress[.] The
4 problems of proof, assessment, and appropriate
5 compensation attendant to awarding damages for
6 emotional distress are troublesome enough in the
7 ordinary tort case, and should not be imported into
8 civil contempt proceedings. Although in some
9 circumstances an award of damages to a party injured by
10 the violation of an injunction may be appropriate, the
11 contempt power is not to be used as a comprehensive
12 device for redressing private injuries, and it does not
13 encompass redress for injuries of this sort.

14 Id. at 577 (internal citations omitted).

15 In Burd v. Walters (In re Walters), 868 F.2d 665 (4th Cir.
16 1989), the Fourth Circuit stated that “[n]o authority is offered
17 to support the proposition that emotional distress is an
18 appropriate item of damages for civil contempt, and we know of
19 none.” Id. at 670. In Weitzman v. Stein, 98 F.3d 717 (2d Cir.
20 1996), the Second Circuit similarly stated that “the district
21 court was within its right to reject Weitzman’s claim for
22 compensation for the emotional distress she and her husband
23 suffered because of the contempt.” Id. at 720. And in the
24 context of discussing the Bankruptcy Code, the district court in
25 United States v. Harchar, 331 B.R. 720 (N.D. Ohio 2005), observed
26 that “[t]here is little indication that awarding damages for
27 emotional harm was commonplace under the bankruptcy court’s
28 traditional contempt procedures—or in any contempt procedures
familiar to Congress in 1984.” Id. at 730 (emphasis in
original).

29 In an effort to bring nonpecuniary damages for emotional
30 distress under the civil contempt umbrella, Plaintiffs cite Leman
31 v. Krentler-Arnold Last Hinge Co., 284 U.S. 448 (1932), for the
32 proposition that “an expansive view of damages available in

1 actions for violation of an injunction has long been recognized.”
2 Adv. Docket 127 at 6:24-25. Plaintiffs assert that Leman is
3 authority for the court to use its equitable powers to award
4 nonpecuniary emotional distress damages for civil contempt to
5 “insure full compensation to the injured party.” Leman, 284 U.S.
6 at 456. Plaintiffs misread Leman.

7 Leman was an appeal from a final decree entered in a civil
8 contempt proceeding in which the District Court found a patent
9 infringer guilty of contempt for deliberate violation of an
10 injunction and ordered the contemnor to pay the injured party
11 over \$39,000.00 in profits it made as a result of its violation.
12 Id. at 450-51. The Court of Appeals sustained the contempt order
13 but reversed the District Court’s award of profits holding that
14 the profits could not be recovered as a measure of pecuniary
15 loss. More precisely, the Court of Appeals stated as follows:

17 But we are of the opinion that the District Court went
18 far afield and exceeded its authority in decreeing that
19 the complainants recover profits made by the respondent
20 by the infringement of the letters patent. In *Gompers*
21 *v. Buck’s Store & Range Co.*, supra, and *Kreplik v.*
22 *Couch Patents Co.*, supra, 190 F. at page 569, it was
23 pointed out that the proper remedial relief for the
24 disobedience of an injunction in an equity case is to
25 impose a ‘fine for the use of the complainant, measured
26 in some degree by the pecuniary injury caused by the
27 act of disobedience.’ In other words, that the amount
28 of the fine or remedial relief is to be governed
largely by the pecuniary damage or injury which the act
of disobedience caused the complainant. *The pecuniary*
damage surely does not include profits which the
defendant made by reason of the infringement. The item
of profits should not have been allowed or taken into
consideration in determining the remedial relief to
which the complainants were entitled by way of fine or
otherwise.

