

JUN 18 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6 In re:) BAP No. EC-09-1409-JuPaKw
7 ALEX ZOTOW and THERESA ZOTOW,) Bk. No. 09-20504
8 Debtors.)
9 _____)
10 ALEX ZOTOW; THERESA ZOTOW,)
11 Appellants,)
12 v.) O P I N I O N
13 JAN P. JOHNSON; BAC HOME LOANS)
14 SERVICING, LP, formerly known)
15 as COUNTRYWIDE HOME LOANS)
16 SERVICING, LP,)
17 Appellees.)

Argued and Submitted on May 18, 2010
at San Francisco, California

Filed - June 18, 2010

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Richard T. Ford, Bankruptcy Judge, Presiding

Before: JURY, KWAN¹, and PAPPAS, Bankruptcy Judges.

¹ Hon. Robert N. Kwan, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 JURY, Bankruptcy Judge:
2

3 Alex and Theresa Zotow ("Debtors") appeal the bankruptcy
4 court's order which determined that BAC Home Loans Servicing, LP
5 ("BAC"), f/k/a Countrywide Home Loans Servicing, LP, did not
6 violate the automatic stay.

7 The matter arose in connection with Debtors' objection to
8 BAC's proof of claim. Debtors objected on the ground that
9 their prepetition escrow arrearages on their mortgage should
10 have been included in BAC's proof of claim. Instead,
11 postpetition, BAC provided notice to Debtors showing an increase
12 to their postpetition mortgage payments which, Debtors argued,
13 improperly included their prepetition escrow arrears in
14 violation of § 362(a)(6).² Debtors further alleged that BAC
15 received several increased postpetition mortgage payments from
16 the Chapter 13 trustee and applied those payments to their
17 prepetition debt, also in violation of the stay.

18 On appeal, Debtors assert that the bankruptcy court erred,
19 as a matter of law, by concluding that BAC's acts did not
20 violate the automatic stay. We disagree with Debtors and, for
21 the reasons set forth below, we AFFIRM.

22 **I. FACTS**

23 On January 13, 2009, Debtors filed their Chapter 13
24 bankruptcy petition. Jan P. Johnson was appointed to serve as
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27 ² Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Chapter 13 trustee.³

2 Debtors' home, listed with a value of \$120,000 in their
3 Schedule A, was encumbered by two mortgages serviced by BAC,
4 each based on separate notes and deeds of trust. This appeal
5 relates only to the first position note and deed of trust.⁴

6 The terms of Debtors' mortgage required them to make
7 monthly payments of principal, interest and escrow items. BAC
8 held the escrow items, which included taxes and homeowners'
9 insurance, in an escrow account until those items became due, at
10 which point BAC distributed the funds. In the year preceding
11 their Chapter 13 filing, BAC charged Debtors \$186.38 a month for
12 escrow items, bringing their total monthly payment under the
13 note to \$1,915.37. When Debtors filed their petition, they were
14 four payments in arrears to BAC, including \$745.52 in escrow
15 payments.

16 Debtors' Chapter 13 plan, dated January 13, 2009,
17 classified BAC as a Class 1 Secured Creditor and provided that
18 Debtors would maintain their monthly postpetition payments of
19 \$1,918.00⁵ to BAC through the Chapter 13 trustee and cure
20 prepetition arrears scheduled at \$5,000 with monthly payments of
21 \$238.10 beginning in the 15th month of the plan.

22 When notified of Debtors' bankruptcy, BAC performed an
23

24 ³ Although listed as an appellee, the trustee has not
25 participated in this appeal.

26 ⁴ The order confirming Debtors' plan indicates that BAC's
27 second position deed of trust was valued at \$0.00.

28 ⁵ This amount is listed in Debtors' plan and differs by a
few dollars from their monthly payment of \$1915.37.

1 escrow analysis in accordance with its regular procedures. The
2 "Escrow Account Review" statement dated January 20, 2009,
3 indicated an escrow shortage of \$660.12. Due to this shortage,
4 BAC recalculated Debtors' monthly escrow payment at \$311.58,
5 which consisted of \$220.04 for insurance and taxes, \$55.01 in
6 "shortage payment" - the monthly amount needed to keep the
7 escrow account from falling below zero, and \$36.53 for a
8 "reserve requirement" allowed by federal regulations to cover
9 unexpected increases in taxes or insurance.

