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UNITED STATES DISTRICT COURT
Northern District of California

JUDITH WHITWORTH,

Plaintiff,

v.

FIDELITY MORTGAGE COMPANY, *et al.*,

Defendants.

No. C 05-4725 MHP (MEJ)

**REPORT AND RECOMMENDATION
FOLLOWING EVIDENTIARY
HEARING ON DAMAGES**

I. BACKGROUND

On May 5, 2009, the Honorable Marilyn Hall Patel, the presiding judge in this matter, issued a Memorandum & Order on Plaintiff Judith Whitworth's Motion for Default Judgment (Dkt. #99). In her Order, Judge Patel granted default judgment in favor of Plaintiff and against Defendant Joel Atwater. With respect to Plaintiff's requests for damages, Judge Patel found that Plaintiff had not submitted sufficient documentation and testimony to enable the Court to determine the proper amount to award. As a result, Judge Patel referred the matter to the undersigned to hold an evidentiary hearing on the issue of damages and to make findings of fact and recommendations regarding the specific amounts that the Court should award. In her Order, Judge Patel also instructed Plaintiff that at the hearing she will need to provide evidentiary support to corroborate her claimed damages, such as documents, affidavits, or witness or expert testimony. With respect to each area of damages Plaintiff requested, Judge Patel then outlined in her Order what evidence Plaintiff would need to submit and what questions she would need to address to enable the undersigned to make a recommendation regarding the proper amount of damages recoverable.

On July 31, 2009, Plaintiff filed a second Motion for Default Judgment (Dkt. #103) before the undersigned and submitted a revised Declaration with supporting documents (Dkt. #102). In preparation for the evidentiary hearing, the undersigned reviewed Plaintiff's Motion and supporting

1 materials and determined that Plaintiff had not addressed the evidentiary questions raised by Judge
2 Patel in her Order. Accordingly, on September 3, 2009, the undersigned issued an Order listing
3 specific questions Plaintiff would need to address at the hearing. In response, Plaintiff filed a
4 Supplemental Brief in Support of Entry of Default Judgment (Dkt. #105), wherein she clarified the
5 categories of damages she is seeking, and a Supplemental Declaration (Dkt. #106), wherein Plaintiff
6 set forth additional facts in support of her damages requests.

7 On September 24, 2009, the undersigned held the evidentiary hearing on damages. After
8 reviewing Plaintiff's submissions and considering the oral argument presented during the hearing,
9 the undersigned makes the following findings and recommendations.

10 II. DISCUSSION

11 A. Compensatory Damages

12 1. Out-of-Pocket Damages

13 With respect to compensatory damages, Judge Patel found that Plaintiff is entitled to an
14 award of her out-of-pocket damages, including her down payment on her house, mortgage payments,
15 property taxes, property insurance payments, and moving expenses. (Dkt. #99 at 7.) Judge Patel
16 indicated that Plaintiff was to submit evidence documenting these out-of-pocket damages at the
17 evidentiary hearing. (*Id.*)

18 Looking first at Plaintiff's mortgage payments, Plaintiff has submitted Customer Account
19 Activity Statements from Washington Mutual Bank documenting that in 2005 she made 11
20 payments on her first mortgage in the amount of \$2,172.17, for a total of \$23,893.87, and 11
21 payments on her second mortgage in the amount of \$721.87, for a total of \$7,940.57. (Dkt. #102,
22 7/28/09 Whitworth Decl. ¶14 & Ex. 2.) Taken together, Plaintiff made \$31,834.44 in mortgage
23 payments on the house.

24 Second, Plaintiff states that she made a \$1,000 down payment on the house, which she
25 requests that the Court include as part of her compensatory damages. Previously, the undersigned
26 pointed out that Plaintiff had not cited to any documentary evidence - for instance, a canceled check
27 or a notation on the Settlement Statement attached to her Declaration - to substantiate this amount.