Krentler-Arnold Hinge Last Co. v. Leman, 50 F.2d 699, 707 (1st

1 Cir. 1931) (emphasis added).¹¹

2 On the issue of whether the profits were recoverable, the
3 Supreme Court reversed the Court of Appeals. Noting that the
4 amount of profits had been "ascertained" in the District Court
5 proceedings, Leman, 284 U.S. at 455, the Supreme Court held that
6 the profits were the equivalent of or a substitute for the
7 injured party's actual pecuniary loss. Id. at 456; see also Rick
8 v. Buchansky, 2001 WL 936293, *6 (S.D.N.Y. Aug. 16, 2001) ("Where
9 actual pecuniary loss is difficult to prove, compensatory relief
10 may include profits derived by the contemnor from the violation
11 of a court order."). In other words, the Supreme Court treated
12 the profits in the contemnor's possession "as if" they were the
13 injured party's compensatory damages. In so doing, the Supreme
14 Court rejected the Court of Appeals' narrow view of the pecuniary
15 loss recoverable for civil contempt and adopted a more expansive
16 view. Leman, 284 U.S. at 456.

18 The point here is that Leman added more to the bucket of
19 pecuniary losses recoverable as compensatory damages for civil
20 contempt. It did not add new or different types of damages to
21 that bucket, *i.e.*, nonpecuniary for emotional distress or
22 otherwise, as Plaintiffs suggest. In that regard, the court does
23 not read Leman as support for the proposition that emotional
24 distress damages are-or historically have been-recoverable for
25

26
27 ¹¹The Court of Appeals adhered to its initial opinion on
28 rehearing. See Krentler-Arnold Hinge Last Company v. J. Howard
Leman, Administrator, C. T. A., et al., 1931 WL 26200 (1st Cir.
June 29, 1931). The rehearing opinion makes it even more clear
that the Court of Appeals considered the profits at issue in the
context of pecuniary loss and not as something else. Id. At *6.

1 civil contempt.

2 Duty bound here to look to the "old soil" of injunction
3 enforcement and apply its "traditional principles" of civil
4 contempt "straightforwardly" to the discharge injunction, the
5 weight of historical authority compels the court to hold that
6 Plaintiffs may not recover nonpecuniary emotional distress
7 damages based on a claim under § 524(i) which treats a violation
8 of its terms as a violation of § 524(a)(2). The measure of
9 recovery for civil contempt under § 105(a) for a violation of §
10 524(a)(2)-either directly or through § 524(i)-is compensatory
11 damages for pecuniary loss.

12 Count 2 will be dismissed. And because further amendment to
13 claim emotional distress damages for a violation of the discharge
14 injunction would be futile, Count 2 will be dismissed with
15 prejudice and without leave to amend the claim for emotional
16 distress damages based on a violation of §§ 524(i) and/or
17 524(a)(2). To the extent Count 2 includes a claim for emotional
18 distress damages based on facts or conduct other than a violation
19 of §§ 524(i) and/or 524(a)(2), any such claim is dismissed
20 without prejudice. Leave to amend to re-allege any such claim in
21 this adversary proceeding will also be denied because any such
22 claim would be subject to the same jurisdictional and abstention
23 analysis applicable to Counts 3 and 4 discussed below making
24 amendment here futile.

26 B. *Count 1 - The Amended Claim Under 11 U.S.C. § 524(i)*

27 Count 1 alleges that in violation of § 524(i) Defendants
28 willfully failed to credit payments they received from the
Trustee and, thus, Defendants willfully failed to credit payments

1 received "under a plan." Defendants move to dismiss the amended
2 § 524(i) claim in Count 1 for two reasons: (1) Plaintiffs'
3 second modified plan was in default; and (2) Plaintiffs have not
4 sufficiently alleged that payments Defendants received from the
5 Trustee, *i.e.*, payments "under a plan," were improperly credited.
6 Defendants' arguments have merit and the court agrees with both.

7 1. ". . . unless . . . the plan is in default . . ."

8 Section § 524(i) makes it a violation of the discharge
9 injunction of § 524(a)(2) for a creditor to willfully fail to
10 credit payments received "under a plan" if the failure causes
11 material injury "unless . . . the plan is in default." 11 U.S.C. §
12 524(i). There are two relevant defaults for consideration here.

