IT IS SO ORDERED.

Dated: March 21, 2018

C. Kathryn Preston
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Case No. 08-61001
Terry Lee Forson,	Chapter 13
Debtor.	Judge Preston

Terry Lee Forson,

On Behalf of Himself and Others Similarly Situated,

Plaintiffs,

v. Adv. Pro. No. 15-02137

Nationstar Mortgage, LLC,

Defendant.

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF TERRY LEE FORSON'S MOTION FOR SUMMARY JUDGMENT

This cause came on for consideration of *Plaintiff Terry Lee Forson's Motion for Summary Judgment* (Doc. 52) (the "Motion") filed by Debtor Terry Lee Forson ("Plaintiff"), the *Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* (Doc. 57) (the "Response") filed by Defendant Nationstar Mortgage, LLC ("Defendant"), *Plaintiff Terry Lee Forson's Reply to Defendant Nationstar Mortgage, LLC's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment* (Doc. 58) (the "Reply"), and the *Sur-Reply Brief in Response to Plaintiff's Reply* (Doc. 62) (the "Sur-Reply").

The Court has jurisdiction over bankruptcy matters pursuant to 28 U.S.C. § 1334 and General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

I. Factual and Procedural Background

On or around September 19, 2007, Plaintiff executed and delivered to Defendant a note and mortgage ("Mortgage Loan") in order to refinance a home located at 145 Craig Drive, Thornville, Ohio 40376. On November 7, 2008, Plaintiff filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code[1]. According to Defendant's proof of claim filed March 18, 2009, as of commencement of Plaintiff's bankruptcy case, the Mortgage Loan had a balance of $123,817.31, which included an installment payment arrearage of $7,564.95. Plaintiff's confirmed Chapter 13 Plan provided for regular monthly payments on the Mortgage Loan to be made by "conduit" through the Chapter 13 Trustee. Plaintiff successfully completed the Plan, and on June 19, 2013, upon

[1] Plaintiff filed the Chapter 13 case with joint debtor Tamara Ann Forson; however, on July 30, 2009, Tamara Ann Forson was voluntarily dismissed from the case. *See* Order Dismissing Chapter 13 Case (Tamara Ann Forson Only), Bankr. No. 08-61001 (Doc. 61).

motion by the Chapter 13 Trustee, the Court entered an order deeming the Mortgage Loan current as of May, 2013 (the "Mortgage Order"). The Mortgage Order also directed Defendant to adjust the Mortgage Loan balance to reflect the balance delineated in the original amortization schedule as of May, 2013, and ordered that any amounts in excess of that balance were discharged. Thereafter, Plaintiff made his monthly mortgage payment on the Mortgage Loan for the months of June 2013 through December 2013, which is undisputed by Defendant. Notwithstanding the fact that Plaintiff maintained his monthly payments to Defendant, Defendant sent letters and mortgage statements to Plaintiff indicating the Mortgage Loan was delinquent.

On June 21, 2013, the Court entered an order granting Plaintiff a discharge under 11 U.S.C. § 1328(a) (the "Discharge Order"), and the bankruptcy case was closed on September 23, 2013. Upon motion filed by Plaintiff, the Court reopened Plaintiff's bankruptcy case on May 12, 2015. On May 19, 2015, Plaintiff, purportedly on behalf of himself and others similarly situated, commenced this adversary proceeding.

Plaintiff's Amended Complaint, filed November 3, 2015, contends that Defendant failed to treat Plaintiff's Mortgage Loan as current following entry of the Mortgage Order and Plaintiff's discharge, and sets forth detailed allegations that Defendant attempted to collect, and actually collected, thousands of dollars in discharged fees from Plaintiff. The Amended Complaint further alleges that Defendant has a uniform set of policies and procedures for servicing mortgage loans, that Defendant has routinely failed to correct its records following a debtor's receipt of a Chapter 13 discharge, and that Defendant systemically collects and/or attempts to collect discharged debts from Chapter 13 debtors. Thus, Plaintiff seeks relief on behalf of a Southern District of Ohio

districtwide class of debtors (the "Districtwide Class").[2]

On behalf of Plaintiff and the Districtwide Class, the Amended Complaint requests an order finding Defendant in contempt, and seeks, along with other redress, an award of compensatory and punitive damages for Defendant's alleged violations of the discharge injunction imposed by 11 U.S.C. § 524. Plaintiff's Motion requests this Court determine as a matter of law that Defendant attempted to collect a debt in violation of the discharge injunction. Defendant argues that the one way intervention doctrine prohibits this Court from making a merit-based determination before deciding a motion to certify the class. In addition, Defendant asserts that there are genuine disputes of material fact that require the Motion be denied.

