amount of the monthly payment for principal and interest, effective May of 2009, is $551.69, and this amount will remain the same until the last scheduled payment of April 1, 2029; (4) Wells Fargo will apply all future monthly payments in accordance with the amortization schedule attached to the Agreed Judgment; (5) until the next scheduled escrow analysis is completed, the De La Fuentes shall pay, in addition to the monthly principal and interest amount of $551.69, the sum of $410.24, which represents the amount of escrow for taxes and insurance[24] (thus, the Agreed Judgment reflects that Wells Fargo has agreed that the total amount of the payment that the De La Fuentes must remit each month is the sum of $551.69 plus $410.24, or $961.93); and (6) Wells Fargo will show in its records that the De La Fuentes owe no outstanding fees, costs, charges or corporate advances as of the last day of April, 2009.

The third element is satisfied because Wells Fargo has failed to comply with the Agreed Judgment. The Court will now discuss Wells Fargo's failure to comply during three discrete time periods: (1) from July 27, 2009 (the date of the entry on the docket of the Agreed Judgment) to January 18, 2010 (the date of the entry on the docket of the Motion for Contempt); (2) from January 19, 2010 (the day following the filing of the Motion for Contempt) to the February 9 Hearing; and (3) from February 10, 2010 to the February 23 Hearing.

*i. The first discrete time period: from July 27, 2009 (the date of the entry on the docket of the Agreed Judgment) to January 18, 2010 (the date of the entry on the docket of the Motion for Contempt)*

During this time period, the evidence is clear that Wells Fargo violated the Agreed Judgment

[24] There is nothing in the record indicating that the "next scheduled escrow analysis" has been completed. Therefore, the Court concludes that the monthly escrow in effect at this time is $410.24.

in several respects. First, it failed to make the changes in its records by August 26, 2009; and then it continually failed to make these changes each day following this deadline. [February 23, 2010 Tr. 20:9–14 (Grissom admitting that the required changes had not been made until the evening of February 22, 2010)]. Second, Wells Fargo sent Monthly Mortgage Statements to the De La Fuentes expressly stating that they had to pay $984.00 rather than the correct amount of $961.93. *See e.g.*, [Ex. No. 2]. Third, Wells Fargo sent Monthly Mortgage Statements to the De La Fuentes expressly stating that the unpaid principal balance was greater than $66,572.80 even though the De La Fuentes had made each and every one of their monthly payments since May of 2009. *See, e.g.,* [Ex. No. 2, showing the balance to be $70,938.84 when it should have been $65,753.16 pursuant to the amortization schedule]. Given these violations of the Agreed Judgment, the De La Fuentes were certainly justified in filing the Motion for Contempt on January 18, 2010.

*ii. The second discrete time period: January 19,2010 (the day following the filing of the Motion for Contempt) to the February 9 Hearing*

During this particular time period, the evidence is also clear that Wells Fargo violated the Agreed Judgment in several respects. First, Wells Fargo put information on its Business Online Account Activity expressly stating that the unpaid principal balance was greater than $66,572.80 even though the De La Fuentes made each and every one of their monthly payments. *See, e.g.,* [Ex. No. 3, showing the balance to be $71,337.82 on the website as of January 21, 2010 when it should have shown that the balance was $65,512.01].

Second, on February 8, 2010 (*i.e.*, just prior to the February 9 Hearing), by which time Wells Fargo had no doubt reviewed the Motion for Contempt and realized that it needed to make

corrections, Wells Fargo put information on its Business Online Account Activity expressly stating that the unpaid principal balance was $66,572.80. Apparently, Wells Fargo, having reviewed the Motion for Contempt, inputted the $66,572.80 figure believing that it had now made the correcting entry required by the Agreed Judgment. The problem with this change is that by February 8, 2010, the De La Fuentes had made each and every one of their monthly payments such that the unpaid principal balance was less than $66,572.80 pursuant to the amortization schedule. *See, e.g.,* [Ex. Nos. 4 & 6, showing the balance to be $66,572.80 when it should be $65,390.24].

Third, Wells Fargo's Business Online Account Activity as of January 21, 2010 expressly set forth that the De La Fuentes needed to pay the sum of $8,934.72 to bring their loan current. [Ex. No. 3]. Wells Fargo's inputting this number into the online records of the De La Fuentes' loan violated the Agreed Judgment because: (1) the Agreed Judgment reflects that Wells Fargo stipulated that the loan was contractually current through April 2009; and (2) the De La Fuentes had made all of their monthly payments since May of 2009. Accordingly, there is no way that any records of the De La Fuentes' loan under the control and supervision of Wells Fargo could accurately represent that as of January 21, 2010, the De La Fuentes were in default by $8,934.72.