13 The first default was a monetary default in the amount of
14 \$10,246.37 which, according to the Trustee, represented
15 approximately 3 plan payments. This monetary default was
16 apparently considered to have been cured sometime before the
17 Trustee's motion to dismiss was heard in September 2019 because
18 the Trustee withdrew the motion and immediately thereafter filed
19 notice that Plaintiffs completed their plan payments.
20

21 The second default was a nonmonetary default consisting of a
22 chapter 13 plan term that exceeded the applicable (and maximum
23 allowable) sixty-month commitment period by six months and
24 Plaintiffs' failure to make all of their required plan payments
25 before the sixty-month plan period expired. See 11 U.S.C. §§
26 1322(d), 1325(b)(4).¹² As the Trustee noted in his September
27

28 ¹²Section 1322(d) states, in relevant part, that a chapter
13 "plan may not provide for payments over a period that is
longer than 5 years." 11 U.S.C. § 1322(d).

1 2019 motion to dismiss, when the motion was filed Plaintiffs were
2 in month sixty-six of a sixty month plan and were approximately
3 three plan payments short.

4 Plaintiffs assert they made all of their plan payments
5 within the applicable sixty month period. But that is not how
6 the Trustee's motion to dismiss reads. The Trustee's motion to
7 dismiss states that in month sixty-six of a sixty month plan
8 "[t]he debtors [were] *delinquent to the trustee* in the amount of
9 \$10,246.37 which represents approximately 3 plan payment(s)."
10 Bankr. Docket 117 at 1:21-22 (emphasis added). These delinquent
11 payments owed to the Trustee pertained to postpetition mortgage
12 payments, id. at 2:6, which remained unpaid in month sixty-six,
13 id. at 2:7, "due to Debtors' delinquency and history of making
14 payments late over the course of the plan[.]" Id. at 2:4-5.

15
16 The court reads the Trustee's motion to dismiss to mean that
17 during the plan term Plaintiffs made some plan payments late, the
18 late plan payments prevented the Trustee from making some
19 mortgage payments during the plan term, and Plaintiffs needed to
20 make these plan payments, as they apparently did in month sixty-
21 six of their sixty month plan, in order to complete all of their
22 plan payments. See Id. at 2:8-10 ("The Trustee cannot make
23 partial payments on post-petition mortgage claims, so in order to
24 complete the plan, the Debtor [sic] needs to make [the
25 delinquent] amount in a lump sum."). Indeed, that there were
26 unpaid plan payments six months after the sixty month commitment
27

28 Section 1325(b)(4) defines the "applicable commitment
period" for above-median debtors as "not less than 5 years." 11
U.S.C. § 1325(b)(4).

1 period ended, which were not "post-plan" payments, is confirmed
2 by a September 3, 2019, letter from the Trustee's office to
3 Plaintiffs submitted as an exhibit to the Trustee's motion to
4 dismiss which informed Plaintiffs that they "have paid into
5 [their] Chapter 13 Plan a total of \$166,184.21, and have an
6 outstanding balance of \$10,246.37. ... This is brought to your
7 attention as we feel certain that you, after paying in as much as
8 you have, truly want to bring your Plan to a successful paid-in-
9 full conclusion." Bankr. Docket 120 at Ex. B.¹³

10 The point here is that Plaintiffs' failed to make all of the
11 payments required by their plan before the sixty month maximum
12 commitment period expired and they made the unpaid plan payments
13 six months after the sixty month commitment period expired. That
14 constitutes a material default. Moreover, the material default
15 was (and remains) incurable because in month sixty-six
16 Plaintiffs' plan could not be modified to accommodate what the
17 Trustee clearly characterized and accepted as postpetition plan
18 payments after the commitment period expired. The court
19 therefore reaffirms its conclusion that Plaintiffs' failure to
20 make all of their plan payments before the sixty-month commitment
21 period expired is (and was) an incurable material default under
22

23
24 ¹³Plaintiffs' assertion that they completed plan payments in
25 March 2019 and their characterization of the payments in default
26 referenced in the Trustee's motion to dismiss as "post-plan"
27 payments is puzzling given the District Court's recognition that
28 Plaintiffs "completed their Plan payments in September 2019 and
the trustee filed a Notice of Final Cure on September 27,
2019[,]" Valdellon, 2024 WL 404404 at *2, and the District
Court's characterization of "post-plan" payments as those
Plaintiffs made directly to Defendants from and after October
2019. Id. at *6.