II. Standard of Review for Motions for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant satisfies this burden, the nonmoving party must then assert that a fact is

[2]Initially, Plaintiff sought relief on behalf of a nationwide class of debtors as well; however, the Court determined that it lacked subject-matter jurisdiction over the claims in the Amended Complaint lodged on behalf of the nationwide class, and that such claims must be dismissed and entered the Order Granting Defendant's Motion to Dismiss Plaintiff's Amended Nationwide Class Allegations or, in the Alternative, to Strike Nationwide Class (Doc. 39) on March 31, 2016.

genuinely disputed and must support the assertion by citing to particular parts of the record. *See* Fed. R. Civ. P. 56(c)(1). The mere allegation of a factual dispute is not sufficient to defeat a motion for summary judgment; to prevail, the non-moving party must show that there exists some genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). When deciding a motion for summary judgment, all justifiable inferences must be viewed in a light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Anderson*, 477 U.S. at 255.

The Sixth Circuit Court of Appeals has articulated the following standard to apply when evaluating a motion for summary judgment:

> [T]he moving [party] may discharge its burden by "pointing out to the . . . court . . . that there is an absence of evidence to support the nonmoving party's case." The nonmoving party cannot rest on its pleadings, but must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial. Although we must draw all inferences in favor of the nonmoving party, it must present significant and probative evidence in support of its [position]. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]."

Hall v. Tollett, 128 F.3d 418, 422 (6th Cir. 1997) (citations omitted). A material fact is one whose resolution will affect the determination of the underlying action. *See Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.,* 88 F.3d 1466, 1472 (6th Cir. 1996). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *See Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996). "The substantive law determines which facts are 'material' for summary judgment purposes." *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d

727, 730 (6th Cir.1994). In determining whether each party has met its burden, the court must keep in mind that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." *Celotex*, 477 U.S. at 323–24.

III. Discussion

A. Class Certification and One Way Intervention

Class actions are governed by Federal Rule of Civil Procedure 23.

> Rule 23 is intended to accommodate lawsuits to vindicate shared rights of widely-dispersed individuals where joinder of all the interested parties would be impractical. But vindication of those rights additionally implies its opposite: the full exoneration of those found innocent of alleged violations of collective rights. To provide for the complete vindication of meritorious group claims and the complete exoneration of falsely accused defendants, Rule 23 . . . requires both plaintiff class members (whether or not personally participating in the class action) and defendants to be bound by judgments on class claims.

Williams v. Lane, 129 F.R.D. 636, 640 (N.D. Ill. 1990). "The class action device was designed to promote judicial efficiency and to provide aggrieved persons a remedy when individual litigation is economically unrealistic, as well as to protect the interests of absentee class members and defendants." 5 MOORE'S FEDERAL PRACTICE ¶ 23.03 (3d ed. 2017) (citation omitted).

> Class action suits serve several basic purposes. One primary purpose is to promote judicial economy and efficiency by avoiding multiple adjudications of the same issues. From the plaintiffs' perspective, class actions afford aggrieved persons a remedy when it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions as, for example, when each claim involves only a small dollar amount. Thus, the class action device enhances access to the courts by spreading litigation costs among numerous litigants with similar claims. From the defendants' perspective, a class action provides a single proceeding in which to determine the merits of the plaintiffs' claims and, therefore, may protect defendants from repeated and potentially inconsistent adjudications.

5 MOORE'S FEDERAL PRACTICE ¶ 23.02 (3d ed. 2017) (footnotes omitted).

> When an action is brought by or against a person as a representative of a class, the court must determine, by order, whether to certify the action as a class action. A plaintiff may not turn a lawsuit into a class action simply by designating it as a class

> action in the pleadings. The court must conduct a "rigorous analysis" into whether all the prerequisites of Rule 23(a) and (b) have been met before certifying the suit as a class action or denying certification. The court must make its certification decision "at an early practicable time" after the action is filed, and must announce its decision in a formal order that defines the class and the class claims and appoints class counsel.

