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BANK & LENDER LIABILITY

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

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WHAT'S INSIDE

CRIMINAL LAW

Ex-bank employee ordered to repay victims of account looting scam

A Massachusetts federal judge has ordered a former bank employee who looted customer accounts to repay a total of $108,000 to her victims, including two women in their 80s.

United States v. Vargas, No. 18-cr-40031, defendant sentenced (D. Mass. May 20, 2019).

Jessica Vargas, 35, of Athol, Massachusetts, also must serve 30 days in prison followed by a two-year term of supervised release, U.S. Attorney Andrew E. Lelling of the District of Massachusetts said in a statement.

U.S. District Judge Timothy S. Hillman imposed the sentence May 20 on Vargas, who pleaded guilty in February to charges of bank

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SEC issues risk alert on Regulation S-P

By Matthew G. White, Esq., and Alexander F. Koskey, Esq.
Baker Donelson

It should not be surprising to anyone that cybersecurity and data protection remain top priorities for regulators of the financial services industry. Indeed, cybersecurity has been regularly identified as a key priority by both FINRA and the SEC for several years.

In addition to issuing guidance, both FINRA and the SEC have instituted several high profile actions against companies for their failure to protect customer information.

Recently, the SEC's Office of Compliance Inspections and Examinations (OCIE) again highlighted their focus on these issues. On April 16, the OCIE published a Risk Alert highlighting the most common compliance issues under Regulation S-P, which governs privacy notices and safeguard procedures for investment advisers and broker-dealers.

The Risk Alert noted specific deficiencies with (1) privacy and opt-out notices and (2) implementing effective policies and procedures to safeguard customer information. While prior risk alerts have focused on general practices and requirements, the specificity of this most recent alert by the OCIE emphasizes the need for firms to review their privacy and security policies and procedures to assess compliance with Regulation S-P.

In particular, the OCIE has stressed a clear requirement for firms to have written policies and procedures implementing specific safeguards for customer information.

In addition to not providing the required privacy notices, the OCIE noted situations where companies failed to identify opt-out rights to customers within their privacy notices.

The OCIE has stressed a clear requirement for firms to have written policies and procedures implementing specific safeguards for customer information.

PRIVACY AND OPT-OUT NOTICES

Under Regulation S-P, advisers and broker-dealers are required to provide three core notices to customers: (a) an Initial Privacy Notice describing its policies and procedures; (b) an Annual Privacy Notice describing policies and procedures during the continuation of the customer relationship, and (c) an Opt-Out Notice explaining to customers the right to opt-out of certain disclosures of non-public personal information to nonaffiliated third parties.

In its Risk Alert, the OCIE noted situations where advisers and broker-dealers either did not provide the required privacy notices to customers or, when such notices were provided, the notices did not accurately reflect the policies and procedures of the company.

SAFEGUARD POLICIES AND PROCEDURES

The OCIE also noted that firms failed to comply with the Safeguards Rule under Regulation S-P by not having written policies and procedures addressing the security and confidentiality of customer records and information.

There were also occurrences where some firms had policies and procedures simply restating the Safeguards Rule, but failed to have specific policies and procedures addressing administrative, technical, and physical safeguards required under the rule.

The three most common problems noted by the OCIE under the Safeguards Rule were the failure to implement or reasonably design policies and procedures that (1) ensured the security and confidentiality of customer information; (2) protect against anticipated threats or hazards regarding the integrity of customer information; and (3) protect against unauthorized access to customer information which could result in substantial harm.

The following are a few of the specific issues the OCIE noted:

- **Personal Devices:** Policies and procedures did not address safeguards for customer information on personal devices. The OCIE observed firm employees who regularly stored customer information on personal laptops without policies and procedures addressing how these devices were to be safeguarded.

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- **Electronic Communications:** Policies and procedures did not address the inclusion of personally identifiable information in electronic communications. This included the lack of procedures to prevent employees from sending unencrypted emails containing personally identifiable information.
- **Training/Monitoring:** Policies and procedures that failed to provide adequate training to employees on certain procedures including requiring customer information to be encrypted, password-protected, and transmitted using only firm-approved methods.
- **Unsecure Networks:** Policies and procedures which did not address or prohibit employees from sending customer information to unsecure locations.
- **Outside Vendors:** Firms failing to follow and monitor outside vendors for compliance with contractual agreements which required vendors to keep customer information confidential.
- **Inventory of Customer Information:** Failure of firms to identify a complete inventory of all systems where customer information was held, including the categories of customer information maintained and adopting policies and procedures to adequately safeguard such information.
- **Incident Response Plans:** Firms not adopting comprehensive incident response plans addressing specific role assignments for implementing such plans, actions required to address security incidents, and procedures for assessing system vulnerabilities.
- **Former Employee Access:** Allowing former employees to retain access rights to customer information after departure from company (i.e., failure to have proper termination procedures).

As noted above, this Risk Alert follows several actions against companies for violations of Regulation S-P. Several of these actions over the past few years have included:

- On September 26, 2018, the SEC announced that a broker-dealer and investment adviser agreed to pay $1,000,000 to settle charges related to failures in cybersecurity policies and procedures surrounding a cyber intrusion that compromised personal information of thousands of customers. The SEC charged the firm with violating the Safeguards Rule (Rule 30(a) of Regulation S-P) and the Identity Theft Red Flags Rule, which are designed to protect confidential customer information and protect customers from the risk of identity theft. The SEC found that cyber intruders managed to bypass the firm's cybersecurity protocol by impersonating firm contractors and calling the firm's technical support hotline, requesting that the passwords be reset, then using the reset passwords to access 5,600 customers' personal information. The key cybersecurity protocol failure, according to the SEC, centered on the firm's "failure to terminate the intruders' access" and its failure "to apply its procedures to the systems used by its independent contractors."
- On June 8, 2016 — The SEC fined another firm $1,000,000 for failing to protect customer information, some of which was hacked and offered for sale online. The firm used web "portals" for employees to access customer information; however, they did not have effective authorization modules to restrict access solely to employees with legitimate business needs, and did not audit or test the relevant authorization modules. The SEC found that as a result of these failures, from 2011 to 2014, a then-employee impermissibly accessed and transferred the data regarding approximately 730,000 accounts to his personal server, which was ultimately hacked by third parties. Following the hack of the personal server, portions of the confidential data was posted on the Internet with offers to sell larger quantities.
- September 22, 2015 — The SEC settled with a firm for $75,000 for failing to establish adequate cybersecurity policies and procedures in advance of a breach that made PII of approximately 100,000 individuals, including thousands of the firm's clients vulnerable to theft. The firm's web server was attacked in July 2013 by an unknown hacker who gained access and copyright to the data on the server, rendering the PII of more than 100,000 individuals, including thousands of the firm's clients, vulnerable to theft. The SEC found that the firm failed to adopt written policies and procedures reasonably designed to safeguard customer information. For example, the firm failed to conduct periodic risk assessments, implement a firewall, encrypt PII stored on its server, or maintain a response plan for cybersecurity incidents. Notably, there were no indications of financial harm to any customers as a result of the attack, and the firm provided notice of the breach and offered free identity monitoring to every affected individual.

These actions are representative of the SEC's continued focus on cybersecurity and data protection, and its willingness to bring actions against companies it believes have failed to protect customer information. We expect more enforcement actions; in fact, the SEC has created a "Cyber Unit" within its enforcement division.

The SEC has also recently issued guidance for public companies regarding how and when to disclose actual and potential cybersecurity-related risks, breaches, or incidents.

The SEC's focus has not been limited to broker-dealers and investment advisers. The SEC has also recently issued guidance for public companies regarding how and when to disclose actual and potential cybersecurity-related risks, breaches, or incidents. Shortly after issuing this guidance, the SEC fined a company $35 million for failing to disclose a substantial data breach and cyberattack.

One thing is for sure: the SEC's focus on cybersecurity-related matters is not going away. Firms need to ensure that they have sufficient policies and procedures in place to address cyber-related concerns and that those policies and procedures are being followed, and must regularly train their employees and test their systems to reduce the likelihood of a data incident. WJ

The Fair Credit Reporting Act

By William L. Anderson, Esq.
Jimerson Birr

This article provides a high level overview of the The Fair Credit Reporting Act, including its statutory authority and the goals of the Act. The article examines what steps a furnisher of information, like a bank, credit union, or credit card company, should take when it receives a dispute. Finally, the article addresses some tips for litigating claims under the Act, from the perspective of the defendant furnisher.

FCRA BASICS

The Fair Credit Reporting Act ("FCRA"), enacted in 1970, under 15 U.S.C. § 1681, provides a mechanism for consumers to ensure that credit reports, produced and maintained by credit reporting agencies ("CRA") such as Equifax, TransUnion, and Experian, are accurate.

Incorrect information contained within the credit reports could adversely impact a consumer's ability to obtain a loan, enter into employment, sign a lease, or be considered for credit. After receiving a copy of their credit report, a consumer may dispute the validity of how a "furnisher" of information, such as a bank or credit card company, is reporting an account to a CRA.

If a consumer disputes the validity of the information, but the furnisher fails to conduct the appropriate inquiry, the furnisher may be liable for the actual damages to the consumer, as well as the consumer's attorney's fees. 15 U.S.C. § 1681(o).

For instance, if a consumer fails to obtain a loan at a lower interest rate due to the incorrect information on their credit report and takes out a higher interest loan, the furnisher may be liable for the difference in the amount paid in interest, plus the attorney's fees. In addition to these damages which are objectively quantifiable, a furnisher may be liable for damages for emotional distress suffered as a result of the inaccurate information.

Incorrect information contained within the credit reports could adversely impact a consumer's ability to obtain a loan, enter into employment, sign a lease, or be considered for credit.

WHAT TO DO WHEN A CONSUMER DISPUTES THEIR CREDIT REPORT

After a consumer receives their credit report from a CRA, they may dispute the validity of information with the CRA or the furnisher directly. If a consumer disputes a certain line item within the credit report, within five days of receiving the dispute, the CRA must provide notice to the furnisher of the information. 15 U.S.C. § 1681(i).

The furnisher must then verify the information provided to the CRA and determine the accuracy of the information reported. Within thirty days of the consumer requesting verification from the CRA, the CRA and furnisher must have completed a "reasonable investigation" into the validity of the item; if the information is invalid, the information should be removed from the file.

A reasonable investigation should verify all relevant data associated with the account. This verification should include the following:

1. Verification of the consumer's personal information

In this step a furnisher's inquiry should be directed to ascertaining if the disputed information is properly linked a particular consumer. For instances, if consumer John Doe, date of birth January 1, 1950, is disputing an account that is appearing on his credit report, the furnisher should verify that they are not incorrectly reporting the subject account that was opened in the name of John Doe, date of birth January 1, 2000.

Additional personal information should be cross-compared to ensure the furnisher is linking the correct account with the correct consumer.

2. Verification of the account information

Next, the inquiry should to turn to what the consumer substantively disputes with the account. Does the consumer believe that the account was settled and is now incorrectly reporting an outstanding balance?

The furnisher should look to their files to determine what information supports how the account is reported to the CRAs. If the consumer has documentation or facts that shed any light on the account status, the furnisher should attempt to reconcile this evidence with their own file in order to make a determination if the account information is being correctly reported.

3. Documentation of the process

A furnisher may be able to dispose of a lawsuit on summary judgment by showing their "reasonable investigation." In an effort to ensure that a furnisher's employees or agents fully investigate disputed accounts, it would be helpful, but not necessary, to develop a "standard operating procedure" or

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"check lists" to ensure a consistently through investigation.

During the investigation, the furnisher should make a contemporaneous memorandum as to what documents or sources were used to verify the disputed account. Should there be any dispute about the process in the future, the furnisher can then refer to their notes and procedures to demonstrate the diligence of their investigation.

agreed that the account was being settled for less than its full balance, and the consumer forgot this information, or, the consumer never understood what this meant from the beginning.

If possible, locate documentary evidence between the furnisher and the consumer that memorializes the negative reporting event, such as the letter that settled the account.

If a consumer disputes a certain line item within the credit report, within five days of receiveing the dispute, the CRA must provide notice to the furnisher of the information.

WHAT TO DO IF YOU ARE SUED UNDER THE FCRA

FCRA cases generally are filed in federal court, as the matter has federal question jurisdiction. To the extent that a case is brought within state court, a furnisher may remove the action to the federal court, regardless of the amount in controversy. 15 U.S.C. § 1681(p).

Given the federal judiciary's resources vis-a-vis most state courts, there will tend to be a higher level of judicial intervention into the matter, and thus, greater legal bills incurred on both sides.

Given the relative straightforward facts of most FCRA cases, some courts place these cases on a fast track "rocket docket," which will expedite the timeframe for resolution. These dockets tend to favor the furnisher, as it may reduce the overall amount of discovery and reduce potential attorney's fees for the consumer.

Case will need majority of attention on the front end

The first step in assessing and investigating the FCRA suit should be verification of what the consumer perceives to be the error. A consumer may have a mistaken belief about their account due to lack of sophistication, or due to the passage of time.

For instances, a consumer may believe that they settled a delinquent account for a full balance, and it should not contain negative reporting information. However, the reality may be that the furnisher and the consumer

Next, counsel for the furnisher will need to identify a witness who can succinctly and accurately testify as to the verification process employed by the furnisher. This witness will also need to understand the communications between the consumer and the furnisher regarding the subject account from the invitation of the dispute onward. This witness should be able to verify the steps that were taken in the verification process.

Counsel should be provided all documents from the furnisher detailing when the dispute came to the furnisher, what the furnisher did in response to the dispute, and what action or resolution the furnisher came to at the conclusion of the dispute. Collecting these documents at the front end will expedite any discovery and help to control the cost of the litigation.

Pushing back on the consumer

Although FCRA suits serve a legitimate interest in protecting consumers, these suits may be abused. Credit disputes may be launched on a consumer's behalf by less than scrupulous credit repair groups, who promise consumers that they can "fix" the consumer's credit. The repair group may send the initial dispute and then, when the account continues to report, refer the consumer to an attorney who is willing to sue the CRAs and the furnishers.

If the suit is being driven by the consumer's attorney, rather than the consumer, the consumer may have a limited insight into how their credit report is purportedly flawed and may have little to no actual damages.

In an effort to push back on the consumer, the furnisher may wish to undertake limited, targeted discovery. If the consumer is represented, general interrogatories, such as "please list your damages," or general requests for production, such as "all documents that support your claim," are unlikely to yield any probative information.

Rather, targeted questions such as "Which bank denied you a loan because of the alleged inaccuracy," or "Please provide documents from Us (the furnisher) which supports your contention that the account was settled in 2015," will provide better insights.

Additionally, if the consumer is non-responsive to these limited requests, the furnisher will have a greater chance of having sanctions awarded in a motion to compel.

An early deposition of the consumer may help in putting the case to rest. In such a deposition, the furnisher can further explore what facts, if any, support the consumer's position that the account is inaccurately reporting, or that the investigation was not reasonable.

Further, there can be an answer as to what specific damages were experienced by the consumer, instead of general assertions that the consumer's "ability to obtain credit was hurt," or that the consumer experienced "emotional distress."

Lastly, if the furnisher's settlement offers have gone unanswered, a deposition may provide the opportunity for the furnisher to revive these discussions.

CONCLUSION

The FCRA provides a tool for consumers to ensure that their credit reports are accurate, and in the case of inaccuracy, a way to work with the CRAs to cure the inaccuracy. However, the FCRA may be abused by consumers, resulting in litigation for furnishers of information.

In order to protect both consumers and itself, a furnisher should conduct investigations into disputes and document the same. If the consumer files suit, the furnisher and its counsel should take steps early in the litigation to limit scope of the action and to keep any legal fees contained. WJ

Feds say 4 men scammed $25 million from mortgage lenders

Four men are facing a 114-count indictment in New York federal court accusing them of running a 10-year-long scheme to fraudulently obtain at least $25 million through mortgage loans on apartment complexes.