1 the second modified plan.¹⁴ In re Kinney, 2019 WL 7938815
2 (Bankr. D. Colo. Feb. 27, 2019), *aff'd*, Kinney v. HSBC Bank USA,
3 N.A. (In re Kinney), 5 F.4th 1136 (10th Cir. 2021), *cert. denied*,
4 143 S. Ct. 302 (2022), illustrates this point.

5 In Kinney, the debtor "failed to make the last three
6 mortgage payments [required under her Chapter 13 plan] during the
7 [five year] plan period." Kinney, 2019 WL 7938815 at *1.
8 Instead, the debtor made three payments about two and a half
9 months after the end of the five-year chapter 13 plan term and
10 then requested a discharge anyway. Id. at 1-2. The bankruptcy
11 court characterized the debtor's actions as a "material default"
12 in her chapter 13 plan and dismissed the chapter 13 case without
13 entry of a discharge. Id. at *4. On appeal, the Tenth Circuit
14 affirmed and characterized the debtor's default as incurable once
15 the plan's five-year period ended. Kinney, 5 F. 4th at 1140. It
16 emphatically stated: "The bankruptcy code suggests that material
17 defaults cannot be cured after the plan has ended." Id. at 1143;
18 In re Jaggars, 2023 WL 7007491, at *1 (Bankr. E.D. Okl. Oct. 23,
19 2023) ("As the parties correctly note, the Tenth Circuit opinion
20 in In re Kinney, 5 F.4th 1136 (10th Cir. 2021) holds that once a
21 plan's five-year period expires, a bankruptcy court is without
22 authority to allow a debtor to cure a 'material default.'").
23

24 Technically, Plaintiffs should not have been permitted to
25 make plan payments after the sixty-month commitment period ended
26

27
28 ¹⁴Section 2.03 of Plaintiffs' second modified plan also states as follows: "If necessary to complete the plan, monthly payments may continue for an additional 6 months, but in no event shall monthly payments continue for more than 60 months."

1 because doing so was an impermissible plan modification under §
2 1329(c).¹⁵ Kinney, 5 F.4th at 1144. Dismissal would have been
3 entirely appropriate. But nobody objected and the Trustee
4 withdrew the motion to dismiss so Plaintiffs managed to receive a
5 discharge by the good grace of the Trustee. That, however, does
6 not change the status of the second modified plan as a plan
7 subject to an incurable material default.¹⁶ And it is precisely
8 this incurable material default that renders § 524(i)
9 inapplicable as a matter of law because a plan in default will
10 not support a § 524(i) claim. Count 1 will therefore be
11 dismissed with prejudice and without leave to amend.

12
13 2. *“ . . . willful failure of a creditor to credit
14 payments received under a plan confirmed under
[Title 11] . . . ”*

15 It initially bears repeating what the District Court made
16 clear about an amended § 524(i) claim; specifically, that post-
17 plan payments, or payments Plaintiffs began making directly to

18 ¹⁵Section 1329(c) states as follows:

19
20 A plan modified under this section may not provide for
21 payments over a period that expires after the
22 applicable commitment period under section
23 1325(b) (1) (B) after the time that the first payment
24 under the original confirmed plan was due, unless the
court, for cause, approves a longer period, but the
court may not approve a period that expires after five
years after such time.

25 11 U.S.C. § 1329(c).