5 MOORE'S FEDERAL PRACTICE ¶ 23.80[1] (3d ed. 2017) (footnotes and citations omitted).

Federal Rule of Civil Procedure 23(c)(1)(A) provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). And generally, "courts decide class certification motions before addressing dispositive motions." *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997). However, "the timing provision of Rule 23 is not absolute. Under the proper circumstances -- where it is more practicable to do so and where the parties will not suffer significant prejudice -- the district court has discretion to rule on a motion for summary judgment before it decides the certification issue." *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984).

> Neither Fed.R.Civ.P. 23 nor due process necessarily requires that the district court rule on class certification before granting or denying a motion for summary judgment. Rule 23 clearly favors early determination of the class issue, but where considerations of fairness and economy dictate otherwise, and where the defendant consents to the procedure, it is within the discretion of the district court to decide the motion for summary judgment first.

Thompson v. Cty. of Medina, 29 F.3d 238, 241 (6th Cir. 1994) (quoting *Wright v. Schock*, 742 F.2d 541, 545-46 (9th Cir. 1984)). The Sixth Circuit Court of Appeals has "consistently held that a district court is not required to rule on a motion for class certification before ruling on the merits of the case." *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 616 (6th Cir. 2002) (citations omitted) (holding "that the district court did not abuse its discretion in ruling first on the merits of the plaintiffs' claims before addressing the plaintiffs' motion for class certification").

> One of the recognized problems that arises when dispositive motions are addressed before class certification motions is that of one-way intervention. By allowing putative class members to wait while the merits of a claim are decided, these members are given the ability to watch the proceedings without any risk to their individual claims which would be precluded by an adverse ruling on the merits. For this reason, courts often look to see if defendants, the risk-bearers in this situation,

have waived any right to have the certification motions decided first.

Hyman v. First Union Corp., 982 F. Supp. 8, 11 (D.D.C. 1997) (citations omitted) (concluding that the defendants implicitly waived their right to have the certification motion decided first and finding that "both parties cooperated with this court, without raising any objections or concerns, so that the summary judgment papers would be ripe at the same time the court would be considering the class certification issues").

In the instant case, based on the one way intervention doctrine, Defendant argues that Plaintiff is prohibited from seeking a merit-based determination from the Court prior to the Court deciding whether a class can be certified. In contrast, Plaintiff posits that Defendant waived the right to object to a merit-based determination because it failed to object to the Court's Order Setting Deadlines (Doc. 44) (the "Scheduling Order") that established deadlines for merit-based discovery and dispositive motions.

The Court concludes that it is appropriate in this case to decide the Motion prior to a determination of class certification for two reasons: First, the Court held a pretrial conference on May 18, 2016 (the "Pretrial") which was attended by counsel for both Plaintiff and Defendant. After the Court and the parties discussed the progress of the litigation, Plaintiff suggested that the Court set deadlines for only merit-based discovery and dispositive motions. As is normal for the Court, it asked the parties whether the proposed procedure was acceptable to the parties, and neither Plaintiff nor Defendant objected or otherwise expressed concern. Accordingly, this Court finds that Defendant implicitly waived its right to have a class certification motion decided first. *See Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997) (concluding that the defendants implicitly waived their right to have the certification motion decided first and finding that "both parties

cooperated with this court, without raising any objections or concerns, so that the summary judgment papers would be ripe at the same time the court would be considering the class certification issues"); *see also Caraluzzi v. Prudential Sec., Inc.*, 824 F. Supp. 1206, 1211 (N.D. Ill. 1993) ("[I]t is relevant that neither party has objected to nor raised concerns about this court's consideration of defendant's motion to dismiss before deciding the issue of class certification.").

Second, considerations of fairness and economy weigh in favor of this Court determining the Motion prior to class certification. Plaintiff and Defendant both attended the Pretrial and neither expressed any disagreement with or concern regarding the proposal that a merit-based determination be made prior to class certification in this case. Indeed, for over a year now the parties have proceeded under this mutual understanding that the Court was going to make a merit-based decision before a motion to certify class would be filed. Presumably Plaintiff relied upon the Scheduling Order and has expended a significant amount of time and resources on seeking only a merit-based determination from this Court at this stage of the litigation. For the Court to determine now after the litigation has progressed for over a year that it must hold the Motion in abeyance until a determination regarding class certification would be inequitable and uneconomical. To be sure, the parties would have to engage in class certification-based discovery before a motion could even be filed if the Court decided to hold the Motion in abeyance, causing yet more delay in this litigation. Accordingly, this Court finds that fairness and economy dictate that it decide the Motion now, before class certification.