United States v. Morgan et al., No. 18-cr-108, pleas entered (W.D.N.Y. May 22, 2019).

Robert Morgan, the owner of real estate firm Morgan Management LLC, and his employees Todd Morgan and Michael Tremiti plotted with Frank Giacobbe, the owner of loan brokerage Aurora Capital Advisors LLC, to perpetrate the scheme, U.S. Attorney James P. Kennedy Jr. of the Western District of New York said in a May 22 statement.

The defendants appeared before U.S. Magistrate Judge Michael J. Roemer of the Western District of New York the same day the indictment was announced and pleaded not guilty to providing false documents to obtain mortgage loans and then pocketing the proceeds, court records show.

Robert and Todd Morgan also entered not guilty pleas to allegations that they scammed insurance companies by inflating storm damage repair expenses for apartment buildings.

MULTIMILLION-DOLLAR SCHEME

Prosecutors claim between 2007 and 2017 the defendants conspired with Scott Cresswell and Kevin Morgan, both of whom worked for Morgan Management, and Aurora employee Patrick Ogiony to bilk lenders out of money, property and other assets.

The conspirators plotted to obtain mortgages on 20 apartment complexes in six states, prosecutors say. Either Robert Morgan or Morgan Management owned the buildings, according to the superseding indictment.

The men allegedly provided false financial documents to lenders and manipulated the properties' incomes and expenses so the figures would appear more attractive.

> The conspirators plotted to obtain mortgages on 20 apartment complexes in six states, prosecutors say.

The defendants also overstated Robert Morgan's income and Morgan Management's revenues and falsified some of the apartment buildings' purchase prices, prosecutors allege.

To fool inspectors who visited the buildings as part of the lending process, the conspirators made empty apartments appear occupied, prosecutors say.

Lenders issued mortgages in sums larger than they would have if they had relied on true data and committed to loans they would not have otherwise approved, the indictment says. The lenders were cheated out of more than $25 million over the life of the fraud, the U.S. attorney says.

Some of the victim lenders passed on their losses by selling their loans to government-sponsored institutions such as the Federal Home Loan Mortgage Corp. and the Federal National Mortgage Association, commonly known as Freddie Mac and Fannie Mae, according to prosecutors.

INSURANCE FRAUD?

The charges further claim that after storms damaged some of the properties in Robert Morgan's portfolio, Robert and Todd Morgan gave insurance companies fake construction contracts and bills that overstated repair costs.

The false documents caused the insurers to overpay by $3 million for work at complexes in Indiana, Pennsylvania and New York, prosecutors say.

If convicted the defendants face up to 30 years in prison and a significant fine. Prosecutors are also seeking the forfeiture of all real and personal property derived from the scheme.

Kevin Morgan, Ogiony and Cresswell were previously convicted of conspiracy-related charges and are awaiting sentencing. WJ

Related Filings:
Superseding indictment: 2019 WL 2282262

Mortgage company escapes lawsuit over post-discharge correspondence

By Douglas Mentes

A mortgage lender has convinced a bankruptcy appeals panel that its post-discharge communications with a debtor were not coercive or harassing in violation of the Bankruptcy Code's discharge injunction.

In re Kirby et al.; Kirby v. 21st Mortgage Corp., No. 18-24, 2019 WL 2119624 (B.A.P. 1st Cir. May 14, 2019).

The 1st U.S. Circuit Bankruptcy Appellate Panel concluded the debtor initiated much of the correspondence and that the other written communications had been sent to comply with state law, engage in good-faith negotiations and service the loan.

The decision affirms a ruling from the U.S. Bankruptcy Court for the District of Maine.

FORECLOSURE LEADS TO CHAPTER 7

Debtors Gregory Kirby and his wife, Amanda, formerly owned real property in Brewer, Maine, on which 21st Mortgage Corp. held a mortgage.

After the Kirbys defaulted on the loan and 21st Mortgage began foreclosure proceedings, the couple filed for Chapter 7 protection in August 2014, according to the BAP opinion. The bankruptcy filing automatically stayed the foreclosure.

The couple at first explored modifying the loan but ultimately did not reaffirm the debt, the opinion said.

The Kirbys obtained a discharge in December 2014 that included their personal liability on the 21st Mortgage loan.

After they unsuccessfully negotiated alternatives to foreclosure through a state diversion program, 21st Mortgage resumed foreclosure proceedings on the property, resulting in a February 2017 foreclosure sale, according to the opinion.

Between the time of the Kirbys' discharge and the foreclosure, the lender sent 24 letters to the Kirbys, including correspondence related to loan modification, mortgage statements and mortgage servicing disclosures, in addition to filing a foreclosure pleading, the opinion said.

ADVERSARY PROCEEDING

In March 2017 Gregory Kirby reopened the bankruptcy case and filed an adversary proceeding alleging the lender's letters violated the discharge injunction of Section 524(a)(2) of the Bankruptcy Code, 11 U.S.C.A. § 524(a)(2), and certain provisions of the Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692.

21st Mortgage moved for summary judgment, saying it sent the letters to comply with state law, engage in good-faith negotiations and service the loan.

The correspondence all went to Kirby's lawyer, and all but one letter included bankruptcy disclaimers indicating Kirby was not personally liable for any discharged debt, the lender said.

The Bankruptcy Court granted summary judgment to 21st Mortgage.

To prove a violation of the discharge injunction, a debtor must show the creditor had notice of the discharge, intended the actions that violated the discharge, and acted in a way that improperly coerced or harassed the debtor, the court said, citing *Bates v. CitiMortgage Inc.*, 844 F.3d 300 (1st Cir. 2016).

Noting no dispute over the first two elements, the Bankruptcy Court employed the *Bates* court's "objective standard" in finding none of the post-discharge correspondence improperly coercive or harassing.

Kirby appealed to the BAP.

PANEL DECISION

Kirby argued on appeal that the "cumulative effect" of the creditor correspondence was coercive and harassing, even if the individual communications were not.

The BAP said there is no test to determine whether creditor conduct is coercive or harassing.

Courts must consider the facts and circumstances of each case, including the "immediateness of any threatened action and the context in which the statement is made," the panel said, quoting *Rosado v. Banco Popular de Puerto Rico (In re Rosado)*, 561 B.R 598 (B.A.P. 1st Cir. 2017).

The BAP distinguished the correspondence sent during negotiations in the diversion program from the correspondence sent after exiting the program.

When a debtor initiates contact with a creditor after entry of a discharge — as Kirby did by participating in the diversion program — certain communications from the creditor are logical and do not violate the discharge injunction, the BAP said, citing *Ladebush v Beneficial New Hampshire Inc.*, No. 11010763, 2016 WL 675580 (Bankr. D.N.H. Feb. 18, 2016).

The panel said none of the post-negotiation correspondence was an attempt to collect a debt or demand payment, finding the correspondence was either informational in nature or to enforce the lender's mortgage foreclosure rights. WJ

Attorneys:
Plaintiff-appellant: J. Scott Logan, Portland, ME

Defendant-appellee: Eleanor L. Dominguez, Ainsworth, Thelin & Raftice, South Portland, ME

Related Filings:
BAP opinion: 2019 WL 2119624
Bankruptcy Court opinion: 589 B.R. 456

See Document Section B (P. 23) for the BAP opinion.

Postpetition repossession, forgery cost 'predatory' lender $21,000

By Conor O'Brien, Esq.

A "predatory" lender must pay a Chapter 13 debtor more than $21,000, including $10,000 in punitive damages, for unlawfully seizing her car and lying about its sale to stop the debtor from redeeming it, a Louisiana bankruptcy judge has ruled.

In re Lewis, No. 18-31573; Lewis v. Money Mayday Loans et al., Adv. No. 18-3016, 2019 WL 2158832 (Bankr. W.D. La. May 16, 2019).

Money Mayday Loans Inc. of Monroe, Louisiana, and its employee Tracy Cullum took the vehicle in violation of the Bankruptcy Code's automatic stay provisions and engaged in "egregious conduct" including forgery, U.S. Bankruptcy Judge John S. Hodge of the Western District of Louisiana said.

The judge awarded the damages, which also included $3,000 for emotional distress, on default judgment, noting that Money Mayday and Cullum stopped participating in the adversary proceeding against them almost from the start.

'ASTONISHING' LOAN

In 2018 Kerry N. Lewis took out a $400 "car title loan" from Money Mayday. The loan required her to repay nearly $600 within 30 days and to grant the lender a security interest in a 2005 Chevrolet Impala she had recently purchased for $3,000, Judge Hodge's opinion said.

The loan was also subject to "an astonishing 209.81% annual percentage rate," the opinion said.

Lewis surrendered the car to Money Mayday after defaulting on the repayment in August 2018, but the lender returned the vehicle to her after she paid nearly $800 the next day, according to the opinion.

Because Lewis had incurred late fees and other charges associated with her default, she continued to owe the lender $125 notwithstanding the payment, the opinion said.

Lewis commenced her Chapter 13 case in the Bankruptcy Court in September 2018. Her filings included her car as an asset, but she mistakenly omitted the lender because she had listed a different entity with a similar name, the opinion said.

REPOSSESSION

Less than a month later, Money Mayday repossessed the vehicle by "self-help," or outside of the judicial process, according to the opinion.

Lewis called the company moments after the repossession and explained that she had filed a Chapter 13 case. The lender refused to return the vehicle, however, so Lewis' attorney intervened, the opinion said.

Money Mayday's sole officer, Andrew G. Nolan, responded to the attorney days later, saying the company had sold the car on the day of the seizure for $700, the opinion said.

Nolan provided Lewis' attorney with a copy of a bill of sale from "Tracy Cullum d/b/a Money Mayday Loans" and the back side of a blank certificate of title for an unknown vehicle showing that it had been transferred to a Travis Christopher, the opinion said.

Louisiana vehicle registry documents showed that Lewis' car continued to be registered in her name, however, and Christopher later testified that the he never purchased the car or signed the bill of sale or the purported title transfer, according to the opinion.

"Defendants forged the signature of Mr. Christopher on both documents, added a notary signature to make them appear legitimate and submitted them to debtor's bankruptcy counsel in an attempt to convince him the vehicle had been sold even though it had not," Judge Hodge said.

DEFAULT JUDGMENT

Lewis filed an adversary complaint against Money Mayday and Cullum in November 2018. The defendants participated without counsel in early proceedings but never filed responsive pleadings and eventually stopped appearing altogether, the judge said.

Lewis filed a motion for a default judgment, arguing that the lender had violated the automatic stay provisions of Section 362(a) of the Bankruptcy Code, 11 U.S.C.A. § 362(a), by seizing her vehicle and refusing to return it to her.

Judge Hodge agreed, noting that Money Mayday had actual notice of the bankruptcy case shortly after repossession.

The judge awarded Lewis damages pursuant to Section 362(k), which allows for recovery of attorney fees and actual and punitive damages for a violation of the automatic stay.

Lewis' award included $312 for lost wages, $698 in transportation costs and nearly $6,000 in attorney fees. WJ

Attorneys:
Debtor: Elijah Orum Young III, Monroe, LA

Related Filings:
Opinion: 2019 WL 2158832

Rapper T.I. engaged in cryptocurrency 'pump and dump' scheme, suit says

By Alex Rose

An investor in FLiK cryptocurrency has filed a proposed class-action lawsuit against its founder, rapper T.I., for allegedly engaging in a scheme to drum up excitement for the security and its video streaming platform before cashing out without delivering promised returns.

Fedance v. Harris et al., No. 19-cv-2125, complaint filed, 2019 WL 2090630 (N.D. Ga. May 10, 2019).

Kenneth Fedance says he lost $3,000 in FLiK's initial coin offering, and that T.I. created a false impression of the cryptocurrency tokens by using social media and purported endorsements by celebrities and industry experts.

Fedance's suit, filed May 10 in the U.S. District Court for the Northern District of Georgia, names T.I., whose legal name is Clifford Joseph Harris, and entertainment executive Ryan Felton as defendants. Both are identified as controlling shareholders of FLiK.

The investor is seeking damages on behalf of a class of those who invested in FLiK's ICO between Aug. 20 and Sept. 20, 2017.

THE PUMP

Before the ICO, FLiK issued a white paper saying it would revolutionize the way the entertainment industry funds projects through cryptocurrency. The company indicated it was developing a video streaming platform called TheFLiK.io and would make 50 million coins available during the ICO, according to the suit.

The suit says Felton insinuated that billionaire media mogul Mark Cuban would be a co-owner of FLiK. Harris also posted a photo on Twitter on Oct. 15, 2017, of himself at a meeting with Cuban, and Harris and actor Kevin Hart promoted the ICO to their social media followers, according to the complaint.

Felton suggested in an Oct. 26 YouTube video that former NBA star Shaquille O'Neal was interested in the new venture, that Harris would be able to secure meetings with entertainment companies to license their products, and that beta testing was underway for the new streaming platform, the complaint says.

Felton also indicated that FLiK tokens, originally offered at just 6 cents apiece, would have a redeemable value of $15 in 15 months, the suit says.

FLiK additionally announced it was in conversations to license Lionsgate Films' catalogue for the new platform and that it was working to be integrated into the U.S. military's set top box, according to the complaint.

THE DUMP

Fedance says the FLiK tokens saw a massive "dump" in late 2017, falling precipitously from a peak value of 35 cents Oct. 17, 2017, and causing substantial losses to investors.

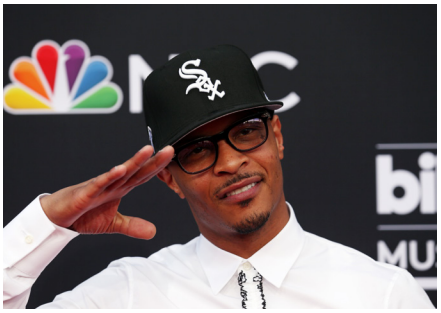
Felton allegedly blamed this in part on Harris, telling an investor that Harris had given a portion of his FLiK tokens to friends and family who had sold them on coinexchange.com, a trading post for cryptocurrencies.

FLiK tokens retained some value by early 2018 with a market price of 18 cents per token and a market cap of $11 million, the suit says.

But Felton announced in April 2018 that FLiK had missed its launch deadline for the streaming platform due to licensing issues, according to the complaint.

Fedance says that by August, the tokens were worth just $0.008 with a market cap of $496,366, and there is no current market for the tokens.

The suit identifies Felton as a "serial defendant" in Georgia with prior convictions for perjury and false statements.



REUTERS/Steve Marcus

Rapper T.I., shown here at the 2018 Billboard Music Awards in Las Vegas, is accused of creating a false impression of the FLiK cryptocurrency by using social media and purported endorsements by celebrities and industry experts.

It alleges he scrambled to delete his previous rosy statements about FLiK from social media platforms following the dump, set up a new company to acquire FLiK while denying any involvement, and stopped responding to investor inquiries.

CLAIMS

Fedance alleges Harris and Felton violated Sections 12(a) and 15(a) of the Securities Act of 1933. He further alleges Harris is liable under the act as a "statutory seller" for selling unregistered securities.

FLiK admitted in its white paper that it was subject to regulation by the Securities and Exchange Commission, but never registered its tokens as securities, the suit says. Fedance notes the Northern District of Georgia has already found that FLiK tokens are securities in a similar, ongoing lawsuit over FLiK. *Beranger v. Harris*, No. 18-cv-5054, *order issued* (N.D. Ga. Apr. 24, 2019). WJ

Attorneys:
Plaintiff: Jason Doss, The Doss Firm LLC, Marietta, GA

Related Filings:
Complaint: 2019 WL 2090630

Riot Blockchain investor updates stock manipulation suit

By Nicole Banas

A Riot Blockchain Inc. shareholder has updated a securities fraud lawsuit alleging the bitcoin mining firm concealed an illicit "pump and dump" scheme that padded the pockets of its top executives and major investors.