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1 In her Supplemental Declaration, Plaintiff states that she was unable to find any documentation to
2 support her claim, and that, as a result of a fire at her house, any documents she had were likely
3 destroyed. (Dkt. #106. Suppl. Whitworth Decl. ¶6a.) Although the undersigned queries whether
4 Plaintiff could have contacted her bank for a copy of the canceled check or an account statement
5 showing the withdrawal of funds from her account used for the downpayment, the undersigned finds
6 Plaintiff's avowal that she made a \$1,000 downpayment to be credible.

7 Third, Plaintiff seeks an award of \$2,263.37 for property tax payments she made on the
8 house. (7/28/09 Whitworth Decl. ¶14.) Plaintiff has submitted two Supplemental Property Tax Bills
9 from Contra Costa County documenting that she made tax payments in the amount of \$219.99 and
10 \$2,043.48, for a combined total of \$2,263.37. (7/28/09 Whitworth Decl. Ex. 3.)

11 Fourth, Plaintiff requests an award of \$2,234.25 for insurance premium payments on the
12 house from December 2005 through July 2007. (7/28/09 Whitworth Decl. ¶14.) In support, Plaintiff
13 has submitted a printout of her account history documenting payments made to Farmer's Insurance.
14 (7/28/09 Whitworth Decl. Ex. 4). Additionally, Plaintiff cites the Court to line 1308 of the Closing
15 Statement, which she explains indicates that she pre-paid the first year of insurance from her loan
16 proceeds. (Suppl. Whitworth Decl. ¶6d.) The undersigned has reviewed this documentation and
17 finds that Plaintiff made at least \$2,234.25 in insurance premium payments on the house.

18 Taken the foregoing figures together, Plaintiff has adequately substantiated her claim that she
19 incurred \$37,332.06 in out-of-pocket damages. However, Plaintiff also acknowledges this amount
20 must be reduced by the amount of corresponding expenses she would have incurred had she not
21 purchased the house through Defendant Atwater. In her Declaration, Plaintiff indicates that had
22 Defendant Atwater not defrauded her, she would have continued to share an apartment with her
23 husband and pay \$455 a month in rent. (7/28/09 Whitworth Decl. ¶17.) Because Plaintiff would
24 have incurred at least \$13,195 in rent during the 29 months she lived in the house she purchased, this
25 amount should be offset against the total amount of her out-of-pocket damages, reducing the total to
26 \$24,137.06. Accordingly, the undersigned **RECOMMENDS** that the Court award Plaintiff
27 \$24,137.06 in out-of-pocket damages.

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1 **2. Emotional Distress**

2 The second component of Plaintiff’s compensatory damages concerns damages for Plaintiff’s
3 emotional distress. Plaintiff requests an award of \$25,000 for her emotional distress. (Dkt. #92,
4 3/12/09 Whitworth Decl. ¶16; 7/28/09 Whitworth Decl. ¶16; Suppl. Whitworth Decl. ¶4.) Judge
5 Patel previously indicated that based on Plaintiff’s testimony and circumstances giving rise to this
6 matter, Plaintiff had credibly demonstrated that she suffered emotional distress as a result of
7 Defendant Atwater’s conduct. (Dkt. #99 at 7.) Judge Patel therefore instructed the undersigned to
8 make findings of fact regarding the proper amount of damages Plaintiff should be awarded for such
9 distress. (*Id.*) Plaintiff has not submitted any evidence of economic loss or medical evidence of
10 mental or physical symptoms. Accordingly, the undersigned has considered Plaintiff’s statements in
11 her Declarations and her attorney’s description of her distress during the evidentiary hearing.