10 On February 19, 2009, BAC sent a Payment Change
11 Notification (the "Notice") to debtor Alex Zotow, his bankruptcy
12 counsel and the Chapter 13 trustee. The Notice showed that due
13 to the new escrow payment of \$311.58, Debtors' monthly payment
14 to BAC would increase from \$1,915.37 to \$2,040.57, effective
15 March 1, 2009. The statement contained the following
16 disclaimer:

17 This statement is being furnished for informational
18 purposes only and should not be construed as an
19 attempt to collect against you personally. While in
20 the future, your obligation to Countrywide may or may
21 not be discharged by operation of law, Countrywide
22 will retain the ability to enforce its rights against
23 the property securing this loan should there be a
24 default.

25 If you are presently involved in a Chapter 13
26 proceeding, please be advised that should this amount
27 conflict with any order or requirement of the Court,
28 you are required to obey all orders of the Court.

29 (Emphasis in original.) On February 24, 2009, the trustee
30 objected to the confirmation of Debtors' plan on the ground that
31 their proposed monthly plan payment of \$2,665 was inadequate due
32 to the increase in their monthly mortgage payment.

33 On February 27, 2009, BAC filed its proof of claim,

1 asserting a secured claim for the principal balance due on
2 Debtors' mortgage of \$156,785.36, prepetition arrears of
3 \$6,328.76, an escrow shortage of \$197.43, and attorneys' fees of
4 \$300.

5 On March 17, 2009, Debtors objected to BAC's claim,
6 contending that the \$197.43 for escrow shortage undervalued the
7 amount of their prepetition escrow arrears. Debtors maintained
8 that \$745.52 for escrow items – the amount they calculated for
9 their prepetition escrow shortage – should have been included in
10 the claim. They further alleged that BAC was collecting
11 prepetition escrow arrears, through increased postpetition
12 escrow deposits added to their monthly payment, in violation of
13 § 362.

14 On November 18, 2009, the bankruptcy court held an
15 evidentiary hearing on Debtors' claim objection, including
16 their allegations regarding BAC's alleged stay violation. The
17 bulk of the evidence concerned the proper method for calculating
18 pre- and postpetition escrow arrears, with live testimony from
19 Debtors' expert and BAC's witness.

20 Debtors also presented evidence regarding their damages for
21 BAC's alleged stay violation. Debtors maintained they suffered
22 emotional distress damages because Mrs. Zotow suffered from
23 migraine headaches after learning that BAC had increased their
24 monthly mortgage payments, which resulted in hospitalization
25 expenses⁶ and lost income. Debtors argued they also suffered
26 damages based on increased attorneys' and expert fees as a

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28 ⁶ Mrs. Zotow testified that her out of pocket expense for hospitalization was a co-pay of \$200.

1 consequence of the trustee's objection to their plan and their
2 having to object to BAC's incorrect claim.

3 The bankruptcy court made oral findings of fact and
4 conclusions of law, sustaining Debtors' objection by disallowing
5 BAC's proof of claim as filed, but allowing the claim without
6 prepetition and pre-confirmation attorney's fees and a corrected
7 escrow shortage. The court adopted Debtors' expert's report for
8 its findings of fact. Relying on the Fifth Circuit's decision
9 in Campbell v. Countrywide Home Loans Inc., 545 F.3d 348 (5th
10 Cir. 2008)⁷, the bankruptcy court stated its conclusions of law
11 on the record, agreeing with Debtors that their prepetition
12 escrow arrears should have been included in BAC's proof of
13 claim. The court also concluded that BAC did not violate the
14 automatic stay. In addition, the court found the evidence
15 insufficient to support a finding of emotional distress or
16 punitive damages. However, the court awarded Debtors'
17 attorneys' fees in the amount of \$1,250.⁸ The court's ruling
18 was reflected in a Civil Minute Order filed December 10, 2009.
19 Debtors timely appealed the order.

21 ⁷ We discuss the holdings in Campbell in Part V below.

22 ⁸ The bankruptcy court did not state on the record the
23 basis for the attorneys' fee award. Since Debtors had objected
24 to BAC's proof of claim, we assume the award was based on the
25 underlying contract. See Travelers Cas. & Sur. Co. of Am. v.
26 Pac. Gas & Elec. Co., 549 U.S. 443, 448 (2007) ("[A]n otherwise
27 enforceable contract allocating attorney's fees (i.e., one that
28 is enforceable under substantive, nonbankruptcy law) is allowable
in bankruptcy except where the Bankruptcy Code provides
otherwise."); see also, Cal. Civ. Code § 1717 (2010). Neither
party presented arguments in their briefs on the exact basis for
the court's award of the fees nor was it an issue on appeal.