B. Violation of Discharge Injunction

"Once an order granting a discharge is entered, § 524(a) of the Bankruptcy Code gives rise

to an injunction . . . ." *Kreuz v. Fischer* (*In re Kreuz*), 2014 Bankr. LEXIS 2667, *5 (Bankr. N.D. Ohio 2014). That statute states in pertinent part:

> (a) A discharge in a case under this title—
>
> > (2) 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 [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(a)(2). With respect to discharged debts, this injunction replaces the automatic stay, set forth in § 362(a), of actions to pursue collection of debts from the debtor personally. *See Ung v. Boni (In re Boni)*, 240 B.R. 381, 384 n.5 (B.A.P. 9th Cir. 1999) ("When the debtor receives a discharge, although the automatic stay of acts against the debtor expires, it is replaced by the discharge injunction."); *In re Perviz*, 302 B.R. 357, 369 (Bankr. N.D. Ohio 2003) ("[Section] 524(a)(2) simply makes permanent what had previously been temporary under § 362(a)(6)."). Unlike § 362,[3] however, § 524 does not include an enforcement mechanism. As a result, damages are not available in private actions to enforce the discharge injunction. *See Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000). Rather, a debtor's only recourse for violation of the discharge injunction is to request that the offending party be held in contempt of court. *See Pertuso*, 233 F.3d at 421 ("The obvious purpose [of § 524(a)(2)] is to enjoin the proscribed conduct—and the traditional remedy for violation of an injunction lies in contempt proceedings . . . ."). "A creditor that attempts collection of a discharged debt is in contempt of the bankruptcy court that issued the discharge, and that court can impose sanctions under Bankruptcy Code § 105." *Montano v. First Light Fed. Credit Union* (*In re Montano*), 2007 Bankr. LEXIS 3125, *5 (Bankr. D.N.M. 2007).

To prevail in a civil contempt proceeding, a plaintiff must prove that the defendant "'violated

[3]Under § 362(k), "an individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."

a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.'" *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 550 (6th Cir. 2006) (quoting *Glover v. Johnson*, 934 F.2d 703, 707 (6th Cir. 1991)). In the context of the discharge injunction, this means that the debtor must demonstrate that the defendant (i) violated the discharge injunction (and thus the order granting the discharge) and (ii) did so with knowledge that the injunction was in place. *See In re Franks*, 363 B.R. 839, 843 (Bankr. N.D. Ohio 2006). The plaintiff bears the burden of proving both elements--violation and knowledge--by clear and convincing evidence. *See Liberte Capital Group*, 462 F.3d at 550. Although some courts have held that constructive knowledge can give rise to contempt,[4] other courts, including the Sixth Circuit, have required actual knowledge. *See Newman v. Ethridge (In re Newman)*, 803 F.2d 721 (table), 1986 WL 17762 at *1 (6th Cir. 1986) ("Notice of the bankruptcy need not be formal; the court is to look to whether the creditor had actual knowledge."); *Franks*, 363 B.R. at 843.

1. Violations of the Discharge Injunction

Plaintiff complains of several actions by Defendant, asserting that they constitute violations of the discharge injunction.

a. December 2013 Mortgage Loan Statement

Defendant violated the discharge injunction when it sent the December 2013 Mortgage Loan statement to Plaintiff. Sending mortgage statements to a debtor after she has received a discharge in bankruptcy violates the discharge injunction as an attempt to collect a debt when "the statements

[4] *See Cultrera v. People's Bank (In re Cultrera)*, 360 B.R. 28, 31 (Bankr. D. Conn. 2007).

provide the amount of the payment and when it is due, a late charge if the payment is not received by a certain date, and the past due amount." *Brown v. Bank of Am. (In re Brown)*, 481 B.R. 351, 361 (Bankr. W.D. Pa. 2012). The Mortgage Order, entered by the Court on June 20, 2013, deemed Plaintiff's Mortgage Loan current through May 2013 and specifically provided in part as follows:

> (a) All pre-petition arrearage claims of [Nationstar Mortgage] have been paid in full through the confirmed Chapter 13 Plan;
>
> (b) All regular, post-petition mortgage payments have been made by the Trustee through [May 2013] as per the motion, and all such "conduit" payments are hereby deemed to have been made on a timely basis;
>
> (c) The mortgage obligation to [Nationstar Mortgage] is hereby deemed current as of [May 2013]; and
>
> (d) [Nationstar Mortgage] shall adjust its loan balance to reflect the balance delineated in the original amortization schedule as of [May 2013]. Any amounts in excess of that balance, including any alleged arrearage, costs, fees or interest are hereby discharged pursuant to 11 U.S.C. §1328.