Takata v. Riot Blockchain Inc. et al., No. 18-cv-2293, consolidated amended complaint filed, 2019 WL 2041842 (D.N.J. May 8, 2019).

The consolidated amended complaint, filed by lead plaintiff Stanley Golovac in the U.S. District Court for the District of New Jersey, adds factual allegations from an ongoing Securities and Exchange Commission civil enforcement action, *SEC v. Honig*, No. 18-cv-8175, *first amended complaint filed* (S.D.N.Y. Mar. 8, 2019).

The SEC says in recently updated allegations that private investor Barry Honig, former Riot CEO John O'Rourke and others netted more than $27 million from similar schemes at three other microcap companies.

Riot, CEO Jeffrey McGonegal, ex-CEO Michael Beeghley and O'Rourke moved to dismiss an earlier version of the shareholder complaint March 18, saying it lacked facts showing the company changed its name from Bioptix Inc. in October 2017 to capitalize on investor interest in cryptocurrencies and facilitate insider selling. Honig filed a separate memo supporting dismissal the same day.

U.S. District Judge Freda L. Wolfson on April 24 terminated the dismissal motions and granted Golovac's request for leave to amend the suit.

The updated complaint, filed May 8, expands the proposed class period to run from April 20, 2017, to Sept. 6, 2018, instead of an 11-month period ending the same date.

It adds as defendants Riot director Jason Les and former directors Andrew Kaplan, Eric So and Mike Dai, as well as three shareholders who sold Riot shares in registered offerings in 2017.

WIDE-RANGING MICROCAP SCHEME?

The consolidated amended complaint says the defendants conspired with dozens of individuals and entities to pump-and-dump the stocks of other publicly listed microcap companies, including Biozone Pharmaceuticals Inc., MabVax Therapeutics Holdings Inc., and MGT Capital Investments Inc.

The SEC suit alleges Honig was the "primary strategist" in schemes to artificially inflate stock prices for Biozone, MabVax and MGT, Golovac says.

Honig launched a proxy battle at Bioptix in late 2016 to appoint O'Rourke, Beeghley, Stetson and other associates to the company's board, the suit says.

After assuming control of the company in early 2017, Honig and his associates caused Bioptix to file a registration statement stating that certain stockholders intended to register and sell more than 5 million shares, the revised complaint says.

The registration statement, which was amended several times in 2017, falsely said the selling stockholders did not have a "material relationship" with Bioptix and the board outside of their investment in the company, the suit says.

But almost every selling stockholder had ties to Honig and the board members through previous co-investments, according to the suit.

A DECEPTIVE 'LABYRINTH'

The board approved a nearly $10 million dividend payout Oct. 2, 2017, two days before the company announced it would change its name to Riot and shift its business focus to cryptocurrencies, the suit says.

Riot's share price soared from its Oct. 2, 2017, closing price of $6.44 to a high of $46.20 on Dec. 19, 2017, as it announced investments in cryptocurrencies, the suit says.

In fact the company's investments were "egregiously wasteful related-party transactions" with entities controlled by the defendants and their business associates, and concealed by "a labyrinth of limited liability companies," the revised complaint says.

The truth emerged over the following nine months as media reports questioned whether Riot's name change was a publicity stunt and revealed that Honig and other stakeholders were selling large amounts of stock, the suit says.

News of the SEC suit and O'Rourke's resignation Sept. 7, 2018, caused Riot's share price to fall more than 24%, closing that day at $4.30, the amended complaint says.

Golovac asserts a claim for scheme liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b), and SEC Rules 10b-5(a) and (c), against all defendants.

Riot, O'Rourke, McGonegal, Beeghley, Kaplan and So are additionally liable under the anti-fraud and control-person provisions of the Exchange Act and SEC Rule 10b-5(b), the suit says. WJ

Attorneys:
Plaintiff: William S. Norton, Joshua C. Littlejohn and Christopher F. Moriarty, Motley Rice LLC, Mt. Pleasant, SC; Joseph J. DePalma, Lite DePalma Greenberg LLC, Newark, NJ

Defendants Riot Blockchain Inc. et al.: Chad J. Peterman, Paul Hastings LLP, New York, NY; Thomas A. Zaccaro and D. Scott Carlton, Paul Hastings LLP, Los Angeles, CA

Defendant Barry Honig: Tyler E. Baker and Christopher Bosch, Sheppard Mullin Richter & Hampton, New York, NY; Robert D. Weber, Sheppard Mullin Richter & Hampton, Los Angeles, CA

Related Filings:
Consolidated amended complaint: 2019 WL 2041842

SECURITIES FRAUD

Equity Bancshares investor suit challenges credit risk disclosures

By Nicole Banas

Equity Bancshares Inc. failed to tell investors about high-risk credit relationships that caused more than $14 million in losses for the bank holding company in this year's first quarter, according to a shareholder lawsuit filed in Manhattan federal court.

Burr v. Equity Bancshares Inc. et al., No. 19-cv-4346, complaint filed, 2019 WL 2094295 (S.D.N.Y. May 13, 2019).

Equity's share price fell more than 16% in late April after the company revealed a $4 million net loss attributable to an increased provision for loan losses, the complaint filed in the U.S. District Court for the Southern District of New York says.

Wichita, Kansas-based Equity is the holding company for Equity Bank, a financial services firm with $3.6 billion in assets and offices in Arkansas, Kansas, Missouri and Oklahoma. The company's stock is listed on the Nasdaq.

The proposed class-action suit says Equity, Chairman and CEO Brad Elliott, and Chief Financial Officer Gregory Kossover violated federal securities law by concealing the company's inadequate internal controls for assessing credit risk.

Plaintiff Stephen Burr is seeking compensation for investors who allegedly overpaid for the company's shares during a nearly one-year period ending April 22.

'POTENTIAL PROBLEM LOANS'

According to the complaint, Equity said repeatedly in regulatory filings that its internal controls over disclosure were effective.

In a first-quarter filing May 11, 2018, Equity reported $8.7 million in net income and a $1.1 million provision for loan losses, the suit says.

Management regularly reviews the company's loans and charges any balances deemed unlikely to be collected to its allowance for loan losses, the report said, according to the suit.

Equity's share price fell more than $2 on Jan. 24, closing at $32.15, after the company disclosed that it downgraded a credit relationship with amounts totaling $28 million, the suit says.

The company's 2018 annual report, filed March 20, said it had nearly $53 million in "potential problem loans" as of Dec. 31, compared to $21 million at the end of 2017. *Equity Bancshares Inc.*, Form 10-K, 2019 WL 01274180 (Mar. 20, 2019).

Burr claims the truth emerged April 22 when Equity revealed that it recorded a $14.5 million provision for losses from a credit relationship in the first quarter.

In a statement that day, Elliott said, "It is important for us to convey we do not believe this represents a systemic trend; rather an isolated individual relationship which is unique to our portfolio."

Equity's share price closed April 23 at $24.71, down 16% from its prior closing price, the complaint says.

The defendants allegedly violated the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a), by failing to disclose an increased risk of loss for some substandard loans. WJ

Attorneys:
Plaintiff: Lionel Z. Glancy, Robert V. Prongay, Charles H. Linehan and Pavithra Rajesh, Glancy Prongay & Murray, Los Angeles, CA; Lesley F. Portnoy, Glancy Prongay & Murray, New York, NY; Howard G. Smith, Bensalem, PA

Related Filings:
Complaint: 2019 WL 2094295

Judge denies REIT's bid for exit from investor suits

By Nicole Banas

A Manhattan federal judge has denied summary judgment to American Realty Capital Properties Inc. and certain former executives on most claims in a consolidated shareholder lawsuit alleging the real estate investment trust doctored its financial results to conceal self-dealing by insiders.

In re American Realty Capital Properties Inc. Litigation, Nos. 15-mc-40, 15-cv-307 and 15-cv-6043, 2019 WL 2082508 (S.D.N.Y. May 10, 2019).

In a May 10 order, U.S. District Judge Alvin K. Hellerstein of the Southern District of New York said there is a genuine factual dispute in the class-action suit as to whether ARCP and former officers and directors misled investors about a key financial metric from 2012 to 2014.

The judge largely denied the defendants' motions for summary judgment except on a narrow issue related to aftermarket purchasers in three registered offerings.

He also entered partial summary judgment for the plaintiffs on a portion of securities fraud claims against ARCP, former Chief Financial Officer Brian Block and former Chief Accounting Officer Lisa McAlister based on facts established in prior criminal convictions. *United States v. Block*, No. 16-cr-595, *notice of appeal filed* (S.D.N.Y. Mar. 21, 2019); *United States v. McAlister*, No. 16-cr-653, *judgment entered* (S.D.N.Y. Mar. 26, 2018).

Further, Judge Hellerstein's order largely denied motions for summary judgment in a separate action brought by shareholders that opted out of the class, and a derivative lawsuit by shareholders seeking to recover damages on behalf of the REIT.

ARCP, which is now named Vereit Inc., is a publicly traded REIT listed on the New York Stock Exchange. Vereit owns and actively manages a diversified portfolio of retail, restaurant, office and industrial real estate assets subject to long-term net leases, according to its website.

INFLATED FINANCIALS?

Judge Hellerstein previously certified a class of investors who bought ARCP shares between May 9, 2012, and Oct. 29, 2014. *In re Am. Realty Capital Prop. Inc. Litig.*, No. 15-mc-40, 2017 WL 3835881 (S.D.N.Y. Aug. 31, 2017).

The suit alleges ARCP, founder and ex-CEO Nicholas Schorsch, and other insiders failed to disclose that they inflated the REIT's primary performance metric, "adjusted funds from operations," or AFFO, by changing the calculation method.

The REIT paid out more than $900 million in fees to its external manager ARC Properties Advisors LLC that were intended to mask undocumented related-party transactions with affiliated entities and individuals, the third amended complaint filed in September 2016 says.

ARCP's share price fell nearly 20% on Oct. 29, 2014, closing at $10, after the REIT announced that it would restate certain financial results because of AFFO calculation errors that were "intentionally not corrected," the suit says.

The class action asserts strict liability for alleged misstatements in offering materials under the Securities Act of 1933, 15 U.S.C.A. §§ 77k and 77o, against ARCP, related entities and individuals, various underwriters and auditor Grant Thornton LLP.

It also alleges violations of the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a), by ARCP, operating partnership ARC Properties, Schorsch, ex-CEO David Kay, ex-CFO Block, former Chief Operating Officer Lisa Beeson and former CAO McAlister.

The parties to the class action and the opt-out and derivative suits filed memos supporting their motions for summary judgment earlier this year.

FACTUAL QUESTIONS REMAIN

Judge Hellerstein's May 10 order said there is a genuine factual dispute in the class action as to whether ARCP directors and the underwriters conducted sufficient due diligence in preparing the offering materials.

The suit identifies possible "red flags" such as discrepancies between the REIT's internal records and its public filings, that should have prompted further investigation, the judge said.

The defendants are entitled to summary judgment only on Securities Act claims by aftermarket purchasers in three of the seven offerings for failure to demonstrate "share tracing," the order said.

Judge Hellerstein said the question of whether the defendants intentionally deceived investors by omitting the method for calculating AFFO is best left to a jury.

The plaintiffs have sufficiently established several elements of the securities fraud claims against Block and McAlister that are based on admitted false statements in the first half of 2014, the judge said.

The defendants in the opt-out suit correctly argued that three common law fraud claims under New York state law are precluded by the Securities Litigation Uniform Standards Act, 15 U.S.C.A. § 78bb(f)(1), the judge said.

Judge Hellerstein denied ARCP officers and directors' motions for summary judgment in the derivative action, saying those claims depend on the outcome of the securities suits WJ

Related Filings:
Order: 2019 WL 2082508

Account looting scam

CONTINUED FROM PAGE 1

fraud in violation of 18 U.S.C.A. § 1344 and bank embezzlement in violation of 18 U.S.C.A. § 656, prosecutors said.

Vargas also agreed to pay a forfeiture money judgment in the same amount as her restitution, according to her plea agreement.

COMPUTER SYSTEM

Vargas committed the offenses while working as a teller and then as branch supervisor for Athol Savings Bank, a federally insured financial institution in her hometown, according to the July 2018 grand jury indictment.

As a bank employee Vargas had access to the bank's computer system, which she used to steal $108,000 from several account holders between August 2016 and December 2017, the charges said.

By manipulating computerized bank records, Vargas made cash withdrawals from customer accounts even though the account holders had not filled out and signed withdrawal slips in accordance with Athol Savings' policies, according to prosecutors.

While the scheme was in operation, Vargas processed $53,000 in unauthorized withdrawals from an 84-year-old bank customer and $13,000 in withdrawals from an 88-year-old account holder, the U.S. Attorney said.

Law enforcement officers arrested Vargas in March 2018 after the scam came to light, the government said. She must report to the federal Bureau of Prisons by July 1, court records show. WJ

> By manipulating computerized bank records, the defendant made cash withdrawals from customer accounts even though the account holders had not filled out and signed withdrawal slips in accordance with the bank's policies, prosecutors said.

Related Filings:
Indictment: 2019 WL 2263038

See Document Section A (P. 17) for the indictment.

CASE AND DOCUMENT INDEX

VARGAS

2019 WL 2263038 (D.Mass.) (Trial Pleading)
United States District Court, D. Massachusetts.

UNITED STATES,
v.
Jessica VARGAS.

No. 4:18CR40031.
February 20, 2019.

Indictment

Andrew E. Lelling, United States Attorney.

William F. Abely, Assistant U.S. Attorney.

Charles McGinty, for defendant Jessica Vargas.

Dear Mr. McGinty:

The United States Attorney for the District of Massachusetts ("the U.S. Attorney") and your client, Jessica Vargas ("Defendant"), agree as follows with respect to the above-referenced case:

1. *Change of Plea*

At the earliest practicable date, Defendant shall plead guilty to all counts in which she is named in the above-referenced Indictment: bank fraud, in violation of 18 U.S.C. § 1344, and bank embezzlement, in violation of 18 U.S.C. § 656. Defendant expressly and unequivocally admits that she committed the crimes charged in Counts One through Three of the Indictment, did so knowingly and willfully, and is in fact guilty of those offenses.

2. Penalties

Defendant faces the following maximum penalties on each count of the Indictment: incarceration for 30 years; supervised release for 5 years; a fine of $1,000,000; a mandatory special assessment of $100; restitution; and forfeiture to the extent charged in the Indictment.

Defendant also recognizes that pleading guilty may have consequences with respect to Defendant's immigration status if Defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offenses to which Defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and Defendant understands that no one, including defense counsel and the District Court, can predict to a certainty the effect of this conviction on Defendant's immigration status. Defendant nevertheless affirms her decision to plead guilty regardless of any immigration consequences that this plea may entail, even if the consequence is Defendant's automatic removal from the United States.

3. *Sentencing Guidelines*

The sentence to be imposed upon Defendant is within the discretion of the District Court ("Court"), subject to the statutory maximum penalties set forth above and the provisions of the Sentencing Reform Act, and the advisory United States Sentencing Guidelines ("USSG" or "Guidelines"). While the Court may impose a sentence up to and including the statutory maximum term of imprisonment

and statutory maximum fine, it must consult and take into account the USSG and the other factors set forth in 18 U.S.C. § 3553(a) in imposing a sentence.