1 On March 4, 2010, Debtors' Chapter 13 plan was confirmed.⁹

2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction under 28 U.S.C.
4 §§ 1334 and 157(b)(2)(A) and (B). We have jurisdiction under 28
5 U.S.C. § 158(a).

6 **III. ISSUE**

7 Whether the bankruptcy court erred in deciding that BAC's
8 acts did not violate the automatic stay under § 362.

9 **IV. STANDARD OF REVIEW**

10 We review the issue of whether a creditor has violated the
11 automatic stay de novo. Sternberg v. Johnston, 595 F.3d 937,
12 943 (9th Cir. 2010).

13 **V. DISCUSSION**

14 Since the bankruptcy court primarily relied on the Fifth
15 Circuit's decision in Campbell for its ruling, it is beneficial
16 to briefly review the case before addressing the merits of this
17 appeal.

18 In Campbell, the lender (coincidentally Countrywide), filed
19 a proof of claim that did not include unpaid escrow payments
20 that accrued prepetition. Campbell, 545 F.3d at 351. Instead,
21 the lender included language in its proof of claim which
22 indicated that it intended to increase the debtors' postpetition
23 monthly mortgage payments to recover an escrow shortage. Id.

24 The debtors filed an adversary proceeding against the
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27 ⁹ On October 13, 2009, Debtors' plan was confirmed. This
28 order was vacated on November 13, 2009, because it was signed and
entered prior to the resolution of Debtors' objection to BAC's
proof of claim.

1 lender, alleging that it was attempting to collect a prepetition
2 debt (property taxes) by increasing their postpetition mortgage
3 payments. At issue was (1) whether the debtors' unpaid
4 prepetition escrow arrears for property taxes constituted a
5 prepetition claim subject to the automatic stay under § 362 and
6 (2) whether the lender's statement in a proof of claim about
7 increased monthly mortgage payments, which included the debtors'
8 missed prepetition escrow payments, violated the automatic stay.

9 In answering the first question, the bankruptcy court held
10 that the lender had a prepetition claim for unpaid escrow
11 arrears, based on the underlying loan documents, which was
12 subject to the automatic stay. The Fifth Circuit affirmed this
13 holding¹⁰, noting that "[t]here was a right to the prepetition
14 escrow payments – which matured into a claim on behalf of
15 Countrywide – each time the [debtors] failed to make the
16 payment." Id. at 354. The Fifth Circuit concluded that the
17 debtors' unpaid escrow at the time of their petition constituted
18 "a 'claim' for purposes of § 362, a holding that does not limit
19 Countrywide's rights under RESPA or the Bankruptcy Code." Id.
20 The appellate court further explained that the "automatic stay
21 operates to halt collection of pre-petition claims, even those
22 claims held by a creditor protected by the anti-modification of
23 Section 1322(b)(2). . . ." Id. The court emphasized its
24 holding was a narrow one and expressly stated that it was
25 refraining from addressing how or whether the stay affected the
26 lender's rights to recalculate escrow payments in subsequent

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28 ¹⁰ The lender apparently was granted the right to appeal
the bankruptcy court's order directly to the Fifth Circuit.

1 years. Id.

2 The bankruptcy court in Campbell also found that the lender
3 had violated the stay by including in its proof of claim the
4 statement that it would be increasing the debtors' mortgage
5 payment postpetition to provide for the prepetition escrow
6 shortage. Id. at 355. On this question, the Fifth Circuit
7 reversed. The court noted that the lender did not collect this
8 new amount or take any action outside the bankruptcy proceeding
9 to collect it. Id. The court also observed that nothing barred
10 a creditor from filing a proof of claim under § 501 of the
11 Bankruptcy Code and, therefore, asserting a right to payment in
12 a proof of claim did not constitute a violation of the stay.
13 Id. at 356. Finally, the court reasoned that the Bankruptcy
14 Code authorized creditors to file claims in the bankruptcy court
15 and that any dispute over those claims may be addressed in that
16 forum as part of the bankruptcy process. Id.

17 Here, the bankruptcy court agreed with the Fifth Circuit in
18 Campbell that BAC should have included Debtors' prepetition
19 escrow arrears in its proof of claim. The correctness of the
20 bankruptcy court's ruling on this issue has not been questioned
21 in this appeal. Rather, Debtors' sole challenge on appeal is
22 whether the bankruptcy court improperly relied on Campbell when
23 it concluded that BAC did not violate the stay.