On June 21, 2013, the Court entered an order granting Plaintiff a discharge under 11 U.S.C. § 1328(a). Plaintiff made his monthly mortgage payment for the Mortgage Loan for the months of June 2013 through December 2013.[5] Despite the fact that Plaintiff continued to make his monthly mortgage payments to Defendant for each month after the Mortgage Loan was deemed current, Defendant continued to send letters and mortgage statements to Plaintiff indicating the Mortgage Loan was delinquent. Plaintiff's December 2013 Mortgage Loan statement indicated amounts due for the following items: (1) monthly mortgage payment in the amount of $936.29; (2) past due payments in the amount of $2,821.74; (3) lender paid expenses in the amount of $4,137.01; (4) unapplied funds balance in the amount of $994.76; and the total amount due of $6,900.28. The mortgage statement also indicated there was an additional fee if the payment was not received by

[5]In the Motion, Plaintiff provided evidence of same. Defendant did not refute this assertion nor provide any evidence to the contrary in the Response.

a date certain (i.e., January 11, 2014). Defendant provides no explanation in its Response as to why the December 2013 mortgage statement indicated the total amount due was $6,900.28 even after Plaintiff made all the monthly mortgage payments after entry of the Mortgage Order.[6] The Court can draw no conclusion but that the December 2013 Mortgage Loan statement was an attempt to collect discharged debt and violated the discharge injunction.

b. December 23, 2013 Telephone Conversation

Plaintiff also complains that Defendant attempted to collect $11,787.32 on December 23, 2013 when a representative informed Plaintiff by telephone that this amount constituted back payments and delinquent fees. Defendant counters by indicating it was Plaintiff that initiated the telephone call to Defendant to obtain information regarding his account. Defendant argues that it advised Plaintiff of the status of his account, and once Plaintiff indicated he disagreed with the information Defendant provided, it noted Plaintiff's payment dispute and created a research ticket regarding same. Each party supported its version of the facts with affidavit testimony, therefore, whether this communication between Plaintiff and Defendant was an attempt to collect a debt or was merely a communication meant to only provide information constitutes a genuine dispute of fact. Accordingly, this Court cannot determine for purposes of summary judgment whether this communication violated the discharge injunction based on the record before it.

[6] Defendant posits that upon its receipt of the Court order dismissing the joint debtor, Tamara Ann Forson, from this Chapter 13 case, it removed the bankruptcy flag from Plaintiff's account which caused it to be moved from the bankruptcy department to general servicing. The order dismissing the joint debtor was entered by this Court on July 31, 2009. Defendant further indicates that Plaintiff's account was transferred back to its bankruptcy department on February 3, 2010. Even if the order dismissing joint debtor caused some confusion within Defendant's internal departments, it eventually must have reconciled Plaintiff's account because the Mortgage Loan was deemed current without objection by Defendant when the Mortgage Order was entered by the Court on June 20, 2013. This theory certainly does not excuse Defendant's violation of the automatic stay.

c. December 27, 2013 Telephone Conversation

Plaintiff alleges that shortly after the above referenced telephone conversation occurred, on December 27, 2013, Defendant contacted Plaintiff again by telephone and demanded that he pay an additional monthly payment plus $4,137.01 in lender fees. Defendant disputes this, and instead contends that it initiated a telephone call to Plaintiff in response to his previously submitted research request. Defendant further alleges that the initial telephone call was disconnected, and it was Plaintiff that called Defendant back to discuss Plaintiff's payment dispute. Defendant asserts that it advised Plaintiff to send copies of his checks to the research department as evidence of payment. Each party supported its version of the facts with affidavit testimony. Therefore, similar to the previously discussed telephone call made on December 23, 2013, whether the telephone conversation on December 27, 2013 was an attempt to collect a debt or was merely a communication meant to only provide information constitutes a genuine dispute of fact. Accordingly, this Court cannot determine for summary judgment, whether this communication violated the discharge injunction based on the record before it.