Fourth, Wells Fargo's Business Online Account Activity as of February 8, 2010 expressly set forth that the De La Fuentes needed to pay the sum of $9,421.52 to make their loan current. [Ex. No. 4]. Wells Fargo's inputting this number into the online records of the De La Fuentes' loan once again violated the Agreed Judgment because: (1) the Agreed Judgment reflects that Wells Fargo stipulated that the loan was contractually current through April 2009; and (2) the De La Fuentes had made all of their monthly payments since May of 2009. Accordingly, there is no way that any records of the De La Fuentes loan under the control and supervision of Wells Fargo could accurately

represent that as of February 8, 2010, the De La Fuentes were in default by $9,421.52.

Fifth, the Business Online Account Activity of January 21, 2010 represents that there are "unpaid fees / late charges" of $78.72. *See* [Ex. No. 3]. By publishing this number into the online records of the De La Fuentes' loan, Wells Fargo violated the Agreed Judgment because: (1) the Agreed Judgment reflects that Wells Fargo stipulated that the loan was contractually current through April 2009; and (2) the De La Fuentes had made all of their monthly payments since May of 2009, including any late charges. [February 23, Tr. 42:20–43:7]. Accordingly, there is no way that any records of the De La Fuentes loan under the control and supervision of Wells Fargo could accurately represent that as of January 21, 2010, the De La Fuentes owed late charges of $78.72.

Sixth, the Business Online Account Activity of February 8, 2010 represents that there are "unpaid fees / late charges" of $78.72. *See* [Ex. No. 4]. Wells Fargo's inputting this number into the online records of the De La Fuentes' loan once again violated the Agreed Judgment because: (1) the Agreed Judgment reflects that Wells Fargo stipulated that the loan was contractually current through April 2009; and (2) the De La Fuentes had made all of their monthly payments since May of 2009, including any late charges. Accordingly, there is no way that any records of the De La Fuentes loan under the control and supervision of Wells Fargo could accurately represent that as of February 8, 2010, the De La Fuentes owed late charges of $78.72.

*iii. The third discrete time period: February 10, 2010 to the February 23 Hearing*

During this particular time period, the evidence is also clear that Wells Fargo continued to be in violation of the Agreed Judgment in several respects. First, the Business Online Account

Activity of February 10 incorrectly shows that there are late charges of $78.72. [Ex. No. 6]. Second, this same day's activity reflects that the outstanding principal balance is $66,572.80 when it should be $65,390.24 pursuant to the amortization table. *See* [Exhibit No. 6]. Third, the Business Online Account Activity incorrectly reflects that the De La Fuentes need to pay $9,698.02 to bring their loan current. [Exhibit No. 6]. Fourth, Wells Fargo still had taken in $220.70 by requiring the De La Fuentes to pay $984.00 each month for ten months, rather than the correct monthly payment of $961.93 delineated in the Agreed Judgment. These overpayments leave Wells Fargo with $220.70 more than it should have under the Agreed Judgment, and Wells Fargo's retention of these funds in the "suspense account" constitutes a violation of the Agreed Judgment.

With respect to the Business Online Account Activity of February 12, 13, 14, 15, 18, 21, & 22, the same four violations described in the paragraph immediately above are also present. For some inexplicable reason, the Business Online Account Activity of February 16 & 19 shows that the De La Fuentes are not in default—*i.e.*, that they did not have to pay $9,698.02 to bring their loan current. That is the good news. The bad news is that the Business Online Account Activity for these two days still inaccurately represents that the unpaid balance is $66,572.80 and that there are unpaid late charges of $78.72. Moreover, Wells Fargo still had $220.70 more than it should have under the Agreed Judgment, and it had not returned these funds to the De La Fuentes.

Finally, the Business Online Account Activity of February 23, 2010 accurately represents that there is no default and that the outstanding principal balance is now $65,390.24, which is in fact the correct number pursuant to the amortization schedule attached to the Agreed Judgment. Once again, that is the good news. However, the bad news is that the Business Online Account Activity of February 23, 2010 continues to falsely represent that the De La Fuentes owe late charges of $78.72.

Thus, even as of the date of the second part of the hearing on the Motion for Contempt—*i.e.*, even as of the February 23 Hearing—Wells Fargo was still in violation of the Agreed Judgment.