The parties agree that Defendant's offense level under the USSG (prior to any adjustment for acceptance of responsibility) is calculated as follows:
a) in accordance with USSG § 2B1.1(a)(7), Defendant's base offense level is 7, because the offenses of conviction have a statutory maximum term of 20 years or more; and

b) in accordance with USSG § 2B1.1(b)(1)(E), Defendant's offense level is increased by 8, because the loss exceeded $95,000 but did not exceed $150,000.

Further, the U.S. Attorney will take the position that Defendant's offense level should be increased by 2 levels in accordance with USSG § 3A1.1(b)(1) because the Defendant knew or should have known that a victim of the offense was a vulnerable victim. Defendant reserves her right to dispute the application of USSG § 3A1.1(b)(1).

If Defendant contends that there is a basis for departure from, or a sentence outside, the otherwise applicable Guidelines sentencing range based on Defendant's medical, mental, and/or emotional condition, or otherwise intends to rely on any such condition at sentencing, Defendant will, forthwith upon request, execute all releases and other documentation necessary to permit the U.S. Attorney and his experts (including Bureau of Prisons medical personnel) to obtain access to Defendant's medical, psychiatric, and psychotherapeutic records and will also provide to the U.S. Attorney forthwith copies of any such records already in Defendant's possession. In addition, Defendant will authorize Defendant's care providers to discuss Defendant's condition with the U.S. Attorney and his agents (including Bureau of Prisons medical personnel), as well as experts retained by the U.S. Attorney. Defendant also agrees to submit to examinations and interviews with experts retained by and chosen by the U.S. Attorney (including Bureau of Prisons medical personnel).

The U.S. Attorney reserves the right to oppose Defendant's argument(s) for a departure from, or a sentence outside, the USSG under the factors set forth in 18 U.S.C. § 3553(a).

Based on Defendant's prompt acceptance of personal responsibility for the offenses of conviction in this case, and information known to the U.S. Attorney at this time, the U.S. Attorney agrees to recommend that the Court reduce by two levels Defendant's adjusted offense level under USSG § 3E1.1, and one additional level should the Court calculate Defendant's total offense level as 16 or greater.

The U.S. Attorney reserves the right not to recommend a reduction under USSG § 3E1.1 if, at any time between Defendant's execution of this Plea Agreement and sentencing, Defendant:
a) Fails to admit a complete factual basis for the plea;

b) Fails to truthfully admit Defendant's conduct in the offenses of conviction;

c) Falsely denies, or frivolously contests, relevant conduct for which Defendant is accountable under USSG § 1B1.3;

d) Fails to provide truthful information about Defendant's financial status;

e) Gives false or misleading testimony in any proceeding relating to the criminal conduct charged in this case and any relevant conduct for which Defendant is accountable under USSG § 1B1.3;

f) Engages in acts that form a basis for finding that Defendant has obstructed or impeded the administration of justice under USSG § 3C1.1;

g) Intentionally fails to appear in Court or violates any condition of release;

h) Commits a crime;

i) Transfers any asset protected under any provision of this Plea Agreement; or

j) Attempts to withdraw Defendant's guilty plea.

Defendant understands and acknowledges that Defendant may not withdraw her plea of guilty if, for any of the reasons listed above, the U.S. Attorney does not recommend that Defendant receive a reduction in offense level for acceptance of responsibility. Defendant also understands and acknowledges that, in addition to declining to recommend an acceptance-of-responsibility adjustment, the U.S. Attorney may seek an upward adjustment pursuant to USSG § 3C1.1 if Defendant obstructs justice after the date of this Plea Agreement.

Nothing in this Plea Agreement affects the U.S. Attorney's obligation to provide the Court and the U.S. Probation Office with accurate and complete information regarding this case.

4. *Sentence Recommendation*

The U.S. Attorney agrees to recommend the following sentence before the Court:
a) incarceration at the low end of the Guidelines sentencing range as calculated by the U.S. Attorney in Paragraph 3;

b) a fine within the Guidelines sentencing range as calculated by the U.S. Attorney in Paragraph 3, unless the Court finds that Defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay a fine;

c) 24 months of supervised release;

d) a mandatory special assessment of $300, which Defendant must pay to the Clerk of the Court on or before the date of sentencing (unless Defendant establishes to the Court's satisfaction that Defendant is unable to do so);

e) restitution of at least $108,171; and

f) forfeiture as set forth in Paragraph 8.

The parties further agree that Defendant may recommend an alternate sentence.

Defendant agrees to provide the U.S. Attorney expert reports, motions, memoranda of law and documentation of any kind on which Defendant intends to rely at sentencing not later than 21 days before sentencing. Any basis for sentencing as to which Defendant has not provided the U.S. Attorney all such items at least 21 days before sentencing shall be deemed waived.

5. *Waiver of Rights to Appeal and to Bring Future Challenge*

a) Defendant has conferred with her attorney and understands that she has the right to challenge both her conviction and her sentence (including any orders relating to the terms and conditions of supervised release, fines, forfeiture, and restitution) on direct appeal. Defendant also understands that, in some circumstances, Defendant may be able to argue in a future proceeding (collateral or otherwise), such as pursuant to a motion under 28 U.S.C. § 2255, 28 U.S.C. § 2241, or 18 U.S.C. § 3582(c), that Defendant's conviction should be set aside or Defendant's sentence (including any orders relating to the terms and conditions of supervised release, fines, forfeiture, and restitution) set aside or reduced.

b) Defendant waives any right to challenge Defendant's conviction on direct appeal or in a future proceeding (collateral or otherwise).

c) Defendant agrees not to file a direct appeal or challenge in a future proceeding (collateral or otherwise) any sentence of imprisonment of 15 months or less or any orders relating to the terms and conditions of supervised release, fines, forfeiture, and restitution. This provision is binding even if the Court's Guidelines analysis is different from that set forth in this Plea Agreement.

d) The U.S. Attorney likewise agrees that, regardless of the analysis employed by the Court, the U.S. Attorney will not appeal any imprisonment sentence of 15 months or more.

e) Regardless of the previous sub-paragraphs, Defendant reserves the right to claim that: (i) Defendant's lawyer rendered ineffective assistance of counsel under Strickland v. Washington; or (ii) the prosecutor in this case engaged in misconduct that entitles Defendant to relief from Defendant's conviction or sentence.

6. *Other Post-Sentence Events*

a) If, despite the waiver provision of sub-paragraph 5(c), Defendant appeals or challenges in a future proceeding (collateral or otherwise) Defendant's sentence, the U.S. Attorney reserves the right to argue the correctness of the sentence imposed by the Court (in addition to arguing that any appeal or future challenge (collateral or otherwise) is waived as a result of the waiver in sub-paragraph 5(c)).

b) If, despite the waiver provision of sub-paragraph 5(c), Defendant seeks re-sentencing, Defendant agrees not to seek to be re-sentenced with the benefit of any change to the Criminal History Category that the Court calculated at the time of Defendant's original sentencing, except to the extent that Defendant has been found actually factually innocent of a prior crime.

c) In the event of a re-sentencing following an appeal from or future challenge (collateral or otherwise) to Defendant's sentence, the U.S. Attorney reserves the right to seek a departure from and a sentence outside the USSG if, and to the extent, necessary to reinstate the sentence the U.S. Attorney advocated at Defendant's initial sentencing pursuant to this Plea Agreement

7. *Court Not Bound by Plea Agreement*

The parties' sentencing recommendations and their respective calculations under the USSG are not binding upon the U.S. Probation Office or the Court. Within the mandatory minimum and maximum sentence Defendant faces under the applicable law, the sentence to be imposed is within the sole discretion of the Court. Defendant's plea will be tendered pursuant to Fed. R. Crim. P. 11(c)(1)(B). Defendant may not withdraw her plea of guilty regardless of what sentence is imposed, or because the U.S. Probation Office or the Court declines to follow the parties' USSG calculations or recommendations. Should the Court decline to follow the U.S. Attorney's USSG calculations or recommendations, the U.S. Attorney reserves the right to defend the Court's calculations and sentence in any direct appeal or future challenge (collateral or otherwise).

8. *Forfeiture*

Defendant understands that the Court will, upon acceptance of Defendant's guilty plea, enter an order of forfeiture as part of Defendant's sentence, and that the order of forfeiture may include assets directly traceable to Defendant's offense, assets used to facilitate Defendant's offense, substitute assets and/or a money judgment equal to the value of the property derived from, or otherwise involved in, the offense.

The assets to be forfeited specifically include, without limitation, the following:

a. $108,171 in United States currency, to be entered in the form of an Order of Forfeiture (Money Judgment).

Defendant admits that $108,171 is subject to forfeiture on the grounds that it is equal to the amount constituting, or derived from, proceeds obtained directly or indirectly, as a result of such offenses.

Defendant acknowledges and agrees that the amount of the forfeiture money judgment represents proceeds the Defendant obtained (directly or indirectly), and/or facilitating property and/or property involved in, the crimes to which Defendant is pleading guilty and that, due at least in part to the acts or omissions of Defendant, the proceeds or property have been transferred to, or deposited with, a third party, spent, cannot be located upon exercise of due diligence, placed beyond the jurisdiction of the Court, substantially diminished in value, or commingled with other property which cannot be divided without difficulty. Accordingly, Defendant agrees that the United States is entitled to forfeit as "substitute assets" any other assets of Defendant up to the value of the now missing directly forfeitable assets.

Defendant agrees to consent to the entry of an order of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 11(b)(1)(J), 32.2, and 43(a) regarding notice of the forfeiture in the charging instrument, advice regarding the forfeiture at the change-of-plea hearing, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Defendant understands and agrees that forfeiture shall not satisfy or affect any fine, lien, penalty, restitution, cost of imprisonment, tax liability or any other debt owed to the United States.

If the U.S. Attorney requests, Defendant shall deliver to the U.S. Attorney within 30 days after signing this Plea Agreement a sworn financial statement disclosing all assets in which Defendant currently has any interest and all assets over which Defendant has exercised control, or has had any legal or beneficial interest. Defendant further agrees to be deposed with respect to Defendant's assets at the request of the U.S. Attorney. Defendant agrees that the United States Department of Probation may share any financial information about the Defendant with the United States Attorney's Office.

Defendant also agrees to waive all constitutional, legal, and equitable challenges (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement.

Defendant hereby waives and releases any claims Defendant may have to any vehicles, currency, or other personal property seized by the United States, or seized by any state or local law enforcement agency and turned over to the United States, during the investigation and prosecution of this case, and consents to the forfeiture of all such assets.

9. *Civil Liability*

By entering into this Plea Agreement, the U.S. Attorney does not compromise any civil liability, including but not limited to any tax liability, Defendant may have incurred or may incur as a result of Defendant's conduct and plea of guilty to the charges specified in Paragraph 1 of this Plea Agreement.

10. *Rejection of Plea by Court*

Should Defendant's guilty plea not be accepted by the Court for whatever reason, or later be withdrawn on Defendant's motion, this Plea Agreement shall be null and void at the option of the U.S. Attorney.

11. *Breach of Plea Agreement*

If the U.S. Attorney determines that Defendant has failed to comply with any provision of this Plea Agreement, has violated any condition of Defendant's pretrial release, or has committed any crime following Defendant's execution of this Plea Agreement, the U.S. Attorney may, at his sole option, be released from his commitments under this Plea Agreement in their entirety by notifying Defendant, through counsel or otherwise, in writing. The U.S. Attorney may also pursue all remedies available to him under the law, regardless whether he elects to be released from his commitments under this Plea Agreement. Further, the U.S. Attorney may pursue any and all charges that have been, or are to be, dismissed pursuant to this Plea Agreement. Defendant recognizes that her breach of any obligation under this Plea Agreement shall not give rise to grounds for withdrawal of Defendant's guilty plea, but will give the U.S. Attorney the right to use against Defendant before any grand jury, at any trial or hearing, or for sentencing purposes, any statements made by Defendant and any information, materials, documents or objects provided by Defendant to the government, without any limitation, regardless of any prior agreements or understandings, written or oral, to the contrary. In this regard, Defendant hereby waives any defense to any charges that Defendant might otherwise have based upon any statute of limitations, the constitutional protection against pre-indictment delay, or the Speedy Trial Act.

12. *Who is Bound by Plea Agreement*

This Plea Agreement is limited to the U.S. Attorney for the District of Massachusetts, and cannot and does not bind the Attorney General of the United States or any other federal, state or local prosecutive authorities.

13. *Modifications to Plea Agreement*

This Plea Agreement can be modified or supplemented only in a written memorandum signed by the parties or on the record in court.

If this letter accurately reflects the agreement between the U.S. Attorney and Defendant, please have Defendant sign the Acknowledgment of Plea Agreement below. Please also sign below as Witness. Return the original of this letter to Assistant U.S. Attorney William F. Abely.

Very truly yours,

ANDREW E. LELLING

United States Attorney

By: <<signature>>

Greg A. Friedholm

Chief, Worcester Branch Office

<<signature>>

William F. Abely

Assistant U.S. Attorney

ACKNOWLEDGMENT OF PLEA AGREEMENT

I have read this letter in its entirety and discussed it with my attorney. I hereby acknowledge that (a) it accurately sets forth my plea agreement with the United States Attorney's Office for the District of Massachusetts; (b) there are no unwritten agreements between me and the United States Attorney's Office; and (c) no official of the United States has made any unwritten promises or representations to me, in connection with my change of plea. In addition, I have received no prior offers to resolve this case. I understand the crimes to which I have agreed to plead guilty, the maximum penalties for those offenses, and the Sentencing Guideline penalties potentially applicable to them. I am satisfied with the legal representation provided to me by my attorney. We have had sufficient time to meet and discuss my case. We have discussed the charges against me, possible defenses I might have, the terms of this Plea Agreement and whether I should go to trial. I am entering into this Plea Agreement freely, voluntarily, and knowingly because I am guilty of the offenses to which I am pleading guilty, and I believe this Plea Agreement is in my best interest.

<<signature>>

Jessica Vargas

Defendant

Date: 2/20/19

I certify that Jessica Vargas has read this Plea Agreement and that we have discussed its meaning. I believe she understands the Plea Agreement and is entering into the Plea Agreement freely, voluntarily, and knowingly. I also certify that the U.S. Attorney has not extended any other offers regarding a change of plea in this case.

Charles McGinty

Attorney for Defendant Jessica Vargas

Date: 2/20/19

End of Document

KIRBY

2019 WL 2119624
Only the Westlaw citation is currently available.
United States Bankruptcy Appellate Panel of the First Circuit.

Gregory M. KIRBY and Amanda Kirby, Debtors.
Gregory M. Kirby, Plaintiff-Appellant,
v.
21st Mortgage Corporation, Defendant-Appellee.

BAP NO. EP 18-024
|
Bankruptcy Case No. 14-20682-PGC
|
Adversary Proceeding No. 17-02007-PGC
|
May 14, 2019

Synopsis
Background: Chapter 7 debtor-mortgagors brought adversary proceeding to recover for mortgagee's alleged violations of discharge injunction. The United States Bankruptcy Court for the District of Maine, Peter G. Cary, J., granted mortgagee's motion for summary judgment, and appeal was taken.

Holdings: The Bankruptcy Appellate Panel, Katz, J., held that:

[1] the 19 written communications that mortgagee sent, not to debtor-mortgagors, but to their attorney, after debtors had received their discharge and while they were actively pursuing mediation to prevent foreclosure, did not violate discharge injunction;

[2] post-discharge escrow account disclosure did not violate discharge injunction;

[3] post-discharge communication that was purely informational, in that it advised of debtors' rights to cancel or terminate private mortgage insurance, did not violate discharge injunction;

[4] cash-for-keys letter did not violate discharge injunction; and

[5] Right to Cure Notice that mortgagee mailed post-discharge was an act to enforce mortgagee's in rem rights in debtor-mortgagors' property, rather than an attempt to collect a debt as personal liability of debtors, and did not violate the discharge injunction.