24 Debtors argue that Campbell is factually distinguishable
25 from the scenario here: i.e., in Campbell, the only action taken
26 by the lender was the filing of a proof of claim which stated
27 that the lender intended to increase the debtors' postpetition
28 mortgage payments. Debtors assert that BAC's actions in this

1 case include far more, violating § 362(a)(6); namely, BAC's acts
2 of (1) sending them the Notice which increased their
3 postpetition mortgage payments to improperly include prepetition
4 escrow arrears, (2) the receipt of the increased postpetition
5 mortgage payments from the Chapter 13 trustee, and (3) the
6 application of those payments to prepetition debt.

7 Section 362(a)(6) provides that a petition filed under
8 Chapter 13 operates as an automatic stay of "any act to collect,
9 assess, or recover a claim against the debtor that arose before
10 the commencement of the case under this title." § 362(a)(6).
11 We consider BAC's acts separately to determine whether any of
12 its activities violated the automatic stay.

13 **A. Sending of the Notice Did Not Violate the Stay**

14 We begin our analysis with the premise that the automatic
15 stay does not prevent all communications between a creditor and
16 the debtor. Morgan Guar. Trust Co. of N.Y. v. Am. Sav. and Loan
17 Ass'n, 804 F.2d 1487, 1491 (9th Cir. 1986); Connor v.
18 Countrywide Bank, N.A. (In re Connor), 366 B.R. 133, 136 (Bankr.
19 D. Haw. 2007). Whether a communication is a permissible or
20 prohibited one is a fact-driven inquiry which makes any bright
21 line test unworkable. See Henry v. Assocs. Home Equity Servs.,
22 Inc., 272 B.R. 266, 278 (C.D. Cal. 2002) (whether creditor's
23 activities involved coercion or harassment is fact-specific
24 inquiry); Cousins v. CitiFinancial Mortgage Co. (In re Cousins),
25 404 B.R. 281, 287 (Bankr. S.D. Ohio 2009) (noting that
26 determining whether a violation of the automatic stay occurs can
27 be complicated). However, case law provides us with some
28 guidance in defining which creditor communications violate the

1 stay.

2 Prohibited communications include those where direct or
3 circumstantial evidence shows the creditor's actions were geared
4 toward collection of a prepetition debt, were accompanied by
5 coercion or harassment, or otherwise put pressure on the debtor
6 to pay. Morgan, 804 F.2d at 1491; In re Draper, 237 B.R. 502,
7 505-06 (Bankr. M.D. Fla. 1999). But mere requests for payment
8 and statements simply providing information to a debtor are
9 permissible communications that do not run afoul of the stay.
10 Morgan, 804 F.2d at 1491 (mere requests for payment are not
11 barred); Henry v. Assocs. Home Equity Servs., Inc. (In re
12 Henry), 266 B.R. 457, 472 (Bankr. C.D. Cal. 2001) (if promissory
13 note has adjustable interest rate, secured creditor may properly
14 give notice of the changes in the interest rate); Draper, 237
15 B.R. at 506 (noting that statements provided for "informational
16 purposes" should not request payment for amounts past due or
17 enclose a payment coupon or return envelope); Chase Manhattan
18 Mortgage Corp. v. Padgett, 268 B.R. 309, 314-15 (S.D. Fla. 2001)
19 (stating that § 362(a) does not prohibit mere notice to a
20 mortgagor in bankruptcy of an advance or escrow deficiency).

21 Along these lines, we have recently recognized that Chapter
22 13 debtors often need information from their mortgage lenders
23 post-confirmation, albeit in a different context. Greenpoint
24 Mortgage Funding, Inc. v. Herrera (In re Herrera), 422 B.R. 698
25 (9th Cir. BAP 2010) (upholding various post-confirmation
26 reporting and other duties imposed on mortgage lenders in
27 Chapter 13 proceedings by addendum approved by judges in Central
28 District of California). Likewise, information from a lender

1 may be equally important to Chapter 13 debtors prior to the
2 confirmation of their plan. Connor, 366 B.R. at 138.