2. Wells Fargo has failed to demonstrate an inability to comply with the Agreed Judgment, or any other relevant defenses

With the De La Fuentes having satisfied the elements of civil contempt, the burden shifts to Wells Fargo to demonstrate an inability to comply with the Agreed Judgment, or establish any other relevant defense. *See LeGrand*, 43 F.3d at 170 (citing *Matin v. Trinity Indus. Inc.*, 959 F.2d 45, 47 (5th Cir. 1992)); *Star Brite Dist., Inc. v. Gavin*, 746 F.Supp. 633, 643 (N.D. Miss. 1990); *In re Bradley*, 588 F.3d at 264. Wells Fargo has failed to do so. Indeed, Grissom conceded that Wells Fargo's records had been inaccurate and required modification to bring them into compliance with the Agreed Judgment. [Feb. 23, 2010 Tr. 10:13–11:1]. Grissom also admitted that the records were not brought into full compliance until the evening of February 22, 2010. [Feb. 23, 2010 Tr. 12:1–19]. Then, at the February 23 Hearing, he first testified that Wells Fargo had come into complete compliance, but then had to concede that this was not true. [February 23, 2010 Tr. 26:6–9, 33:19].

Additionally, Wells Fargo failed to demonstrate an inability to comply with the Agreed Judgment, or any other relevant defenses. In an apparent attempt to excuse away Wells Fargo's failure to abide by the terms of the very judgment to which it expressly agreed, Wells Fargo offered four explanations: (1) Wells Fargo's accounting software would not allow it to make all the necessary changes to the De La Fuentes' account [*See, e.g.*, February 23, 2010 Tr. 55:14–18]; (2) the De La Fuentes did not bring Wells Fargo's non-compliance with the Agreed Judgment to Wells

Fargo's attention before filing the Motion for Contempt [*See, e.g.*, February 23, 2010 Tr. 55:14–18]; (3) the information set forth on the Online Business Account Activity does not constitute an "official record" of Wells Fargo and therefore the De La Fuentes assume the risk of relying on these records; and (4) Wells Fargo did not willfully fail to make the correcting entries [*See, e.g.*, February 23, 2010 Tr. 54:3–6].

With respect to the first contention, the Court is highly skeptical that, if properly motivated, Wells Fargo could not make the necessary changes to the De La Fuentes' account in the same business day, or, at the most, two business days. First, the record indicates that Wells Fargo is capable of flurries of activity correcting entries on the day before a hearing—here, on the day before the February 23 Hearing.[*See, e.g.*, February 23, 2010 Tr. 12:17–19]. Second, Grissom's testimony that "[i]t is my understanding that there are system limitations" [February 23, 2010 Tr. 15:2–3] is hearsay to which this Court gives very little weight; at the February 23 Hearing, he was not qualified as an expert in computer information systems or electronic record keeping. Finally, Wells Fargo does not contend, and realistically cannot contend, that the quirks of its accounting software rendered it incapable of complying with the requirements of the Agreed Judgment, which gave Wells Fargo thirty days to bring its records into compliance. Indeed, by signing the Agreed Judgment, Wells Fargo was representing that it could correct its records within thirty days. Not only did Wells Fargo fail to bring its records into compliance within this liberal thirty-day period, Wells Fargo has failed to comply with the Agreed Judgment for almost six months. Indeed, Wells Fargo is still not in complete compliance.

With respect to the second contention, that the De La Fuentes did not contact Wells Fargo regarding Wells Fargo's noncompliance with the Agreed Judgment, the Court disagrees. In fact, the

De La Fuentes contacted Wells Fargo about these issues when they were required to call in to make their monthly payment to Wells Fargo; Ms. De La Fuente's testimony was very clear on this point. [February 9, 2010 Tr. 12:4–16]. Granted, Ms. De La Fuente did not expressly say to the Wells Fargo representative that "Wells Fargo is in violation of the Agreed Judgment." Nevertheless, she did convey to the representative that the figures showing up on the Business Online Account Activity were incorrect.

Grissom attempted to counter this point by testifying that if the De La Fuentes or their counsel had only communicated with **him** about Wells Fargo's failure to correct its records, such corrections would have been made without further ado. [February 23, 2010 Tr. 15:14–19]. The Court has difficulty giving much credence to this point because when Grissom did become aware of the problem—which he testified was on the date that the Motion for Contempt was filed, i.e., on January 18, 2010 [February 23, 2010 Tr. 11:7–11]—Wells Fargo still did not correct the defects in its records as required by the Agreed Judgment. Indeed, even though the Motion for Contempt was filed on January 18, 2010, and even though Wells Fargo had until February 9, 2010 (*i.e.*, the date of the first hearing on the Motion for Contempt) to correct the problems in its records of the De La Fuentes' loan, Wells Fargo still failed to make all of the required corrections. Thus, Grissom's testimony on this point is not credible.