12 In her Declarations, Plaintiff states that as a result of being lured into the transaction by
13 Defendant Atwater, her relationship with her family has been severely strained, which has caused
14 her significant personal distress. (3/12/09 Whitworth Decl. ¶16; 7/28/09 Whitworth Decl. ¶16.) She
15 also states that the stress of having to figure out how to make house payments she could not afford,
16 and ultimately losing her house, has caused her anxiety, destroyed her confidence, and diminished
17 her self-image. (7/28/09 Whitworth Decl. ¶16.) Plaintiff also indicates that the physical and
18 emotional stress she experienced has caused her to have difficulty sleeping, which requires her to
19 take sleep medication. (3/12/09 Whitworth Decl. ¶16; 7/28/09 Whitworth Decl. ¶16.) Further, she
20 states that she has become extremely sad and fearful about her well-being in her senior years
21 because she invested and lost all of her savings in the house. (*Id.*) She states that the ordeal has
22 caused her to become angry, frustrated, and distrustful, and that she cries easily. (7/28/09
23 Whitworth Decl. ¶16.)

24 Like Judge Patel, the undersigned finds Plaintiff’s representations to be credible, particularly
25 in light of the circumstances of this case. However, aside from Plaintiff’s statements in her
26 Declarations, Plaintiff has not submitted any other evidence of her emotional distress to support the
27 amount of damages she has requested. Thus, having considered Plaintiff’s description of her
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1 emotional distress, the undersigned finds that an award of \$10,000 for emotional distress to be
2 appropriate and **RECOMMENDS** that the Court award this amount.

3 **3. Compensatory Damages Already Awarded Against Other Defendants**

4 Finally, Judge Patel noted in her Order that Plaintiff's compensatory damages award against
5 Defendant Atwater must be offset against any compensatory damages that have already been
6 awarded to Plaintiff against any other defendants in this case. (Dkt. #99 at 8.) In her Declaration,
7 Plaintiff indicates that on November 25, 2008, she obtained a judgement of non-dischargeability in
8 bankruptcy court for \$24,392.02 against Defendant Coker dba Fidelity Mortgage Company and
9 Pacific Home Brokers. (7/28/09 Whitworth Decl. ¶20 & Ex. 5.) However, Plaintiff states that, to
10 date, she has not received any payment from that judgment. (*Id.*) Because Plaintiff has not
11 recovered any of her compensatory damages from Defendant Coker, there is no basis to reduce the
12 amount of her compensatory damages. Should Plaintiff receive any payment from Defendant Coker
13 in satisfaction of her judgment against him, Plaintiff's compensatory damage award against
14 Defendant Atwater should be reduced accordingly.

15 **4. Compensatory Damages Recommendation**

16 In sum, with respect to compensatory damages, the undersigned **RECOMMENDS** that the
17 Court award Plaintiff \$24,137.06 in out of pocket damages and \$10,000 for emotional distress, for a
18 total of \$34,137.06 in compensatory damages.

19 **B. Punitive Damages**

20 In her Order, Judge Patel found that Plaintiff had established by clear and convincing
21 evidence that she is entitled to punitive damages. (Dkt. #99 at 8-9.) She therefore instructed the
22 undersigned to consider and make recommendations on the appropriate amount of punitive damages
23 to award. Plaintiff requests an award of \$20,000 in punitive damages. (7/28/09 Whitworth Decl.
24 ¶18; Suppl. Decl. ¶4.) The question, then, is whether this award is reasonable.

25 Under California law, when assessing punitive damages courts are to consider: (1) the degree
26 of reprehensibility of the defendant's conduct; (2) the amount of compensatory damages awarded to
27 the plaintiff; and (3) the wealth of the defendant. *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910,

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1 928 (1978); *see Harrell v. Kepreos*, No. CIV S-06-0849, 2008 WL 619117, at *4 (E.D. Cal. Mar. 4,
2 2008).

3 With respect to the first factor, as Judge Patel highlighted in her Order, Defendant Atwater
4 made a series of misrepresentations to Plaintiff, including that he could secure a loan for Plaintiff
5 that she could afford and, after the loan payments exceeded what he had represented to Plaintiff, that
6 he could refinance her loans to reduce the monthly payments. Defendant Atwater also falsified
7 information on Plaintiff's loans applications without her knowledge and misrepresented other
8 material terms of the loans to Plaintiff. As a result of Defendant Atwater's conduct, Plaintiff
9 invested and ultimately lost her entire savings and has experienced emotional distress and strained
10 relations with her family. These facts demonstrate the reprehensibility of Defendant Atwater's
11 conduct and support the need for punitive damages to deter him from similar conduct in the future.