Affirmed.

West Headnotes (27)

[1] **Bankruptcy**🔑Finality

Order granting mortgagee's motion for summary judgment on claims asserted against it by Chapter 7 debtor-mortgagors, for allegedly violating the discharge injunction and their rights under the Fair Debt Collection Practices Act (FDCPA), was final order, from which appeal would lie as matter of right. 11 U.S.C.A. § 524(a)(2); Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.; 28 U.S.C.A. § 158(a)(1).

Cases that cite this headnote

[2] **Bankruptcy**🔑Finality

Generally, an order granting motion for summary judgment is a final, appealable order. 28 U.S.C.A. § 158(a)(1).

Cases that cite this headnote

[3] **Bankruptcy**🔑Record; assignments of error; briefs

While Chapter 7 debtor-mortgagors filed notice of appeal from bankruptcy court's grant of mortgagee's motion for summary judgment both on their claims that its post-discharge communications violated the discharge injunction and on their claims that these communications violated the Fair Debt Collection Practices Act (FDCPA), debtors waived issue of whether these communications violated the FDCPA by their conduct on appeal in addressing only whether the discharge injunction was violated. 11 U.S.C.A. § 524(a)(2); Consumer Credit Protection Act, § 802 et seq., 15 U.S.C.A. § 1692 et seq.

Cases that cite this headnote

[4] **Bankruptcy**🔑Conclusions of law; de novo review

Bankruptcy Appellate Panel reviews a bankruptcy court's grant of summary judgment de novo.

Cases that cite this headnote

[5] **Bankruptcy**🔑Discharge as injunction

Discharge injunction advances the overarching purpose of the Bankruptcy Code by affording honest but unfortunate debtors a "fresh start" free from the burdens of personal liability for unsecured prepetition debts. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[6] **Bankruptcy**🔑Carrying out provisions of Code
Bankruptcy🔑Discharge as injunction

Scope of the discharge injunction is broad, and bankruptcy courts may enforce it in exercise of their authority to issue "necessary or appropriate" orders. 11 U.S.C.A. §§ 105(a), 524(a)(2).

Cases that cite this headnote

[7] **Bankruptcy**🔑Enforcement of Injunction or Stay

Burden of proof is on former debtor seeking to recover for discharge violations to establish that creditor, by its post-discharge conduct, violated the discharge injunction. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[8] **Bankruptcy**🔑Enforcement of Injunction or Stay

Standard of proof, in proceeding to recover for creditor's alleged violation of discharge injunction, is proof by clear and convincing evidence. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[9] **Bankruptcy**🔑Discharge as injunction

To prevail on claim against creditor for allegedly violating discharge injunction, debtor must show that creditor: (1) had notice of the discharge; (2) intended the actions which violated the discharge injunction; and (3) acted in manner that improperly coerced or harassed the debtor. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[10] **Bankruptcy**🔑Discharge as injunction

To determine whether a creditor's post-discharge conduct violated the discharge injunction, courts assess whether that conduct was improperly coercive or harassing under an objective standard; debtor's subjective feeling of coercion or harassment is insufficient. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[11] **Bankruptcy**🔑Discharge as injunction

There is no specific test to determine whether a creditor's post-discharge conduct was improperly coercive or harassing in violation of discharge injunction; rather, courts consider the facts and circumstances of each case, including factors such as the immediateness of any threatened action and the context in which statements are made. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[12] **Bankruptcy**🔑Discharge as injunction

Creditor's post-discharge conduct is coercive, in violation of discharge injunction, when it is tantamount to a threat or places the debtor between a rock and a hard place in which he would lose either way. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[13] **Bankruptcy**🔑Discharge as injunction

While broad, the discharge injunction has its limitations and does not prohibit every post-discharge communication between a creditor and debtor, only those that are designed to collect, recover or offset any discharged debt as a personal liability of debtor. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[14] **Bankruptcy**🔑Lien enforcement
Bankruptcy🔑Effect as to Securities and Liens

Discharge injunction does not enjoin a secured creditor from recovering on valid prepetition liens, liens which, unless modified or avoided, ride through bankruptcy unaffected and are enforceable post-bankruptcy in accordance with state law. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[15] **Bankruptcy**🔑Lien enforcement

Secured creditor, without violating the discharge injunction, may take any appropriate action to enforce a valid lien surviving the debtor's discharge, as long as creditor does not pursue in personam relief against debtor. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[16] **Bankruptcy**🔑Discharge as injunction

Question of whether creditor's post-discharge communications violate the discharge injunction is a particularly fact-intensive one, for which no bright line answer exists. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[17] **Bankruptcy**🔑Discharge as injunction

Correspondence that is informational in nature does not violate the discharge injunction, as not being designed to collect, recover or offset any discharged debt as personal liability of debtor. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[18] **Bankruptcy**🔑Lien enforcement
Bankruptcy🔑Mortgages or Liens

Common factor in cases in which courts find that mortgagee's correspondence violates either the automatic stay or the discharge injunction is a clear demand by mortgagee for payment of prepetition debt, accompanied by coercion in the form of threatened action or some other consequence for nonpayment, or harassment to induce the debtor to pay. 11 U.S.C.A. §§ 362(a), 524(a)(2).

Cases that cite this headnote

[19] **Bankruptcy**🔑Discharge as injunction
Bankruptcy🔑Proceedings, Acts, or Persons Affected

Bankruptcy disclaimer is typically ineffective to insulate a creditor from liability for violating the automatic stay or the discharge injunction, when there is evidence of creditor coercion or harassment. 11 U.S.C.A. §§ 362(a), 524(a)(2).

Cases that cite this headnote

[20] **Bankruptcy**🔑Discharge as injunction

In deciding whether a creditor's post-discharge communications violated the discharge injunction, courts must look beyond the particular content of communications and consider whether the circumstances and context in which the communications occurred give rise to an inference of coercion. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[21] **Bankruptcy**🔑Lien enforcement

The 19 written communications that mortgagee sent, not to Chapter 7 debtor-mortgagors, but to their attorney, after debtors had received their discharge and while they were actively pursuing mediation to prevent loss of mortgaged property through foreclosure, did not violate discharge injunction, where all but one of these 19 communications contained an unambiguous bankruptcy disclaimer, indicating that if debtors had received a bankruptcy discharge, then mortgagee was not attempting to collect a debt from them personally, and where the one communication that did not contain a disclaimer merely advised of changes to the interest rate on debtors' adjustable rate mortgage; communications were not coercive or harassing. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[22] **Bankruptcy**🔑Violation of discharge order

Post-discharge communications from creditor that do not contain a bankruptcy disclaimer are not per se violations of the discharge injunction, if it is evident from the circumstances that there is no coercion or harassment. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[23] **Bankruptcy**🔑Lien enforcement

Post-discharge escrow account disclosure that mortgagee mailed, not to Chapter 7 debtor-mortgagors, but to their attorney, did not violate discharge injunction, though this communication contained new payment information and payment due date, where the communication made no demand for payment and did not threaten any adverse consequences, and where it also contained an unambiguous bankruptcy disclaimer. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[24] **Bankruptcy**🔑Lien enforcement

Post-discharge communication that mortgagee mailed, not to Chapter 7 debtor-mortgagors, but to their attorney, did not violate discharge injunction, where communication was purely informational in that it advised of debtors' rights to cancel or terminate private mortgage insurance and did not demand payment or threaten any adverse consequences, and where it also contained an unambiguous bankruptcy disclaimer. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[25] **Bankruptcy**🔑Lien enforcement

Even assuming that incomplete and un-notarized copy of cash-for-keys letter that mortgagee had mailed post-discharge was admissible as evidence of mortgagee's alleged violation of discharge injunction, this letter, which acknowledged that debtors had received discharge of their personal liability on mortgage debt, did not violate the discharge injunction. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[26] **Bankruptcy**🔑Lien enforcement

Right to Cure Notice that mortgagee mailed post-discharge was an act to enforce mortgagee's in rem rights in Chapter 7 debtor-mortgagors' property, rather than an attempt to collect a debt as personal liability of debtors, and did not violate the discharge injunction, especially given that it contained an unambiguous bankruptcy disclaimer. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[27] **Bankruptcy**🔑Violation of discharge order

In proceeding to recover for mortgagee's alleged violation of discharge injunction, Chapter 7 debtor-mortgagors' failure to introduce all but the last page of pleading that mortgagee had filed, post-discharge, in state court prevented court from discerning precise nature of the pleading and the context in which allegedly objectionable statement on final page was made, as required for court to decide whether the pleading violated discharge injunction. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

Appeal from the United States Bankruptcy Court for the District of Maine (Hon. Peter G. Cary, U.S. Bankruptcy Judge)

Attorneys and Law Firms

J. Scott Logan, Esq., Portland, on brief for Plaintiff-Appellant.

Eleanor L. Dominguez, Esq., South Portland, on brief for Defendant-Appellee.

Before Godoy, Harwood, and Katz, United States Bankruptcy Appellate Panel Judges.

Opinion

Katz, U.S. Bankruptcy Appellate Panel Judge.

***1** Gregory M. Kirby ("Mr. Kirby") appeals from the bankruptcy court's order (the "Order") granting summary judgment in favor of 21st Mortgage Corporation ("21st Mortgage") on his complaint alleging that post-discharge communications from 21st Mortgage were attempts to collect a discharged debt in violation of § 524(a)(2)'s discharge injunction and the Fair Debt Collections Practices Act ("FDCPA").[1] Mr. Kirby asserts that the bankruptcy court erred in granting summary judgment in favor of 21st Mortgage because: (1) there were genuine issues of material fact which required a trial; and (2) 21st Mortgage failed to establish that its post-discharge correspondence did not violate the discharge injunction as a matter of law.[2] Discerning no error, we **AFFIRM**.

BACKGROUND

The following facts are undisputed.[3]

Mr. Kirby and his wife (the "Kirbys") previously owned real property in Brewer, Maine (the "Brewer Property"), subject to a mortgage lien securing a promissory note held by 21st Mortgage. When the Kirbys defaulted on their obligations under the note, 21st Mortgage commenced a state court foreclosure action against them, and the case was promptly transferred to the Foreclosure Diversion Program.[4]

The day before the initial mediation session scheduled for August 28, 2014, the Kirbys commenced a voluntary bankruptcy case by filing a petition under chapter 7 of the Bankruptcy Code. In their bankruptcy schedules, the Kirbys disclosed their interest in the Brewer Property[5] and listed 21st Mortgage as the holder of a $ 343,619 claim secured by a lien on the Brewer Property. The Kirbys' schedules also reflected their intent to retain the Brewer Property and "to explore modification." The Kirbys did not reaffirm the debt to 21st Mortgage. They received chapter 7 discharges pursuant § 727(a) (relieving them of personal liability for the debt to 21st Mortgage) on December 4, 2014. As 21st Mortgage concedes, it received notice of the entry of the Kirbys' discharges, and the bankruptcy case was closed shortly thereafter.

***2** After the entry of the Kirbys' discharges, the parties resumed mediation under the state court Foreclosure Diversion Program. Between December 2014 and October 2015, the parties engaged in extensive efforts to mediate an alternative to foreclosure. During this ten-month period, the parties participated in three court-sponsored mediation sessions, and the Kirbys pursued other loss mitigation options with 21st Mortgage. Ultimately, the parties were unable to reach a resolution and the case was returned to the foreclosure docket. In October 2016, the state court entered a judgment of foreclosure in favor of 21st Mortgage, and the Brewer Property was sold at a foreclosure auction in February 2017.

But matters did not end there. In March 2017, the bankruptcy case was reopened at Mr. Kirby's request and Mr. Kirby filed a two-count complaint seeking damages against 21st Mortgage on account of his claims that post-discharge written correspondence sent by 21st Mortgage regarding the defaulted loan violated the discharge injunction imposed by § 524(a)(2) of the Code and certain provisions of the FDCPA.

I. Events and Correspondence During the Mediation Period

The majority of 21st Mortgage's post-discharge communications were sent between December 2014 and October 2015, while the parties were engaged in mediation and loss mitigation efforts (the "mediation period"). During this period, 21st Mortgage sent nineteen written communications—eight letters relating to Mr. Kirby's request for a loan modification, nine periodic mortgage statements, and two other "mortgage servicing" notices. All of these communications were addressed to Mr. Kirby in the care of his bankruptcy counsel, J. Scott Logan, at Attorney Logan's place of business.[6] The specific correspondence is described below.

A. Monthly Mortgage Statements

During the mediation period, 21st Mortgage sent nine monthly mortgage statements, each of which set forth an amount due and a due date, indicated that a late fee would be charged if the payment was not received, and included a payment coupon. At the top of the second page, the statements provided: "This is an attempt to collect a debt and any information obtained will be used for that purpose." ("Collection Notice"). Each statement also contained the following bankruptcy disclaimer:

> **NOTICE**: Please be advised further that this letter constitutes neither demand for payment of the captioned debt nor a notice of personal liability to any recipient hereof who might have received discharge of such debt in accordance with applicable bankruptcy laws or who might be subject to automatic stay of Section 362 of the United States Bankruptcy Code. This letter is being sent to any such parties merely to comply with applicable state law governing foreclosure of liens pursuant to contractual powers of sale.

B. ARM Notice

In January 2015, 21st Mortgage sent a notice (the "ARM Notice") regarding changes to the interest rate on the adjustable rate mortgage. The notice included the current and estimated new interest rates and monthly payments, a payment amount and due date, the loan balance, and the remaining loan term. The letter contained a Collection Notice, but did not include a bankruptcy disclaimer.[7]

C. PMI Disclosure

Also in January 2015, 21st Mortgage sent an annual private mortgage insurance disclosure (the "PMI Disclosure"), informing Mr. Kirby of his rights under federal law regarding the cancellation or termination of his private mortgage insurance. It contained a Collection Notice and the same bankruptcy disclaimer as that contained in the mortgage statements.

D. Loss Mitigation Letters[8]

***3** In April 2015, while mediation was ongoing, the Kirbys submitted a "Making Home Affordable Program Request for Mortgage Assistance" application requesting a loan modification (the "RMA application"). 21st Mortgage sent four letters relating to the application and a fifth letter informing the Kirbys that they did not qualify for a loan modification because the Brewer Property was not their primary residence. Then, in response to the Kirbys' request to continue mediation and discuss further loss mitigation options, 21st Mortgage sent a letter offering a short sale as a possible alternative to foreclosure. After the Kirbys appealed the denial of their RMA application, 21st Mortgage sent one letter acknowledging their appeal and another reporting that it was upholding its decision. All of these letters contained a Collection Notice and a similar bankruptcy disclaimer:

> Please be advised further that this letter constitutes neither demand for payment of the captioned debt nor a notice of personal liability to any recipient hereof who might have received a discharge of such debt in

> accordance with applicable bankruptcy laws or who might be subject to automatic stay of Section 362 of the United States Bankruptcy Code.

("Bankruptcy Disclaimer").

II. Post-Mediation Correspondence

After mediation and loss mitigation efforts proved unsuccessful and the case was returned to the foreclosure docket, Mr. Kirby's counsel sent a letter to 21st Mortgage dated October 6, 2015 asking 21st Mortgage to "refrain from any further contact with the Debtor" (the "Cease and Desist Letter"). In that letter, Attorney Logan also maintained that 21st Mortgage violated the discharge injunction by sending a mortgage statement dated September 14, 2015, but he did not contend that any of the other 18 communications sent during the mediation period violated the discharge injunction. After receiving the Cease and Desist Letter, 21st Mortgage continued to send written communications, although no communications related to the defaulted loan were sent following the February 2017 foreclosure sale.