d. Letter dated January 2, 2014

Plaintiff received a letter dated January 2, 2014 from Defendant advising that the Chapter 13 Bankruptcy status on Plaintiff's account had been updated to reflect Debtor's discharge. The same letter also explained that the monthly payment amount would be increasing based on Defendant's escrow analysis. And finally, the letter advised Plaintiff that his account was approximately two payments delinquent and was due for December 1, 2013 (a date post-discharge and post Chapter 13). This letter, though it advised of the new monthly payment amount and that

the account was delinquent, it did not indicate a late fee would be charged if the payment was not received by a certain date nor did it indicate what the past due amount was. Thus, the Court finds that this letter was not an attempt to collect a discharged debt but instead was provided for informational purposes only.

e. Letter dated January 13, 2014

In contrast, however, the letter dated January 13, 2014, that Defendant sent to Plaintiff was an attempt to collect a debt in violation of the discharge injunction. That letter advised Plaintiff that he had not made payments on the Mortgage Loan since December 1, 2013, and the failure to make the payments was a default under the terms of the Mortgage Loan. The letter specified a past due amount of $3,580.16,[7] and in order to cure the default, Plaintiff had to pay the total past due amount plus any other amounts that would come due. The letter provided a date certain by which the past due amount must be received in order to cure the default. The letter further described how Plaintiff could make the payment and what to expect when calling Defendant on the telephone to do so. The letter advised that Defendant was not obligated to accept less than the full amount owed. The letter informed Plaintiff of the ramifications if the default was not cured (i.e., acceleration of the debt, foreclosure and sale of the property). And finally, the letter instructed Plaintiff that the default and any legal action that resulted from the default may be reported by Defendant to one or more local and national credit reporting agencies. The Court notes that this letter did contain a disclaimer that stated if the account holder had received a discharge in bankruptcy, the letter is not an attempt to

[7]The past due amount necessarily included discharged debt because the Mortgage Loan was deemed current as of May 2013 after Plaintiff completed his Plan, and Plaintiff made all subsequent monthly payments through December 2013. According to Plaintiff's December 2013 Mortgage Loan statement, the monthly mortgage payment at that time was $936.29; so even if Plaintiff had missed a payment, or even two, at the time the January 13, 2014 letter was sent, the past due amount specified well exceeded one or two monthly mortgage payment amounts. Consequently, the Defendant must have been attempting to collect discharged debt.

collect a debt from the account holder personally, but was provided for informational purposes. This disclaimer, however, does not neutralize the remaining provisions of the letter that were designed to encourage if not coerce payment from Plaintiff. *See In re Bruce*, 2000 Bankr. LEXIS 2210, at *7 (Bankr. M.D.N.C. 2000) (finding that the disclaimer language in the mortgage statement was insufficient to negate the demand for payment). In the instant case, the letter sent by Defendant clearly emphasized the consequences if Plaintiff did not cure the default and required action by Plaintiff to retain his property. The disclaimer language in the letter is not sufficient to overcome the payment demand. Therefore, the Court finds this letter was an attempt to collect a discharged debt in violation of the discharge injunction.[8]

f. Letter dated August 13, 2014

Plaintiff received a letter dated August 13, 2014 from Defendant that acknowledged receipt of Plaintiff's payment in the amount of $993.10 and indicated that the total amount required to bring Plaintiff's loan account current was $3,972.40.[9] Plaintiff asserts that he was current with his mortgage payments to Defendant through July 2014, but when he attempted to make his mortgage payment in August 2014, it was returned with the letter. In the Motion, Plaintiff provided evidence of same. Defendant did not, however, refute this assertion nor provide any evidence to the contrary in the Response. Therefore, the Court can only conclude that Plaintiff was current on his mortgage payments when the letter dated August 13, 2014 was sent to him. And it follows, therefore, that the

[8] In the Motion, Plaintiff mentions two other letters sent by Defendant, one dated February 7, 2014 and another dated February 20, 2014, that indicated Plaintiff's loan account was past due and delinquent in the amount of $5,951. Plaintiff's affidavit attached to the Motion, however, fails to attest to these facts. Accordingly, the record lacks sufficient evidence from which this Court can make a determination as to whether these two letters were an attempt to collect a discharged debt in violation of the discharge injunction.

[9] Defendant advised in the same letter that it was returning the funds, however, because the amount of the payment received was insufficient to bring Plaintiff's loan account current.