26 ¹⁶That a discharge was entered does not change this. See
27 United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010).
28 Moreover, § 1328(a) states that the “as soon as practicable after
completion by the debtor of all payments under the plan . . . the
court shall grant the debtor a discharge.” 11 U.S.C. § 1328(a).
Technically, all plan payments were completed. They were just
completed significantly late.

1 Defendants beginning in October 2019 are not payments "under a
2 plan" within the meaning of § 524(i). Valdellon, 2024 WL 404404
3 at *6 ("The Court agrees with the Bankruptcy Court that the
4 post-plan payments were not payments made 'under the plan.'").
5 That means the only payments this court need consider as payments
6 "under a plan" for purposes of Plaintiffs' amended § 524(i) claim
7 are those payments Defendants received from the Trustee through
8 Plaintiffs' final plan payment in September 2019. Id. at *8
9 ("The Bankruptcy Court has not yet considered Debtors'
10 allegations that payments made by the trustee under the Plan were
11 misapplied and should give rise to a section 524(i) claim.").

12 Plaintiffs do not identify any specific plan payments that
13 Defendants miscredited. Rather, Defendants' alleged liability
14 under § 524(i) is based on an inference that arises as follows:
15 (1) the Trustee paid Defendants \$19,140.48 in prepetition arrears
16 (as he was obligated to do based on Claim 9-1), SAC ¶ 162, 163,
17 169; (2) as of January 17, 2019, statements Plaintiffs received
18 from Defendants showed \$19,211.02 credited to prepetition arrears
19 from payments received from the Trustee, SAC ¶ 164 & Ex. 23; and
20 (3) through August 16, 2019, statements Plaintiffs received from
21 Defendants showed \$20,623.04 credited to prepetition arrears from
22 payments received from the Trustee, SAC ¶ 165 & Ex. 23. From the
23 differences in arrears actually paid and arrears stated as paid
24 on statements, Plaintiffs surmise that Defendants over-allocated
25 plan payments to prepetition arrears and under-allocated plan
26 payments to postpetition payments. SAC ¶¶ 166-168, 170-172; see
27 also Adv. Docket 116 at 12:3-8 ("Here, Valdellons have alleged
28 and shown that Defendants credited, from payments made by the

1 Chapter 13 Trustee, more money to pre-petition arrears than was
2 paid by the Chapter 13 Trustee to pre-petition arrears. *The only*
3 *way* Defendants could have credited, from payments made by the
4 Chapter 13 Trustee, more money to pre-petition arrears than was
5 paid by the Trustee is for Defendants to have diverted money
6 intended for ongoing maintenance payments to pre-petition
7 arrears.") (former emphasis added, latter emphasis in original).
8 However, at the same time that Plaintiffs suggest that plan
9 payments were improperly credited, Plaintiffs rely on Defendants'
10 sworn response to the Trustee's final cure notice to allege that
11 postpetition loan payments made from plan payments were current
12 when the final plan payment was made in September 2019. SAC ¶¶
13 45-47, 146-148.

14
15 If the court must accept as true that it was undisputed in
16 September 2019 that Plaintiffs' loan was current as to its
17 postpetition payments, then the only logical conclusion is that
18 plan payments were properly credited. Indeed, Plaintiffs concede
19 as much in their opposition. Adv. Docket 116 at 15:20-22 ("If
20 Defendants had credited payments in accordance with the Trustee's
21 designations and the Trustee's Notice of Final Cure, Valdellons
22 would be current in payments through September 1, 2019 [sic] with
23 payments made by the Chapter 13 Trustee."). It cannot be true
24 that plan payments were miscredited and, at the same time,
25 miscredited plan payments cured arrears and kept postpetition
26 payments current. In other words, if plan payments were
27 miscredited as they are alleged to have been, *i.e.*, over-
28 allocated to prepetition arrears and under-allocated to
postpetition payments, Plaintiffs' loan would not (and could not

1 have been) current as it is alleged it was, and as it is further
2 alleged it was undisputed it was, in September 2019.