Finally, even though neither the De La Fuentes nor their counsel notified Grissom, it does not constitute a defense to civil contempt of the Agreed Judgment. Indeed, both counsel for Wells Fargo and Grissom admitted that the De La Fuentes had no responsibility to help Wells Fargo comply with the Agreed Judgment [February 23, 2010 Tr. 39:23–40:9; 54:19–55:1], so this argument is misplaced. Moreover, one wonders why Wells Fargo would need any notice that it

needed to correct its records given that: (1) the Agreed Judgment resulted from the De La Fuentes filing the Adversary Proceeding against Wells Fargo for improper and inaccurate entries in the loan records; (2) Wells Fargo and the De La Fuentes, through their respective attorneys, announced a settlement orally on the record on April 21, 2009, and one of the terms of this settlement included the correction of records by Wells Fargo; (3) Wells Fargo felt compelled to file a Motion for Entry of Final Judgment on June 10, 2009 when the parties were unable to agree on the amount of the monthly escrow that had to be paid, and Wells Fargo submitted a proposed judgment which required it to make correcting entries; (4) on July 20, 2009, this Court denied the Motion for Entry of Final Judgment and set trial for July 28, 2009; and (5) on July 27, 2009, the parties entered into and filed the Agreed Judgment which expressly required Wells Fargo to make correcting entries. If Wells Fargo did not have sufficient notice through all of these circumstances and events to realize that it really did need to correct the inaccuracies in the loan files of the De La Fuentes, then this Court is skeptical that a letter or a phone call from the De La Fuentes or their counsel to Grissom would have led Wells Fargo to make the corrections. But, in any event, the De La Fuentes had no legal duty to give notice to Wells Fargo that it was violating the terms of the very Agreed Judgment into which Wells Fargo had entered. The need to make correcting entries should have been a huge blip on Wells Fargo's radar screen upon the entry of the Agreed Judgment, if not much earlier than that. Wells Fargo should not have to be told to comply with the terms of an Agreed Judgment.

With respect to the argument that the Business Online Account Activity is not an "official record" of Wells Fargo, the clear implication is that Wells Fargo has no duty to ensure the accuracy of the information contained thereon and that debtors such as the De La Fuentes assume the risk of relying on this information. This is a Catch-22 argument. In the computer age in which we live,

consumers are expected to obtain information from their financial institutions by going online and reviewing this information—which is published online by these very institutions, including Wells Fargo. If consumers such as the De La Fuentes cannot rely on the information set forth online, and if institutions such as Wells Fargo are not responsible for publishing accurate information online, then faith in the integrity of the very system by which we live will be severely undermined. In essence, Wells Fargo's argument is that the phrase "loan records" in the Agreed Judgment—which, it must be remembered, Wells Fargo is required to correct—does not encompass the information about the De La Fuentes' loan that Wells Fargo publishes online. The Court cannot accept this disingenuous argument.

Finally, it is of no moment that Grissom testified that Wells Fargo's failure to comply with the Agreed Judgment has not been willful. [Feb. 23, 2010 Tr. 11:2–6]. In assessing whether Wells Fargo is in civil contempt of the Agreed Judgment, it is irrelevant whether Wells Fargo's failure to comply is willful. *In re Bradley*, 588 F.3d at 264.

Nor does Wells Fargo's argument that it simply made an honest error pass muster. In Grissom's own words: "Mistakes happen, we're all human. And when mistakes occur—even though we are a big bank, we are run by humans. And when mistakes occur—and there will be mistakes. Our error ratio is very low for the number of loans that we service." [February 23, 2010 Tr. 40:11–14]. The Court certainly agrees that "mistakes happen." However, when mistakes happen not once, not twice, but repeatedly, and when actions are not taken to correct these mistakes within a reasonable period of time, the failure to right the wrong—particularly when the basis for the problem is a months-long violation of an agreed judgment—the excuse of "mistakes happen" has no credence. Here, Wells Fargo's failure to take corrective action to comply with the Agreed Judgment

does not come within hailing distance of the realm where "mistakes happen" is a legitimate excuse. Rather, such failure, if not willful refusal to comply with the Agreed Judgment, is at least reckless disregard of the Agreed Judgment.