$3,972.40 must have included fees and costs that were discharged in the bankruptcy case. Accordingly, the Court finds that this letter was an attempt to collect a discharged debt in violation of the discharge injunction.

g. August 2014 telephone conversation

Plaintiff also alleges that he received a telephone call from Defendant in August 2014 informing him that he needed to pay $8,109.41 to bring his mortgage loan current. As previously discussed, Plaintiff was current with his mortgage loan payments as of August 2014, and the Defendant neither disputed this nor provided evidence to the contrary in the Response. For the same reasons as stated above, the Court can only conclude that the request for Plaintiff to pay $8,109.41 must have included fees and costs that were discharged in Plaintiff's bankruptcy case. Therefore, the Court finds that the August 2014 telephone conversation was an attempt to collect a discharged debt in violation of the discharge injunction.

Having demonstrated by clear and convincing evidence that Defendant attempted to collect a discharged debt in violation of the discharge injunction, Plaintiff must also prove that Defendant did so with knowledge that the injunction was in place.

2. Knowledge of the Discharge Injunction

Defendant was an active participant in Plaintiff's Chapter 13 proceeding, and as a result, had actual knowledge of the discharge injunction when it sent the letters and mortgage statement to Plaintiff. *See In re Martinez*, 561 B.R. 132, 168 (Bankr. D. Nev. 2016) (determining that the creditor knew that the discharge injunction applied based on its level of activity in the case in

addition to receiving a copy of the discharge order); *see also Gunter v. Kevin O'Brien & Assocs. Co. LPA (In re Gunter),* 389 B.R. 67, 73 n.6 (Bankr. S.D. Ohio 2008) (intimating that actual knowledge can be established using the "mailbox rule" which provides that a presumption of receipt arises upon proof that the item was addressed properly, had sufficient postage, and was deposited in the mail). In this case, Defendant asserts that it never received a copy of the Mortgage Order or the Discharge Order. Notwithstanding, Defendant was scheduled as a secured creditor in Plaintiff's Chapter 13 case which was filed on November 7, 2008. Only seven days after Plaintiff filed his bankruptcy case, attorneys for Defendant, Joe M. Lozano, Jr. and Tyler Jones, filed a Request for Service of Notice (Doc. 17) requesting that all notices be mailed to Defendant at the following address: P.O. Box 829009, Dallas, Texas 75382-9009 (the "Noticing Address"). On March 18, 2009, Defendant filed a proof of claim (the "POC") and again indicated it wanted to be served documents at the Noticing Address. According to the record in this case, both the Mortgage Order and the Discharge Order were mailed to Defendant at the Noticing Address. The entity responsible for serving bankruptcy court documents, the Bankruptcy Noticing Center (the "BNC"), filed certificates of notice (Docs. 84 and 85) on June 22 and 23, 2013, declaring under penalty of perjury that both the orders were mailed to Defendant at the Noticing Address. Accordingly, it is presumed that Defendant received both orders and thus had actual knowledge of them.

In addition to receiving a copy of the orders, Defendant acknowledges that on July 17, 2013, Plaintiff called Defendant and advised that he had received his discharge in bankruptcy. Moreover, the letter dated January 2, 2014, that Defendant mailed to Plaintiff specifically stated that it had updated Plaintiff's account file to reflect the discharge! Defendant attempted to collect a debt even after both of these events.

V. Conclusion

For the foregoing reasons, the Court finds that Defendant (i) violated the discharge injunction (and thus the order granting the discharge) when it sent the December 2013 Mortgage Loan statement, the letter dated January 13, 2014, the letter dated August 13, 2014 and made the August 2014 telephone call to Plaintiff and (ii) did so with knowledge that the injunction was in place. The Court will determine whether the December 23, 2013 and December 27, 2013 phone calls and the letters dated February 7, 2014 and February 20, 2014 were violations of the discharge injunction in addition to the damages at a separately scheduled hearing on the matter. Therefore, it is

ORDERED AND ADJUDGED that Plaintiff Terry Lee Forson's Motion for Summary Judgment (Doc. 52) is GRANTED. A separate partial final judgment will be entered in accordance with the foregoing.

IT IS SO ORDERED.

Copies to:

Troy J Doucet, Attorney for Plaintiff, Served via ECF

Andrew J. Gerling, Attorney for Plaintiff, Served via ECF

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