A. Escrow Account Disclosure, Short Sale Letter, and PMI Disclosure

Between October 2015 and November 2016, 21st Mortgage sent: (1) an annual escrow account disclosure statement (the "Escrow Account Disclosure") listing current and new payment information, the escrow account activity for the current year, and a projection for the next year; (2) a letter regarding a possible short sale as an alternative to foreclosure (the "Short Sale Letter"); and (3) another PMI Disclosure. All of these communications included the Bankruptcy Disclaimer and were addressed to Mr. Kirby in the care of his counsel. Both the PMI Disclosure and Short Sale Letter contained a Collection Notice, but the Escrow Account Disclosure did not.

B. The Cash-for-Keys Letter

On January 4, 2016, 21st Mortgage's counsel, Eleanor L. Dominguez, sent a letter directly to the Kirbys at their Saco address (the "Cash-for-Keys Letter").[9] This was the first correspondence sent directly to the Kirbys. The letter provided, in relevant part:

> Your former attorney, J. Scott Logan, Esq., has given me permission to contact you directly in this foreclosure action. As you know, mediation efforts in this matter were unsuccessful and the above referenced matter will likely be scheduled for trial soon. At trial, my client, MidFirst Bank,[10] will seek a foreclosure judgment. In Maine, lenders may seek borrowers for any deficiency between the ultimate sales price of a foreclosed property and the fair market value of the same. *Because you have both been discharged in bankruptcy*, my client would like to offer you a Consent Judgment with a waiver of deficiency and Cash-for-Keys assistance rather than proceed to trial. For MidFirst, it saves the time and expense of a trial. For you, you do not have to worry about ever being pursued for a deficiency and you will receive up to $ 1,000.00 payable after foreclosure sale and inspection, if you agree to the conditions set forth in the **attached** Cash-for-Keys Agreement.

***4** (emphasis added). Although the letter did not contain a pro forma bankruptcy disclaimer, it acknowledged that the Kirbys had each received a bankruptcy discharge. The letter was accompanied by a draft consent judgment of foreclosure and order of sale; however, the record reflects that Mr. Kirby's counsel did not include the draft judgment and order of sale in either the exhibits to the complaint or as part of the summary judgment record.

C. The Right to Cure Notice

In March 2016, Attorney Dominguez sent a Notice of Mortgagor's Right to Cure (the "Right to Cure Notice") to Mr. Kirby at both the Saco and Brewer addresses, notifying him that he was in default, that he could cure the default by making certain payments, and that 21st Mortgage intended to foreclose on the mortgage if he did not cure the default. The Right to Cure Notice contained a Collection Notice and the following bankruptcy disclaimer on the last page:

> To the extent your original obligation was discharged, or is subject to an automatic stay of bankruptcy under Title 11 of the United States Code, this notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation. However, a secured party retains rights under its security instrument, including the right to foreclose its lien.

D. The State Court Pleading

In July 2016, 21st Mortgage filed a pleading in the state court foreclosure action (the "State Court Pleading"), which provided on the last page: "Defendants are already liable for costs and attorney's fees associated with the enforcement of the note and mortgage." In the proceedings below, however, Mr. Kirby only submitted the final page of the State Court Pleading on which the allegedly objectionable language appeared and, therefore, the precise nature of the document and the context in which this statement appeared are not apparent from the summary judgment record.

III. The Adversary Proceeding

Mr. Kirby's complaint contained two counts.[11] In Count I, he alleged that 21st Mortgage's post-discharge communications were coercive attempts to collect a debt in violation of the discharge injunction and that he was entitled to actual damages (including costs and attorney's fees) and punitive damages pursuant to § 105(a). In Count II, Mr. Kirby asserted that 21st Mortgage's post-discharge communications were unlawful debt collection practices under the FDCPA. In his prayer for relief, he asked for actual damages and a sanction of "up to $ 1,000.00 per violation[.]"

21st Mortgage filed a motion for summary judgment (the "Summary Judgment Motion"), asserting that there were no genuine issues of material fact and that, as a matter of law, its actions did not violate the discharge injunction.[12] 21st Mortgage acknowledged that it had notice of Mr. Kirby's discharge and had sent a total of 22 post-discharge communications regarding the defaulted loan,[13] but contended that none of those communications improperly harassed or coerced Mr. Kirby to pay a discharged debt in violation of the discharge injunction.

***5** In his objection to the Summary Judgment Motion (the "Objection"), Mr. Kirby argued that 21st Mortgage, having notice of the entry of his discharge, sent at least nine and "possibly as many as twenty-six" mortgage statements and "at least ten other communications" which "demanded payment" from him in violation of the discharge injunction.[14] He did not raise any factual disputes regarding the substance of the written communications identified in the Summary Judgment Motion or the circumstances under which they were sent. Rather, he argued that there were material "issues" in dispute as to whether the disclaimer language "insulate[d]" 21st Mortgage from liability for discharge injunction violations. Additionally, he contended that any mitigating effect of the bankruptcy disclaimers was offset by the numerous other "demands for payment" made by 21st Mortgage, such as the Cash-for-Keys Letter, the Right to Cure Notice, and the State Court Pleading.

In support of his Objection, Mr. Kirby submitted two (almost identical) affidavits of his counsel, Attorney Logan,[15] which primarily listed the communications prepared and/or sent by 21st Mortgage or its counsel, including the Cash-for-Keys Letter, the State Court Pleading, and 21st Mortgage's internal mortgage servicing notes. Mr. Kirby also submitted his own affidavit with no exhibits attached. That affidavit was notarized and provided, in its entirety:

> I, Gregory Kirby, hereby state and affirm, under penalties of perjury, the following:
>
> 1. I received multiple communications from 21st Mortgage after my bankruptcy discharge that asked for money.
>
> 2. My wife and I received a letter from Attorney Dominguez offering to waive a mortgage deficiency in exchange for consenting to foreclosure judgment.
>
> 3. Attorney Dominguez's letter was confusing and upsetting to me and my family because we believed we had discharged our personal duties to pay the mortgage in our bankruptcy.
>
> 4. My wife and I received a pleading in the foreclosure suggesting that we remained obligated to pay 21st Mortgage's legal fees, after the bankruptcy.

In his response to the Defendant's Statement of Material Facts, Mr. Kirby admitted all of the material facts as set forth by 21st Mortgage, but stated that the bankruptcy disclaimers were not "prominent." He also filed an Opposing Statement of Material Facts, which mirrored the averments contained in Attorney Logan's affidavit and primarily cited Attorney Logan's affidavit for evidentiary support.

A. The Bankruptcy Court's Order and Decision

On June 26, 2018, the bankruptcy court entered the Order granting the Summary Judgment Motion, and also issued an accompanying written decision. See Kirby v. 21st Mortg. Corp. (In re Kirby), 589 B.R. 456 (Bankr. D. Me. 2018).

The bankruptcy court articulated the discharge injunction standard under § 524(a)(2) as follows: "In order to prove a violation of the discharge injunction, a debtor must show that the defendant (1) had notice of the discharge, (2) intended the actions which violated the discharge, and (3) acted in a way that improperly coerced or harassed the debtor." Id. at 463 (citing Bates v. CitiMortgage, Inc., 844 F.3d 300, 304 (1st Cir. 2016)). Noting there was no dispute that 21st Mortgage received notice of Mr. Kirby's discharge and intended the post-discharge actions which allegedly violated the discharge injunction, the court stated that "the only unresolved question is whether this conduct was 'improperly coercive or harassing under an objective standard.' " Id. at 464. Examining each of the post-discharge communications sent by 21st Mortgage, the court held that none of the post-discharge communications were improperly "coercive" or "harassing." See id. at 469.

***6** With regard to the mortgage statements, the bankruptcy court observed that they "might be confusing to a layperson" as they stated an amount due and a due date, that late fees would be added if payment was not made, and that they were an attempt to collect a debt. Id. at 466. The court concluded, however, that the bankruptcy disclaimers adequately informed the recipient that 21st Mortgage was not attempting to collect a debt from the recipient or to hold the recipient personally responsible for the debt if he had been discharged in bankruptcy. Id. The court also found it compelling that: (1) 21st Mortgage sent the statements to Mr. Kirby's counsel, rather than to Mr. Kirby, "during the course of ongoing loan modification negotiations"; (2) 21st Mortgage stopped sending mortgage statements immediately upon receiving the Cease and Desist Letter; and (3) Mr. Kirby's counsel did not send the Cease and Desist Letter until after the mediation process concluded, which indicated "he did not perceive the statements to be any danger or threat to his client." Id. at 466. Under these circumstances, the bankruptcy court ruled, the mortgage statements did "not constitute discharge injunction violations." Id.

The court similarly concluded that the Loss Mitigation Letters, the Short Sale Letter, the ARM Notice, and the Escrow Account Disclosure did not violate the discharge injunction because they contained bankruptcy disclaimers, were sent to Mr. Kirby's counsel, and were sent during settlement negotiations. Id. at 466-67.

As to the Cash-for-Keys Letter, the bankruptcy court determined that the letter was "inadmissible" because it was only before the court by way of Mr. Kirby's and Attorney Logan's affidavits. The court ruled that those affidavits were "defective" because they were not based on the affiants' personal knowledge and because Attorney Logan's affidavits were not properly notarized. Id. at 467-68. Consequently, the court declined further consideration of the Cash-for-Keys Letter. Id.

Lastly, the bankruptcy court considered the Right to Cure Notice, stating that the "vast majority" of the notice contained information that a foreclosing mortgagee must, under Maine law, include in a right to cure letter. Id. at 468 (citing, among other things, Me. Rev. Stat. Ann. tit. 14, § 6111(1-A)). Because strict compliance with the statutory requirements is required for a valid foreclosure, the court concluded, 21st Mortgage was "required" to send the Right to Cure Notice before foreclosing on the Brewer Property and, therefore, it did not violate the discharge injunction. Id.

Based on the foregoing, the bankruptcy court concluded:

> 21st Mortgage did communicate with Mr. Kirby and his wife following the entry of a discharge in his bankruptcy case[ ]. However, the vast majority of the written communications which were properly presented to the court on 21st Mortgage's motion for summary judgment were sent to Mr. Kirby's bankruptcy counsel and given the context of those communications they do not objectively constitute coercive or harassing actions in violation of the protections of the discharge injunction. Of the two communications which were sent directly to the Kirbys, only one—the [Right to Cure Notice]—was appropriate for this court to consider upon the motion for summary

> judgment. For the reasons set forth above, the [Right to Cure Notice] was not a violation of the discharge injunction either. Therefore, 21st Mortgage's motion for summary judgment will be granted.

Id. at 469.

Mr. Kirby timely filed a notice of appeal with respect to the Order.

POSITIONS OF THE PARTIES

I. Mr. Kirby

Mr. Kirby argues that the bankruptcy court erred in granting summary judgment in favor of 21st Mortgage because: (1) there were genuine issues of material fact as to the coercive nature of the post-discharge correspondence; and (2) 21st Mortgage failed to establish that its post-discharge correspondence did not violate the discharge injunction as a matter of law. He claims to have raised genuine issues of material fact through Attorney Logan's affidavits that identified the many communications from 21st Mortgage, evidencing "a pattern of coercive behavior," and maintains that the bankruptcy court erroneously deemed the affidavits to be inadmissible.

***7** He further asserts that the bankruptcy court erroneously determined that all of the communications had bankruptcy disclaimers, and argues that any mitigating effect of the bankruptcy disclaimers was offset by the numerous other "demands for payment" made by 21st Mortgage. According to Mr. Kirby, the "cumulative effect" of all the communications sent by 21st Mortgage was coercive and harassing, even if the individual communications alone were not.

II. 21st Mortgage

21st Mortgage counters that its post-discharge communications did not violate the discharge injunction because they were sent: (1) to comply with Maine state law; (2) to engage in "good faith mediation negotiations"; and/or (3) in furtherance of "routine mortgage servicing and foreclosure processing." Moreover, it notes that the majority of its communications were sent to Mr. Kirby's counsel, rather than to Mr. Kirby, and all but one communication included bankruptcy disclaimers indicating that Mr. Kirby was not personally liable for any discharged debt. Therefore, 21st Mortgage contends, when considering the totality of the circumstances, the bankruptcy court correctly ruled that the post-discharge communications did not improperly harass Mr. Kirby for, or attempt to coerce him into, payment of a discharged debt.

APPELLATE JURISDICTION

I. Finality

[1] [2]We may hear appeals from final orders. See 28 U.S.C. § 158(a)(1) and (b)(1); see also Bullard v. Blue Hills Bank, ––– U.S. ––––, 135 S.Ct. 1686, 1692, 191 L.Ed.2d 621 (2015) (discussing the Panel's jurisdiction to hear bankruptcy appeals under 28 U.S.C. § 158(a)); Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (1st Cir. BAP 1998) (citing 28 U.S.C. § 158(a)(1)). Generally, an order granting a motion for summary judgment is a final order. Bullard, 135 S.Ct. at 1694; see also Encanto Rests., Inc. v. Aquino Vidal (In re Cousins Int'l Food, Corp.), 565 B.R. 450, 458 (1st Cir. BAP 2017) ("An order granting summary judgment is a final order where no counts against any defendants remain.") (citation omitted) (internal quotations omitted). Here, the bankruptcy court granted summary judgment in favor of 21st Mortgage on both counts of the complaint. Therefore, the Order is final and we have jurisdiction to hear this appeal.[16]

II. Scope of the Appeal

[3]When assessing our jurisdiction, we must also identify the scope of the appeal. In his statement of the issues on appeal, Mr. Kirby asserted that the bankruptcy court erred in granting summary judgment as to both counts of his complaint. On appeal, however, he

does not challenge, or even address, the bankruptcy court's grant of summary judgment as to the alleged violations of the FDCPA. Consequently, he has waived that issue. See Canning v. Beneficial Me., Inc. (In re Canning), 706 F.3d 64, 70 n.7 (1st Cir. 2013) (stating that appellant waived issue by failing to raise it in its brief); Tower v. Leslie-Brown, 326 F.3d 290, 299 (1st Cir. 2003) ("[W]e have made it abundantly clear that failure to brief an argument does, in fact, constitute waiver for purposes of appeal.") (citation omitted). Therefore, our review in this appeal is limited to the grant of summary judgment as to Count I—the alleged discharge injunction violations.

STANDARD OF REVIEW

***8** [4]The standard of review on appeal from a grant of summary judgment is de novo. Prime Healthcare Servs.–Landmark LLC v. United Nurses & Allied Prof'ls, Local 5067, 848 F.3d 41, 45 (1st Cir. 2017); United Paperworkers Int'l Union, Local 14 v. Int'l Paper Co., 64 F.3d 28, 31 (1st Cir. 1995) ("Because the summary judgment standard requires the trial court to make a legal determination rather than to engage in factfinding, appellate review is plenary.") (citation omitted); Noviello v. City of Bos., 398 F.3d 76, 84 (1st Cir. 2005) ("An order granting summary judgment engenders de novo review.") (citation omitted).

DISCUSSION

I. The Summary Judgment Standard

"In bankruptcy, summary judgment is governed in the first instance by Bankruptcy Rule 7056" which "incorporates into bankruptcy practice the standards of Rule 56 of the Federal Rules of Civil Procedure." Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 762 (1st Cir. 1994) (citation omitted); see also Soto-Rios v. Banco Popular de P.R., 662 F.3d 112, 115 (1st Cir. 2011). Summary judgment should only be granted "when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law." In re Varrasso, 37 F.3d at 763. "[A]n issue is 'genuine' if the record permits a rational factfinder to resolve that issue in favor of either party," and "[a] fact is 'material' if its existence or nonexistence has the potential to change the outcome of the suit." Harrington v. Simmons (In re Simmons), 810 F.3d 852, 857 (1st Cir. 2016) (citation omitted) (internal quotations omitted). A party asserting that a fact can be genuinely disputed "must support the assertion by [ ] citing to ... materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials[.]" Fed. R. Civ. P. 56(c)(1)(A). Finally, when considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. Johnson v. Univ. of P.R., 714 F.3d 48, 52 (1st Cir. 2013) (citation omitted).