3 Based the foregoing, the court concludes that Plaintiffs
4 have not alleged a plausible amended § 524(i) claim. So even if
5 the second modified plan was not a plan in default, Count 1 would
6 nevertheless be dismissed with prejudice and without leave to
7 amend on the foregoing independent and alternative grounds.

8 C. *Counts 3 and 4 - Non-Core State Law Claims*

9 The claims alleged in Counts 3 and 4 are non-core state law
10 claims. Count 3 alleges claims for breach of contract, negligent
11 infliction of emotional distress, and declaratory relief. SAC ¶¶
12 215-237. Count 4 alleges a claim for Unlawful Fraudulent and
13 Unfair Business Acts and Practices (California Business and
14 Professions Code § 17200 *et seq.*). SAC ¶¶ 238-248.

15 1. *Subject Matter Jurisdiction Under 28 U.S.C. § 1334*

16 The non-core state law claims in Counts 3 and 4 do not
17 “arise under” Title 11 or “arise in” a case under Title 11. See
18 28 U.S.C. § 1334. They also are not “related to” Plaintiffs’
19 chapter 13 case.
20

21 “Related to” jurisdiction exists only if, in any way, “the
22 outcome of the proceeding could conceivably have any effect on
23 the estate being administered in bankruptcy.” Fietz v. Great
24 Western Savings (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988)
25 (internal quotations and citations omitted). The court is
26 hard-pressed to comprehend how, if at all, the non-core state law
27 claims in Counts 3 and 4 could conceivably have any effect
28 whatsoever on the administration of Plaintiffs’ chapter 13 case
inasmuch as Plaintiffs no longer have a chapter 13 case being

1 administered. Creditors in Plaintiffs' chapter 13 case have been
2 paid. Plaintiffs have completed all plan payments. Plaintiffs'
3 chapter 13 plan has run (if not over-extended) its sixty-month
4 course and the plan term can not be further extended. Plaintiffs
5 have also received a discharge, the Trustee's final account has
6 been filed and approved, and the Trustee has been relieved of all
7 duties relative to the estate.

8 The point here is that there is nothing more to do or that
9 can be done in Plaintiffs' chapter 13 case. There is no longer a
10 chapter 13 case or estate to administer. The court therefore
11 concludes it lacks "related to" jurisdiction over the non-core
12 state law claims in Counts 3 and 4 without the Bankruptcy Code
13 claims. The non-core state law claims in Counts 3 and 4 will
14 therefore be dismissed without prejudice.

15
16 2. *Discretionary Abstention Under 28 U.S.C. §
1334(c) (1)*

17 Even if the court had "related to" jurisdiction over the
18 non-core state law claims in Counts 3 and 4, or if jurisdiction
19 were ever found to exist, the court would nevertheless exercise
20 its discretion to abstain from adjudicating those claims under 28
21 U.S.C. § 1334(c) (1) in the absence of any claim under the
22 Bankruptcy Code. A bankruptcy court considers twelve factors
23 when determining whether to abstain under 28 U.S.C. § 1334(c) (1):
24

25 (1) the effect or lack thereof on efficient estate
administration if the court abstains;

26 (2) the extent to which state law issues predominate
27 over bankruptcy issues;

28 (3) the difficulty or unsettled nature of applicable
law;

(4) the presence of a related proceeding commenced in

1 state court or other non-bankruptcy court;

2 (5) the jurisdictional basis, if any, other than 28
3 U.S.C. § 1334;

4 (6) the degree of relatedness or remoteness of the
5 proceeding to the main bankruptcy case;

6 (7) the substance rather than form of a 'core' matter;

7 (8) the feasibility of severing state law claims from
8 core bankruptcy matters to allow judgments to be
9 entered in state court with enforcement left to the
10 bankruptcy court;

11 (9) the burden on the bankruptcy court's docket;

12 (10) the likelihood that the commencement of the
13 proceeding in bankruptcy court involves forum shopping
14 by one of the parties;

15 (11) the existence of a right to a jury trial; and

16 (12) the presence of non-debtor parties.