12 As to the second factor, as indicated above, the undersigned recommends that the Court
13 award \$34,137.06 in compensatory damages. Plaintiff's requested amount of punitive damages is
14 thus less than the amount of her compensatory damages and is not excessive in relation to her actual
15 damages.

16 Looking at the final factor, which focuses on the defendant's financial condition, Plaintiff's
17 counsel indicated during the evidentiary hearing that Plaintiff does not have any evidence on this
18 factor. The California Supreme Court has indicated that evidence of a defendant's financial
19 condition is a prerequisite to an award of punitive damages in order to ensure that the award will
20 actually serve to deter the defendant's conduct. *Adams v. Murakami*, 54 Cal. 3d 105, 119 (1991).
21 Without such information, the undersigned cannot determine whether the amount of punitive
22 damages Plaintiff seeks exceeds the amount necessary to properly punish and deter Defendant
23 Atwater from future misconduct. *See id.* at 110. Consequently, because Plaintiff has not met her
24 burden of producing evidence on this factor, the undersigned **RECOMMENDS** that the Court
25 **DENY WITHOUT PREJUDICE** Plaintiff's request for an award of \$20,000 in punitive damages
26 and **GRANT** Plaintiff leave to marshal evidence relating to Defendant Atwater's financial condition
27 and move for reconsideration of the proper amount of punitive damages that should be awarded.
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1 **C. Damages for Violation of RESPA**

2 With respect to Plaintiff's damages under RESPA, Judge Patel indicated that Plaintiff needed
3 to provide additional information and evidence on the second prong of the two-prong test for
4 determining whether the yield spread premium Plaintiff paid was permissible. (Dkt. #99 at 10.) In
5 her Supplemental Declaration, Plaintiff indicates that she is abandoning her claim to damages under
6 RESPA. (Suppl. Decl. ¶¶4, 8.) Accordingly, this issue is moot.

7 **D. Disgorgement Pursuant to California Unfair Business Practices Law**

8 In her Order, Judge Patel found that Plaintiff had established Defendant Atwater's actions
9 violated California business law, and therefore California's unfair competition law, such that
10 Plaintiff could disgorge Defendant Atwater of any money Plaintiff paid him in connection with his
11 unlawful business practices. (Dkt. #99 at 11.) Toward this end, Judge Patel directed Plaintiff to
12 prepare and provide evidence as to what money she paid Defendant Atwater in connection with his
13 provision of real estate services. (*Id.*) To guide Plaintiff, the Court explained that the settlement
14 statement that Plaintiff submitted was insufficient to establish the amount she paid to Defendant
15 Atwater. (*Id.*) Specifically, the Court noted that although Plaintiff alleged that the statement
16 demonstrates that she paid \$22,761 in real estate and mortgage broker fees, the statement does not
17 reflect this amount. (*Id.*) Further, the Court noted that even if Plaintiff could establish the total
18 amount in real estate and mortgage broker fees, Plaintiff must provide evidence corroborating her
19 allegations that Defendant Atwater was paid all but \$500 of this amount. (*Id.*)