3 In the end, one distinguishing factor between permissible
4 and prohibited communications is evidence indicating harassment
5 or coercion. When such evidence is present, a disclaimer on the
6 communication that it was being sent for "informational purposes
7 only" is ineffective. For example, the bankruptcy court in
8 Draper found that the lender-creditor violated the automatic
9 stay despite the disclaimer because the invoice included amounts
10 past due, the lender included a payment coupon and envelope with
11 its invoice, and the lender continued to send the invoices to
12 debtor post-confirmation after the debtor and his attorney
13 requested it to stop. Draper, 237 B.R. at 506.

14 The bankruptcy court in Connor reached the opposite result.
15 In Connor, the statements, which included the principal balance
16 of the loan, the amount of the monthly payment due, instructions
17 on how to make a payment, a perforated, detachable payment
18 coupon, and a return envelope, did not violate the stay when the
19 debtor had an interest in receiving current information about
20 the status of his mortgage in order to formulate a confirmable
21 Chapter 13 plan. Connor, 366 B.R. at 138. Further, the debtor
22 had not alleged in his complaint that the monthly statements
23 were threatening or coercive. Id. The court reached a contrary
24 result with respect to the statements sent after the debtor's
25 Chapter 13 bankruptcy case was converted to Chapter 7,
26 concluding that the debtor had no need for the information at
27 that time.

28 Given these parameters, we conclude that, as a matter of

1 law, the Notice sent by BAC to Debtors was informational in
2 nature and thus not in violation of the stay. First, unlike
3 Draper, the Notice sent by BAC was not in the nature of an
4 invoice. Rather, the Notice merely set forth the fact of the
5 debt, caused by the recent escrow analysis which resulted in an
6 increase to Debtors' monthly escrow deposit. E.g., Morgan, 804
7 F.2d at 1491 n.4. Second, BAC did not send the Notice with a
8 payment coupon or envelope. It is obvious that the payment
9 coupons and return envelopes sent to the debtor after the
10 confirmation of his Chapter 13 plan in Draper did not provide
11 information and had no purpose other than to collect the debt
12 outside the bankruptcy. See also, Cousins, 404 B.R. at 287-88
13 (noting that information about past or current balance amounts
14 sent prior to confirmation of the debtor's plan might be helpful
15 to determine what was owed, but an attached payment coupon does
16 not have such an informational purpose). Put simply, the record
17 reveals no indication that BAC took any steps to collect the
18 prepetition escrow arrearages from Debtors outside the
19 bankruptcy court.

20 Third and last, BAC sent a single Notice to debtor Alex
21 Zotow, Debtors' attorney and the trustee prior to the
22 confirmation of Debtors' Chapter 13 plan. Debtors had an
23 interest in and need for the information contained in the Notice
24 since any increase in their monthly escrow payments would affect
25 the feasibility of their plan. See Pultz v. NovaStar Mortgage,
26 Inc. (In re Pultz), 400 B.R. 185, 190-92 (Bankr. D. Md. 2008)
27 (noting that sending of single loan statement was useful to the
28 debtor for forecasting the amount of the unsecured debt she

1 could pay through her Chapter 13 plan).

2 In sum, these facts, which are undisputed, do not rise to
3 the level of coercion or harassment and we do not construe them
4 as putting pressure on Debtors to pay. Accordingly, we hold
5 that the Notice was a permissible communication that did not
6 violate the automatic stay.

7 Finally, we are reluctant to conclude that BAC should be
8 penalized because the bankruptcy court later determined that BAC
9 improperly included prepetition escrow debt in its postpetition
10 calculations in the context of a claim objection. Although the
11 Notice apparently was the catalyst for the increased payments
12 made by the trustee to BAC prior to the confirmation of Debtors'
13 plan, Debtors could have challenged the payment amount
14 immediately by motion to the court rather than waiting until the
15 error was highlighted during Debtors' claim objection.

16 **B. Receiving Postpetition Payments From the Chapter 13**
17 **Trustee Did Not Violate the Stay**

18 Debtors also assert that BAC "collected" the prepetition
19 escrow debt from the Chapter 13 trustee in violation of
20 § 362(a)(6). We are unpersuaded by this argument. The language
21 of § 362(a)(6) makes it clear that some act to collect a
22 prepetition debt is necessary for a stay violation. Here, BAC
23 received the payments from the trustee pursuant to the Eastern
24 District of California's General Order No. 05-03, which is
25 applicable to Chapter 13 cases. Paragraph 5 is entitled "Plan
26 Payments", which provides in relevant part under subsection (c):

27 (1) post-petition contract installment payments to
28 Class 1 claim holders shall be made by the Trustee
whether or not the chapter 13 plan has been confirmed
and whether or not the holder of the claim has filed a

1 proof of claim.