17 Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.),
18 912 F.2d 1162, 1167 (9th Cir. 1990).

19 First, as noted above, that there is no longer a chapter 13
20 estate necessarily means that abstention can have no effect on
21 the administration of any estate.

22 Second, the non-core claims in Counts 3 and 4 are state law
23 claims.

24 Third, state law relative to the claims in Counts 3 and 4 is
25 not difficult and it is well-developed. The state court is
26 particularly adept at adjudicating those claims.

27 Fourth, absence of a pending state court proceeding is an
28 important-but not determinative-consideration. There is a
statement in Security Farms v. International Brotherhood of
Teamsters, Chauffers, Warehousemen, and Helpers, 124 F.3d 999,
1009-10 (9th Cir. 1997), that could be read to suggest that

1 abstention requires a pending proceeding in another forum.
2 However, Wilks v. United States (In re Wilks), 1999 WL 357919, at
3 *5 (9th Cir. BAP April 22, 1999), dispels any such notion. The
4 court therefore does not view the absence of a pending state
5 court proceeding as an impediment to abstention.

6 Fifth, without Bankruptcy Code claims there is no
7 jurisdictional basis over the non-core state law claims in Counts
8 3 and 4.

9 Sixth, the non-core state law claims in Counts 3 and 4 are
10 remote and not related to Plaintiffs' chapter 13 case because
11 there no longer is a chapter 13 case being administered.

12 Seventh, the state law claims in Counts 3 and 4 are all
13 non-core matters.

14 Eighth, with the dismissal of Bankruptcy Code claims there
15 are no core matters to sever non-core matters from.

16 Ninth, adjudication by this court of the non-core state law
17 claims in Counts 3 and 4 that a state court is equally capable of
18 determining would place a burden on this court's docket in that
19 it would take judicial resources more appropriately dedicated to
20 core jurisdictional matters.

21 Tenth, the court perceives no forum shopping. Plaintiffs
22 filed in this court on the basis of Count 1.

23 Eleventh, Defendants may be entitled to a jury trial on the
24 non-core state law claims in Counts 3 and 4. Any jury trial
25 would be more efficiently handled in state court instead of by a
26 district (or by consent bankruptcy) judge. These claims also
27 raise the specter of the need to obtain Defendants' consent to
28 the entry a final judgment by a bankruptcy judge.

1 Twelfth, to the extent Plaintiffs are no longer chapter 13
2 debtors the dispute is between non-debtors.

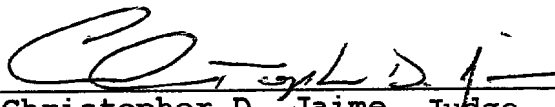
3 In short, the Tucson Estates factors favor abstention even
4 if "related to" subject matter jurisdiction over the non-core
5 state law claims in Counts 3 and 4 exists.
6

7
8 **V.
Conclusion**

9 Based on the foregoing, Defendants' motion to dismiss will
10 be **GRANTED** as follows: **(1)** the § 524(i) claim in Count 1 will be
11 dismissed with prejudice; **(2)** the claim for emotional distress
12 damages in Count 2 will be dismissed with prejudice to the extent
13 it is based on a violation of § 524(i) and/or § 524(a) (2) and
14 will be dismissed without prejudice to the extent it is based on
15 facts and conduct that do not constitute a violation of §§ 524(i)
16 and/or 524(a) (2); **(3)** Counts 3 and 4 will be dismissed without
17 prejudice.
18

19 A separate amended order granting Plaintiffs' motion to
20 dismiss and amended judgment will issue.
21

22 **Dated:** May 17, 2024

23
24 
25 **Christopher D. Jaime, Judge**
26 **United States Bankruptcy Court**
27
28

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

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

Mark A. Wolff
8861 Williamson Dr #30
Elk Grove CA 95624-7920

Robert W. Norman
9970 Research Drive
Irvine CA 92618