A party moving for summary judgment has the initial burden of demonstrating that there are no material facts that are genuinely disputed and that the movant is entitled to judgment as a matter of law. Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 66 (1st Cir. 2004) (citations omitted). In meeting this burden, the moving party "ordinarily must support the motion with affidavits or other materials of evidentiary quality." Fed. Refinance Co. v. Klock, 352 F.3d 16, 30 (1st Cir. 2003) (citing Plumley v. S. Container, Inc., 303 F.3d 364, 368 (1st Cir. 2002)). "The burden of production then shifts to the nonmovant to show that a genuine issue looms." Id. (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990)). "The protocol differs, however, as to issues on which the nonmovant bears the burden of proof." Id. "As to such issues, the movant is not obliged to make an initial evidentiary showing." Id. "Rather, it is incumbent upon the nonmovant to demonstrate, in the first instance, that specific facts exist sufficient to create an authentic dispute." Id. (citation omitted).

II. The Discharge Injunction and its Limitations

***9** [5] [6]Section 524(a)(2) provides that a discharge under the Bankruptcy Code "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 such debt as a personal liability of the debtor ...." 11 U.S.C. § 524(a)(2); see also Ramírez Rosado v. Banco Popular de P.R. (In re Ramírez Rosado), 561 B.R. 598, 605 (1st Cir. BAP 2017) (stating § 524 "establishes the discharge injunction") (citation omitted). "The injunction affords honest but unfortunate debtors [ ] a 'fresh start' from the burdens of personal liability for unsecured pre[-]petition debts and thus advances the overarching purpose of the Bankruptcy Code." In re Canning, 706 F.3d at 69 (citing Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); Pratt v. Gen. Motors Acceptance Corp. (In re Pratt), 462 F.3d 14, 17-18 (1st Cir. 2006)). "[T]he scope of the injunction is broad, and bankruptcy courts may enforce it through [ ] § 105 ...." Id. (citing In re Pratt, 462 F.3d at 17, 21).

[7] [8] [9] [10] [11] [12]"The burden of proof is on the former debtor to establish by clear and convincing evidence that [the] creditor violated the post-discharge injunction." In re Ramírez Rosado, 561 B.R. at 605 (citation omitted) (internal quotations omitted). To prevail on a claim for violations of § 524(a)(2), a debtor must show that the creditor: (1) "ha[d] notice of the discharge"; (2) "intend[ed] the actions which violated the discharge"; and (3) "act[ed] in a way that improperly coerc[ed] or harass[ed] the debtor." Bates, 844 F.3d at 304 (quoting Best v. Nationstar Mortg. LLC (In re Best), 540 B.R. 1, 9 (1st Cir. BAP 2015)). In this circuit, courts "assess whether conduct is improperly coercive or harassing under an objective standard—the debtor's subjective feeling of coercion or harassment is not enough." Id. (citations omitted). "While there is no specific test to determine whether a creditor's conduct meets this objective standard, the circuit considers the facts and circumstances of each case, including factors such as the immediateness of any threatened action and the context in which a statement is made." In re Ramírez Rosado, 561 B.R. at 605 (citing Bates, 844 F.3d at 304) (internal quotations omitted). "An action is coercive when it is tantamount to a threat, or places the debtor between a rock and a hard place in which he would lose either way." Id. (citing Diamond v. Premier Capital, Inc. (In re Diamond), 346 F.3d 224, 227 (1st Cir. 2003)) (internal quotations omitted).

[13] [14] [15]Although broad, the discharge injunction has its limitations. It does not prohibit "every communication between a creditor and debtor—only those designed to collect, recover or offset any [discharged] debt as a personal liability of the debtor." Id. at 605-06 (quoting In re Best, 540 B.R. at 9). In addition, the discharge injunction does not enjoin a secured creditor from recovering on valid pre-petition liens, "which, unless modified or avoided, ride through bankruptcy unaffected and are enforceable in accordance with state law." In re Canning, 706 F.3d at 70 (citation omitted). "[A] secured creditor may take any appropriate action to enforce a valid lien surviving the discharge, as long as the creditor does not pursue in personam relief against the debtor." In re Best, 540 B.R. at 9 (citation omitted) (internal quotations omitted).[17]

***10** [16] [17]The question of whether 21st Mortgage's communications violated the discharge injunction is a "particularly fact-intensive inquiry" and, therefore, no bright line rule exists. Caldwell v. Redstone Fed. Credit Union, No. 2:15-cv-01923-JHE, 2018 WL 3518466, at *13 (N.D. Ala. July 20, 2018) (citation omitted); see also Zotow v. Johnson (In re Zotow), 432 B.R. 252, 258 (9th Cir. BAP 2010) ("Whether a communication is a permissible or prohibited one is a fact-driven inquiry which makes any bright line test unworkable.") (citations omitted); In re Culpepper, 481 B.R. 650, 658 (Bankr. D. Or. 2012) ("Because of the variety of situations in which alleged violations of the discharge injunction can arise, such cases are very fact dependent."). Case law, however, is instructive in determining whether a creditor's communications violate the discharge injunction. Because the discharge injunction only prohibits those communications "designed to collect, recover or offset any [discharged] debt as a personal liability of the debtor," In re Ramírez Rosado, 561 B.R. at 606 (citation omitted), correspondence that is "informational in nature" does not violate the automatic stay or discharge injunction. Elliott v. PHH Mortg. Corp., No. 15-CV-01221(BKS), 2017 WL 10153593, at *5 (N.D.N.Y. Mar. 3, 2017); see also In re Zotow, 432 B.R. at 259; Mele v. Bank of Am. Home Loans (In re Mele), 486 B.R. 546, 557 (Bankr. N.D. Ga. 2013) (analyzing the "overall tenor" of the correspondence to determine whether it was informational or sought to collect a debt personally from the debtor).

[18] [19]"The 'common factor' in cases where courts 'find a violation of either the automatic stay or the discharge injunction by a mortgagee for loan related correspondence' is 'a clear demand for payment of a pre[-]petition debt accompanied by coercion in the form of threatened action or some other consequence for nonpayment, or harassment to induce the debtor to pay.' " Elliott, 2017 WL 10153593, at *5 (quoting In re Bell, No. 14-60510, 2014 WL 6913509, at *3 (Bankr. N.D.N.Y. Nov. 13, 2014)); see also In re Zotow, 432 B.R. at 258-59 (collecting cases). When evidence of coercion or harassment is present, courts typically find that a bankruptcy disclaimer is ineffective to insulate the creditor from liability. See, e.g., In re Youngkin, No. 12-08391-8-RDD, 2014 WL 789117, at *6 (Bankr. E.D.N.C. Feb. 27, 2014) (concluding that despite disclaimer, the mortgagee's monthly mortgage statement violated the discharge injunction because it was "nothing more than a cleverly disguised form meant to induce payment of funds [from the debtor]"); Todt v. Ocwen Loan Servicing, LLC (In re Todt), 567 B.R. 667, 679 (Bankr. D.N.H. 2017) (stating that "a pro forma bankruptcy disclaimer is not a 'get out of jail free' card that can absolve a creditor of liability for a pattern of conduct that is inconsistent with the terms of the disclaimer itself"). Courts have also concluded, however, that communications do not violate the discharge injunction if they include an "unambiguous" disclaimer that the communication is not an attempt to collect in personam, but rather, only an attempt to assert the creditor's *in rem* rights against collateral. See In re Bell, 2014 WL 6913509, at *4 (stating that although mortgage statement indicated a total amount due, a due date, and the possibility of a late charge, it included "an unambiguous and conspicuously placed disclaimer in bold typeface" that expressly advised debtors that it was not an attempt to collect a debt against them personally but "strictly for information purposes only").[18]

***11** [20]The First Circuit also requires courts to look beyond the particular content of communications and consider whether the circumstances and context in which the communications occurred "give rise to an inference of coercion." See Bates, 844 F.3d at 306.

For example, in Bates, the First Circuit upheld the bankruptcy court's ruling that Internal Revenue Service ("IRS") 1099-A forms which indicated (incorrectly) that the debtors were personally liable for a debt did not violate the discharge injunction. Id. at 307. The First Circuit determined that the IRS forms merely provided information about the potential tax implications of a foreclosure; even if the lender had incorrectly "checked the box" indicating that the debtors were personally liable for the debt, that action did not "create a demand for payment." Id. at 304-05. It determined that neither the lender's failure to correct the forms, nor a telephone conversation between the debtors and the lender in which the lender incorrectly stated that the debt was not discharged in bankruptcy violated the discharge injunction. Id. at 306. In making this determination, the First Circuit considered whether "all of the circumstances surrounding the 1099-A Forms" gave rise to an "inference of coercion," and concluded that they did not. Id.

III. Analysis

Employing the summary judgment and discharge injunction standards set forth above, we now consider: (1) whether Mr. Kirby demonstrated that there were genuine issues of material fact which precluded the entry of summary judgment as to the alleged discharge injunction violations; and (2) whether the bankruptcy court erred in ruling that 21st Mortgage's post-discharge correspondence did not violate the discharge injunction as a matter of law.

A. Whether Mr. Kirby Demonstrated Genuine Issues of Material Fact

In his Objection, Mr. Kirby asserted there were "factual disputes" precluding summary judgment as to: whether the post-discharge communications contained "prominent" bankruptcy disclaimers, whether the Cash-for-Keys Letter was an "offer [to] waive[ ] a discharged debt," and whether communications sent after the Cease and Desist Letter "exacerbate [21st Mortgage]'s conduct." None of these alleged "factual disputes" are questions of *material fact* –but merely legal arguments in support of his contention that the communications were coercive and harassing.[19] The underlying factual record—the content of the communications and to whom and when they were sent—are not in dispute. Likewise, even if Mr. Kirby's affidavit was admissible, the content of the affidavit does not raise any factual disputes. No additional documents were attached to the affidavit, and whether Mr. Kirby was "confus[ed] and upset[ ]" by 21st Mortgage's communications is not the question. The only question is whether, under the objective standard articulated by the First Circuit, the record supports a finding that the discharge injunction was violated. Therefore, Mr. Kirby's so-called "factual disputes" do not present a trial-worthy issue.

Although Mr. Kirby pointed to no other alleged factual disputes, we would be remiss in failing to consider whether there is a genuine factual dispute as to the number of communications sent. 21st Mortgage asserted that it sent nine post-discharge mortgage statements, but in his Objection, Mr. Kirby stated that 21st Mortgage "printed and apparently sent ... 22 monthly statements." At first blush, this contradiction seems to create a factual dispute. But Mr. Kirby offered no evidentiary support for this assertion, as required by Rule 56(c)(1).[20] Despite his acknowledgment in his Objection to the Summary Judgment Motion that discovery was complete, he did not submit copies of the additional 13 monthly statements 21st Mortgage allegedly sent. Instead, he offered as part of the summary judgment record only 21st Mortgage's computerized "collection notes" which reflected that additional mortgage statements were internally "printed."[21] Therefore, Mr. Kirby failed to demonstrate a genuine factual dispute regarding the number of post-discharge mortgage statements.[22] In sum, Mr. Kirby failed to present "specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue" which would have precluded the entry of summary judgment. See Brooks v. AIG SunAmerica Life Assurance Co., 480 F.3d 579, 586 (1st Cir. 2007) (citation omitted) (emphasis omitted). The only remaining question is whether, on the undisputed facts, 21st Mortgage was entitled to judgment as a matter of law.

B. Whether 21st Mortgage Violated the Discharge Injunction

***12** It is undisputed on appeal that 21st Mortgage had actual knowledge that Mr. Kirby received a discharge under § 727 and that, after receiving notice of the discharge, it sent 24 communications to Mr. Kirby or his counsel and filed a pleading in the state court foreclosure action. Consequently, the first two elements of the discharge injunction standard under § 524(a)(2)—that the creditor had notice of the discharge and intended the actions which violated the discharge—are satisfied. Our focus, therefore, is on the third element – whether, under an objective standard and considering the facts and circumstances surrounding the communications, the post-discharge communications improperly coerced or harassed Mr. Kirby into paying the discharged debt. See Bates, 844 F.3d at 306 (considering whether the circumstances and context in which the communications occurred "give rise to an inference of coercion"); see also Schinabeck v. Wells Fargo Bank, N.A. (In re Schinabeck), Adv. Pro. No. 11-4022, 2014 WL 5325781, at *8 (Bankr. E.D. Tex. Oct. 20, 2014) (stating that "it is appropriate in the § 524 context not only to look at each individual act, but also to examine the totality of the circumstances surrounding the Defendant's conduct").

Here, 21st Mortgage sent 24 written communications to Mr. Kirby or his counsel during the 26-month period following the entry of the Mr. Kirby's discharge. Nineteen of the post-discharge communications were sent while the parties were actively engaged in mediation to negotiate an alternative to foreclosure. After the conclusion of the mediation process in October 2015, 21st Mortgage and its counsel sent five additional written communications, but ceased all correspondence after the foreclosure sale in February 2017.

Although Mr. Kirby argues that the sheer volume of the communications amounts to coercion, even if the individual communications do not, the surrounding circumstances and context in which the communications were sent eliminated any coercive or harassing effect of the post-discharge communications.

Because of the unique circumstances presented by the parties' involvement in the mediation process, we consider the post-discharge communications in two categories—those that were sent during the mediation period and those that were sent after the conclusion of the mediation period.

1. Communications Sent During Mediation

[21]The facts and circumstances surrounding the 19 written communications sent to Mr. Kirby in the care of his counsel during the mediation period—nine mortgage statements, the ARM Notice, the PMI Disclosure, and eight Loss Mitigation Letters—are clear from the record and are undisputed. Mr. Kirby wanted to retain the Brewer Property and, therefore, voluntarily initiated and participated in the state court-sponsored mediation program in order to explore alternatives to foreclosure. Although his requests were ultimately denied, Mr. Kirby actively pursued loan modification and other loss mitigation options with 21st Mortgage. At no time during the nearly year-long mediation period did Mr. Kirby or his attorney allege that 21st Mortgage's correspondence violated the discharge injunction or ask 21st Mortgage to cease its written communications. Attorney Logan waited until the conclusion of the mediation to send the Cease and Desist Letter, in which he only alleged that one of the 19 communications sent during the mediation period (a mortgage statement) violated the discharge injunction. Upon receipt of the Cease and Desist Letter, 21st Mortgage immediately stopped sending the monthly mortgage statements and the only communications sent thereafter were either informational in nature or related to the foreclosure process.

[22]In addition, all of the post-discharge communications sent during the mediation process were sent to Mr. Kirby's counsel and not directly to Mr. Kirby, and all but one of them contained unambiguous bankruptcy disclaimers informing Mr. Kirby that if he had received a bankruptcy discharge, 21st Mortgage was not attempting to collect a debt from him personally and the correspondence was for informational purposes only. The ARM Notice, which did not have a bankruptcy disclaimer, merely informed Mr. Kirby of changes to the interest rate on his adjustable rate mortgage. Communications that do not contain a bankruptcy disclaimer are not per se violations of the discharge injunction where it is evident from the circumstances that there is no coercion or harassment. See In re Gill, 529 B.R. 31, 41 (Bankr. W.D.N.Y. 2015) ("[T]he absence of disclaimer language in a communication to a debtor is not a *per se* violation of the discharge injunction, where there is no evidence of coercion or harassment.") (citing Whitaker v. Bank of Am. (In re Whitaker), Adv. Pro. No. 13-5008, 2013 WL 2467932, at *8 (Bankr. E.D. Tenn. June 7, 2013)). Such is the case here.