2 (2) To assist the Trustee in making post-petition
3 contract installment payments to Class 1 claim
4 holders, the debtor shall complete the Class 1
5 Checklist and Authorization to Release Information,
6 Exhibit 5, and deliver it to the Trustee within 15
7 calendar days of filing the petition. This document
8 shall not be filed with the court.

9 (Emphasis added). E.D. Cal. Gen. Order No. 05-03 (Oct. 28,
10 2005, effective Oct. 17, 2005) (as amended by Gen. Order 08-02).

11 BAC did not engage in any act to possess or collect these
12 payments because it received them as part of the chapter 13
13 process. Thus, BAC was lawfully in possession of these payments
14 at the time it allegedly misapplied them.

15 This result is consistent with the Fifth Circuit's decision
16 in Campbell, which holds that a creditor's legal actions taken
17 in a bankruptcy proceeding do not violate the stay. Campbell,
18 545 F.3d at 354. Just as a lender's request for increased
19 postpetition payments that improperly included prepetition debt
20 in a proof of claim does not violate the stay, BAC's receipt of
21 payments from a Chapter 13 trustee is not an act proscribed by
22 § 362(a)(6).

23 Finally, Debtors advance policy reasons for us to consider
24 in our analysis. Debtors contend that if BAC is not held
25 accountable, then it would be difficult, if not impossible, for
26 them to realize a financial fresh start. Debtors, however, miss
27 the forest for the trees by overlooking the reasons for the
28 automatic stay.

The statute seeks to ensure orderly administration of
the debtor's estate to protect the creditors' right to
equality of distribution, to provide a breathing spell
for the debtor, and to maintain the status quo. An
additional purpose of the stay, to which Congress

1 specifically addressed in subsection 362(a)(6), is to
2 prevent harassment of the debtor by sophisticated
creditors.

3 Morgan, 804 F.2d at 1491 (citations omitted).

4 The result we reach does not undermine either the "fresh
5 start" provisions of the Bankruptcy Code or the "breathing
6 spell" offered by the automatic stay. Debtors' "fresh start"
7 was protected by several procedural requirements surrounding
8 their objection to BAC's proof of claim and confirmation of
9 their Chapter 13 plan. Debtors' "breathing spell" also was
10 sufficiently protected since the respite is not from
11 communication with creditors, but from the threat of immediate
12 action by creditors, such as a foreclosure or a lawsuit. Id.

13 We also cannot construe BAC's conduct as interfering with
14 the orderly administration of Debtors' estate. BAC's single
15 notice sent pre-confirmation did not jeopardize Debtors' plan or
16 the process for distributing funds to other creditors.

17 Generally, the injunction of § 362 serves to control creditor
18 action by encouraging creditors to participate in the bankruptcy
19 process to resolve their claims. See Harchar v. United States
20 (In re Harchar), 393 B.R. 160, 179 (Bankr. N.D. Ohio 2008).

21 That is exactly what BAC did here. And that process worked:
22 BAC's incorrect proof of claim was brought to the bankruptcy
23 court's attention, and the court properly ordered the adjustment
24 of the proof of claim.

25 Due to our holding, it is unnecessary to address Debtors'
26 remaining arguments concerning their right to recover punitive
27 or other damages under § 362(k)(1). However, we address two
28 housekeeping matters relating to damages. Debtors argue for the

1 first time in their reply brief that we should remand this
2 matter because the bankruptcy court failed to order BAC to
3 refund the portion of postpetition payments which were improper.
4 Debtors' failure to "specifically and distinctly" address this
5 issue in their opening brief constitutes a waiver. Alcaraz v.
6 INS, 384 F.3d 1150, 1161 (9th Cir. 2004). There is nothing
7 prohibiting Debtors from seeking this remedy from the bankruptcy
8 court.

9 In addition, Debtors contend that BAC continues to violate
10 the stay by collecting the increased mortgage payments post-
11 confirmation. This alleged stay violation is different from the
12 one raised in this appeal. Accordingly, Debtors should have
13 presented this argument to the bankruptcy court in the first
14 instance. United Student Funds, Inc. v. Wylie (In re Wylie),
15 349 B.R. 204, 213 (9th Cir. BAP 2006) ("Absent exceptional
16 circumstances, this court generally will not consider arguments
17 raised for the first time on appeal.").

18 **VI. CONCLUSION**

19 For these reasons, we AFFIRM.
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