20 Reviewing the documents Plaintiff filed after Judge Patel issued her Order, Plaintiff has
21 merely re-submitted the same evidence Judge Patel previously reviewed. Specifically, in her July 28
22 Declaration, Plaintiff alleges that, according to the settlement statement attached to her Declaration,
23 Pacific received a broker's commission in the amount of \$9,475 and Fidelity received \$13,286 in
24 connection with the making of her loans. (7/28/09 Whitworth Decl. ¶9.) While Plaintiff cites to
25 certain line number entries in the settlement statement to explain how she calculated these amounts,
26 Plaintiff has not explained why some of the fees appear in the right-hand ledger of the spreadsheet,
27 while other entries - namely, the \$9,475 Plaintiff alleges was paid to Pacific and the \$9,096 Plaintiff
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1 alleges was paid to Fidelity - are not reflected in the right hand ledger. It is therefore unclear
2 whether these figures were included the total amount of fees Plaintiff had to pay when entering into
3 the loan, or whether they were paid from some other source. During the evidentiary hearing,
4 Plaintiff did not proffer any further explanation as to these figures. Thus, as an initial matter,
5 Plaintiff has not substantiated her allegations that she paid \$22,761 in real estate and mortgage
6 broker fees.

7 Moreover, as indicated above, in order to seek disgorgement of fees paid to Defendant
8 Atwater, Plaintiff has the burden of establishing that *Defendant Atwater* actually was paid those
9 fees. As she did in her Motion for Default Judgment, Plaintiff alleges Defendant Coker stated that
10 Defendant Atwater received all but \$500 of the \$22,761 in fees that she paid. Plaintiff, however, has
11 not provided any other information about the statement from Defendant Coker, such as when he
12 made the statement, to whom he made it, or the context or setting in which he made the statement.
13 Without such information, the undersigned cannot assess the reliability of the proffered statement.
14 Aside from this statement, Plaintiff has not provided any other evidence to corroborate her allegation
15 that Defendant Atwater was paid all \$500 of the fees she paid to Defendant Coker and/or Fidelity or
16 Pacific. As a result, the undersigned finds that Plaintiff has failed to sufficiently establish the
17 amount of money she paid Defendant Atwater in connection with his unlawful business practices.
18 The undersigned therefore **RECOMMENDS** that the Court **DENY** Plaintiff's request for
19 disgorgement of \$22,261 from Defendant Atwater.

20 **E. Attorneys' Fees and Costs**

21 In her Order, Judge Patel found that Plaintiff is entitled to attorneys' fees and costs under
22 RESPA and advised Plaintiff on the proper procedure under the Civil Local Rules for seeking such
23 awards. In her Declaration and supporting materials filed with the undersigned following Judge
24 Patel's ruling, Plaintiff did not provide any information regarding either attorneys' fees or costs.
25 The undersigned pointed out this deficiency to Plaintiff in the undersigned's September 3, 2009
26 Order and again referred Plaintiff to the Civil Local Rules for guidance on how to brief this issue. In
27 response, Plaintiff states in her Supplemental Declaration that she is no longer seeking an award of
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1 attorneys' fees in connection with her RESPA claim. (Dkt. #106, 9/12/09 Decl. ¶8.) Although
2 Plaintiff did not address costs, Plaintiff did not provide any figure or documentation to support an
3 award of costs. Thus, at this point, Plaintiff appears to have abandoned any request for an award of
4 costs. Based on these developments, the undersigned **RECOMMENDS** that the Court **DENY**
5 Plaintiff's request for attorneys' fees and costs as moot.

6 **III. CONCLUSION**

7 Based on the undersigned's consideration of Plaintiff's Declarations and supporting
8 documents and evidence presented at the hearing, the undersigned **RECOMMENDS** as follows:

9 Plaintiff should be awarded \$34,137.06 in compensatory damages. Plaintiff's request for an
10 award of \$20,000 in punitive damages should be **DENIED WITHOUT PREJUDICE**. Plaintiff's
11 requests for damages under RESPA, disgorgement of fees paid to Defendant Atwater, and attorneys'
12 fees and costs should be **DENIED AS MOOT**.

13 Pursuant to Fed. R. Civ. P. 72(b)(2) a party may serve and file objections to this Report and
14 Recommendation ten (10) days after being served.

15 **IT IS SO RECOMMENDED.**

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17 Dated: December 15, 2009

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20 Maria-Elena J. Jones
21 Chief United States Magistrate Judge
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