***13** Although neither the inclusion of a bankruptcy disclaimer nor sending the letters to counsel, standing alone, insulates 21st Mortgage from liability, these facts become more compelling where, as here, the parties were also engaged in extensive efforts to mediate an alternative to foreclosure.[23] Not only were the parties participating in mediation through the state court foreclosure diversion program, but Mr. Kirby also initiated communications with 21st Mortgage when he submitted requests for a loan modification. Several courts have recognized that when a debtor, after the entry of his discharge, initiates communications with the creditor in order to explore alternatives to foreclosure so that he can retain the property, certain communications from the creditor (including those designed to inform the debtor of the payment amounts necessary to bring the mortgage current) are "logical" and do not violate the discharge injunction. See Ladebush v. Beneficial N.H., Inc. (In re Ladebush), Adv. Pro. No. 13-1154-JMD, 2016 WL 675580, at *9 (Bankr. D.N.H. Feb. 18, 2016) (determining that a creditor's communications seeking payment from the debtors were not "improperly coercive" as the debtors had "evidence[d] a desire to stay in the Property and attempt to resolve the arrearage"); Manning v. CitiMortgage, Inc. (In re Manning), 505 B.R. 383, 387 (Bankr. D.N.H. 2014) (determining that, where the debtor initiated post-discharge contact with the creditor in an effort to avoid foreclosure and retain his property, the creditor's request that the debtor become current on his mortgage and sign a reaffirmation agreement did not violate the discharge injunction); In re Culpepper, 481 B.R. at 658 (stating that a debtor who filed several post-discharge applications to obtain a loan modification "opened the door to further communications with [the creditor]"). As one court observed, where a debtor fails to reaffirm the debt, he will be "forced to deal with the [creditor] post-discharge" if he wants to retain his property. In re Manning, 505 B.R. at 388.

The totality of the circumstances presented in the record surrounding the post-discharge communications serves to eliminate any alleged coercive effect of the communications that were sent during the mediation process. We conclude, therefore, that the bankruptcy court did not err in ruling that the nine mortgage statements, the ARM Notice, the PMI Disclosure, and the Loss Mitigation Letters did not violate the discharge injunction.

2. Post-Mediation Communications

The record reflects that, following the failure of mediation and loss mitigation and 21 Mortgage's receipt of the Cease and Desist Letter, 21st Mortgage or its counsel sent the following: (1) the Escrow Account Disclosure; (2) another PMI Disclosure; (3) the Cash-for-Keys Letter; (4) the Right to Cure Notice; and (5) the State Court Pleading. We examine each communication in turn and conclude that none of them coerced or harassed Mr. Kirby to pay a discharged debt.

(a) Escrow Account Disclosure

[23]The Escrow Account Disclosure informed Mr. Kirby of the current and projected yearly escrow account activity. Although it contained new payment information and a payment due date, it did not indicate that it was an attempt to collect a debt, make any demand for payment, or threaten any adverse consequences. It was sent to Mr. Kirby's counsel, rather than to Mr. Kirby, and it contained an unambiguous bankruptcy disclaimer. We conclude, therefore, that the record does not establish that the Escrow Account Disclosure improperly coerced and harassed Mr. Kirby in violation of the discharge injunction. See, e.g., In re Whitmarsh, 383 B.R. 735, 736 (Bankr. D. Neb. 2008) (stating that notice informing debtors of the status of their escrow account did not violate the discharge injunction); see also In re Ramírez Rosado, 561 B.R. at 605 (stating that discharge injunction only prohibits communications designed to collect a debt as a personal liability of the debtor).

(b) PMI Notice

[24]The PMI Notice informed Mr. Kirby of his rights under federal law regarding the cancellation or termination of his private mortgage insurance. It was purely informational in nature and did not demand payment, request that Mr. Kirby take any action, or threaten any adverse consequences. It was also sent to Mr. Kirby's counsel, rather than to Mr. Kirby, and contained an unambiguous bankruptcy disclaimer. We agree with the holding in a similar case, In re Youngkin, 2014 WL 789117, at *5, where the bankruptcy court held that a private mortgage insurance disclosure which contained a bankruptcy disclaimer did not violate the discharge injunction. We conclude, therefore, that the record does not establish that the PMI Notice improperly coerced and harassed Mr. Kirby in violation of the discharge injunction.

(c) The Cash-for-Keys Letter

***14** [25]Turning to the Cash-for-Keys Letter, we must first consider whether it is properly before us in this appeal. The bankruptcy court ruled that the Cash-for-Keys Letter was inadmissible as it was submitted only as an attachment to Attorney Logan's affidavits, which affidavits the court ruled were defective because they were not properly notarized. While it is true that the affidavits were not properly notarized, "28 U.S.C. § 1746 allows for 'unsworn declarations under penalty of perjury' to support any matter that legally requires an affidavit to support it." Uncle Henry's Inc. v. Plaut Consulting, Inc., 240 F.Supp.2d 63, 69 (D. Me. 2003) (citation omitted). Because Attorney Logan's affidavits were made "under pains and penalties of perjury," the defective jurats did not render them inadmissible.

The Cash-for-Keys Letter as submitted, however, suffers from a separate defect. The version provided by Attorney Logan as an exhibit to the complaint and as part of the summary judgment documents was incomplete in that he failed to attach the referenced draft consent judgment of foreclosure and order of sale. Although the failure to produce a complete copy of the letter does not render it inadmissible, the incomplete letter carries little evidentiary weight in the absence of the documents referenced therein. See Greener v. Cadle Co., 298 B.R. 82, 92 (N.D. Tex. 2003) ("[A]rguments regarding the accuracy or incompleteness of the document go to the weight of the evidence, not its admissibility."). Even if admissible, however, inasmuch as the portion of the letter that was submitted acknowledged that Mr. Kirby had received a discharge in bankruptcy, we conclude that it does not support a determination that the discharge injunction was violated.

(d) The Right to Cure Notice

[26]The bankruptcy court ruled that most of the Right to Cure Notice constituted information that a foreclosing mortgagee must, under Maine law, include in a default or right to cure letter. See Me. Rev. Stat. Ann. tit. 14, § 6111(1); Bordetsky v. JAK Realty Tr., 157 A.3d 233, 237 (Me. 2017). We need not address whether the Maine statute applies in this case, however, as we conclude that the plain language of the Right to Cure Notice demonstrates that it was an act to enforce 21st Mortgage's foreclosure rights rather than an attempt to collect a debt as a personal liability. The notice informed Mr. Kirby of the amount of the default, that he could cure the default by making certain payments, and that 21st Mortgage intended to foreclose on the mortgage if he did not cure the default. Moreover, the Right to Cure Notice contained an unambiguous bankruptcy disclaimer. Under these circumstances, the Right to Cure Notice was a permissible communication by a secured creditor in reference to the enforcement of its rights against a property *in rem*, rather than personally against Mr. Kirby. See Bibolotti v. Am. Home Mortg. Servicing, Inc., No. 4:11-CV-472, 2013 WL 2147949, at *10 (E.D. Tex. May 15, 2013) (describing an analogous letter as "precisely the type of communication the discharge injunction allows secured creditors to use in order to enforce their rights against a property *in rem*, rather than personally against a debtor") (citations omitted). We conclude, therefore, that the record does not establish that the Right to Cure Notice improperly coerced and harassed Mr. Kirby in violation of the discharge injunction.

(e) The State Court Pleading

[27]Finally, Mr. Kirby argues that the bankruptcy court erred by failing to consider whether the filing of the State Court Pleading violated the discharge injunction, specifically pointing to the statement in the State Court Pleading that "Defendants are already liable for costs and attorney's fees associated with the enforcement of the note and mortgage." However, as noted above, the document submitted as part of the summary judgment record included only the final page on which the allegedly objectionable language appeared, rendering it impossible to discern the precise nature of the document and the context in which this statement appeared. Mr. Kirby's failure to submit the entire pleading as part of the summary judgment record is fatal to his claim that the State Court Pleading violated the discharge injunction.[24] Therefore, any error by the bankruptcy court in failing to address the State Court Pleading is harmless. We cannot conclude, based on the last page of the State Court Pleading, that its overall effect was to harass or coerce Mr. Kirby into paying a discharged debt in violation of the discharge injunction.

CONCLUSION

***15** We conclude that Mr. Kirby failed to demonstrate genuine issues of material fact which would have precluded the entry of summary judgment. Additionally, we conclude, based on the totality of the circumstances surrounding the post-discharge communications contained in the summary judgment record, together with the substance of those communications, that Mr. Kirby did not establish that the correspondence in question, whether viewed individually or cumulatively, coerced or harassed him to pay a discharged debt in violation of the discharge injunction. Therefore, the bankruptcy court did not err in granting summary judgment in favor of 21st Mortgage, and we **AFFIRM**.

All Citations

--- B.R. ----, 2019 WL 2119624

Footnotes

1 All references to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code" or the "Code"). All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure and all references to "Rule" are to the Federal Rules of Civil Procedure.

2 As discussed later, because Mr. Kirby presented no argument in his appellate brief regarding the bankruptcy court's grant of summary judgment on the FDCPA claim, he has waived that issue and it is not before us in this appeal. See Scope of Appeal, infra.

3 The facts set forth in this section are gleaned from the undisputed facts articulated by the bankruptcy court in the Order, and the Joint Stipulations of Fact submitted by the parties.

4 The Foreclosure Diversion Program in Maine offers eligible homeowners the opportunity to participate in court-sponsored mediation sessions with their lenders to discuss alternatives to foreclosure litigation. See Me. Rev. Stat. Ann. tit. 14, § 6321-A.

5 The Kirbys identified the Brewer Property as their "former residence." On their petition, they listed a current residential address in Saco, Maine.

6 All of these communications were addressed as follows:
GREGORY M KIRBY
C/O SCOTT LOGAN
75 PEARL ST #212
PORTLAND ME 04101-4101

7 This is the only communication sent by 21st Mortgage that did not contain a bankruptcy disclaimer.

8 Mr. Kirby does not argue that the loss mitigation communications described in this paragraph violated the discharge injunction.

9 The Cash-for-Keys Letter contained the following salutation: "Dear Gregory and Amanda ...."

10 The reference to "MidFirst Bank" appears to be a scrivener's error.

11 It is not apparent from the record or from the appellate briefs why Mrs. Kirby, who was a borrower under the note and a mortgagor on the mortgage, did not join in the complaint.

12 In support of the Summary Judgment Motion, 21st Mortgage submitted: (1) an affidavit by Jeff Warkins, Staff Attorney of 21st Mortgage; (2) an affidavit by 21st Mortgage's counsel, Eleanor L. Dominguez; and (3) Defendant's Statement of Material Facts.

13 21st Mortgage identified its post-discharge communications as follows: (1) nine monthly mortgage statements; (2) the ARM Notice; (3) two PMI Notices; (4) eight "loss mitigation letters"; (5) the Right to Cure Notice; and (6) the Escrow Account Disclosure. 21st Mortgage did not submit either the Cash-for-Keys Letter or the State Court Pleading, arguing that the State Court Pleading was inadmissible under the "judicial privilege doctrine," and the Cash-for-Keys Letter constituted an "offer of compromise" which was inadmissible under Fed. R. Evid. 408.

14 Although Mr. Kirby specifically identified some of the communications, he did not identify the majority of the post-discharge communications by date or description.

15 The first affidavit was stated "under pains and penalty of perjury," but was not notarized, and the second was acknowledged by an attorney admitted to practice in Maine. It was dated October 20, 2017, but indicated that Attorney Logan appeared before the acknowledging attorney on October 19, 2017.

16 Although the bankruptcy court did not memorialize the judgment in a separate document as required by Rule 58(a), it is clear from the record that the Order was the court's final decision in the case and 21st Mortgage did not object to the filing of an appeal in the absence of a separate judgment. Under these circumstances, we conclude that the Order is final and that we have jurisdiction. See Bankers Trust Co. v. Mallis, 435 U.S. 381, 387, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (ruling that the separate-document requirement may be waived where the parties are not misled and the lower court "evidenced its intent that the opinion and order from which an appeal was taken would represent the final decision in the case").

17 Section 524(j), which provides a specific exception to the discharge injunction for certain acts taken by mortgagees, does not apply here as the Brewer Property was not Mr. Kirby's principal residence at the time the post-discharge communications were sent. See 11 U.S.C. § 524(j); see also Best, 540 B.R. at 9.

18 See also In re Best, 540 B.R. at 11 (stating there was no discharge injunction violation where disclaimers made it clear that the creditor was not attempting to collect a debt because the debtor had received a discharge); Navarro v. Banco Popular de P.R. (In re Navarro), 563 B.R. 127, 146-47 (Bankr. D.P.R. 2017) (holding that mortgage statements did not violate the discharge injunction because they contained disclaimers that specifically acknowledged the debtor's bankruptcy filing, stated they were not attempts to collect debts, and were sent for informational purposes only); Lemieux v. America's Servicing Co. (In re Lemieux), 520 B.R. 361, 366 (Bankr. D. Mass. 2014) (concluding that mortgage statements did not violate discharge where "[e]ven a hypothetical unsophisticated consumer" would understand that the statements were not attempts to collect a debt).

19 The alleged factual dispute as to whether the bankruptcy disclaimers were "prominent" did not give rise to an issue of "material" fact—it did not "change the outcome of the suit." See In re Simmons, 810 F.3d at 857.

20 Rule 56(c)(1) provides that a party asserting that a fact can be genuinely disputed "must support the assertion by ... citing to ... materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1).

21 21st Mortgage's staff attorney explained in an affidavit that "printed" statements were "internally printed" to their electronic system, but were not physically printed or sent to either Mr. Kirby or his counsel. Mr. Kirby did not offer any contradictory evidence which would give rise to a disputed fact.

22 Similarly, Mr. Kirby asserts *in his appellate brief* that 21st Mortgage sent a mortgage statement in January 2016 (several months after the Cease and Desist Letter), but he did not present that mortgage statement or any evidence in the summary judgment proceedings that 21st Mortgage sent any such mortgage statement. Therefore, there was no disputed fact before the bankruptcy court as to this issue.

23 We are not suggesting that sending post-discharge communications to counsel rather than directly to the debtor will automatically eliminate their coercive effect. See In re Diamond, 346 F.3d at 228 ("The fact that the statement was made by [creditor']s attorney to [debtor']s attorney does not detract from its coerciveness."); but see In re Reuss, No. DT 07-05279, 2011 WL 1522333, at *2 (Bankr. W.D. Mich. Apr. 12, 2011) (stating that sending letter to counsel rather than to the debtor himself "undercuts any suggestion that [the creditor] intended to pressure the [d]ebtor"). Rather, it is but one factor to be considered when examining the totality of the circumstances of the post-discharge communications.

24 Mr. Kirby argues that the entire State Court Pleading was properly before the court because 21st Mortgage produced it during discovery in response to his Request for Admissions. Mr. Kirby "overlooks the crucial point that documents do not automatically become a part of the record simply because they are the products of discovery." Hoffman v. Applicators Sales & Serv., Inc., 439 F.3d 9, 15 (1st Cir. 2006) (citation omitted). "If a party wishes the court to consider matters disclosed during discovery, he must take appropriate steps to have them included in the [summary judgment] record[.]" Id. Mr. Kirby did not offer 21st Mortgage's response as evidentiary support for his Opposing Statement of Material Facts and, therefore, it is not part of the summary judgment record. See id. Moreover, although Mr. Kirby included a complete copy of the State Court Pleading in the appellate record, in reviewing a grant of summary judgment, "we are limited to the ... evidence available to the court at the time the motion was made." Id. at 14.

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