Moreover, Grissom's gratuitous statement that "[o]ur error rate is very low for the number of loans that we service" [Feb. 23, 2010 Tr. 40:13–14] is disingenuous for two reasons. First, even if the statement is true—and this Court expressly makes no such finding, as Grissom gave no specific testimony about the number of loans serviced by Wells Fargo and the number of errors made by Wells Fargo relating to those loans—Wells Fargo's numerous and continuous errors **in this case** have caused the De La Fuentes to constantly fear that Wells Fargo is attempting to foreclose on their homestead. The consternation in Ms. De La Fuente's voice when she gave the following testimony was palpable: "I can't even count how much time. Every time I look at my account, the stress, the pain, the anxiety. It's frustrating and upsetting. 'Cause I figured, I mean, we did what we were supposed to do. We caught up, we paid, and we've stayed caught up." [February 9, 2010 Tr. 11:19–23].

Second, recent case law contradicts the suggestion by Grissom that Wells Fargo rarely commits errors. *See, e.g., Nibbelink v. Wells Fargo Bank*, 403 B.R. 113, 116 (Bankr M.D. Fla 2009) (Wells Fargo sanctioned for overcharging Chapter 13 debtors, threatening to foreclose on the debtors' home, and keeping incorrect records of the debtors' loan); *Wells Fargo Bank v. Jones*, 391 B.R. 577, 582 (E.D. La. 2008) (Wells Fargo sanctioned for collecting sums far in excess of the amounts reasonably necessary to satisfy the loan; collecting both pre and post-petition charges from property of the estate without authorization; delaying the return of the debtor's property for over one year; failing to provide a reasonable accounting of the loan history; and improperly applying

payments resulting in significant additional and unwarranted interest charges); *Myles v. Wells Fargo*, 395 B.R. 599, 601 (Bankr. M.D. La. 2008) (Wells Fargo admonished for failing to comply with the terms of the plan and violating the automatic stay by treating the debtors' mortgage debt as if they were in default rather than current as of the petition date; misapplying the debtors' monthly mortgage payments; depositing debtors' direct monthly payments on the current mortgage debt into a suspense account and not applying them to the post-petition mortgage debt; and failing to disclose any of these actions to the debtors).

In sum, this Court concludes that Wells Fargo is in contempt of the Agreed Judgment and has failed to establish that it is incapable of complying with its terms or that it has some other applicable defense.

3. Action that this Court will take to coerce Wells Fargo to comply with the Agreed Judgment

Appropriate action for this Court to take in the wake of a finding of civil contempt includes: (1) a daily fine that is levied and paid to the Clerk of Court until the contemnor comes into compliance; (2) a compensatory fine to be paid to the movants; and (3) reasonable attorneys' fees and costs incurred by the movants. *In re Bradley*, 588 F.3d at 263–264. The Court addresses each of these in turn with respect to the suit at bar.

*i. Daily fine*

In paragraph 19 of the Motion for Contempt, the De La Fuentes request that Wells Fargo

pay a per diem sanction of $2,500.00 until Wells Fargo complies with the Agreed Judgment. The Court has so far declined to impose this amount of per diem sanction. However, at the close of the February 9 Hearing, the Court orally ordered that Wells Fargo would henceforth be liable on a per diem basis for the amount of $1,182.56 for each day that passed until it corrected the inaccurate principal balance figure so that the proper amount of $65,390.24 would replace the improper amount of $66,572.80. On February 10, 12, 13, 14, 15, 16, 18, 19, 21, and 22, the Wells Fargo Business Online Account Activity continued to inaccurately represent that the principal balance was $66,572.80. [Ex. No. 6]. It was only by the beginning of the February 23 Hearing that the Business Online Account Activity finally reflected the correct outstanding principal balance pursuant to the amortization schedule attached to the Agreed Judgment. [Exhibit No. 6]. Thus, when the February 23 Hearing began, Wells Fargo had become liable to this Court for the amount of $11,825.60 (*i.e.*, $1,182.56 x 10 days).

Meanwhile, because Wells Fargo continues to violate the Agreed Judgment by inaccurately representing in its records that the De La Fuentes have late charges of $78.72, this Court concludes that it is appropriate to increase the amount of the coercive per diem fine. Thus, beginning three business days after this Memorandum Opinion is entered on the docket, this Court will impose a per diem coercive fine on Wells Fargo of $1,261.28 (*i.e.*, $1,182.56 + $78.72), and this amount will accrue each day until Wells Fargo comes into compliance with the Agreed Judgment. Moreover, Wells Fargo must deliver to the Clerk of Court a check for the amount of $11,825.60. Wells Fargo will have three business days to take this action. Stated differently, Wells Fargo will be liable for $1,261.28 per day, effective May 21, 2010 (i.e., three business days from the entry on the docket of this Memorandum Opinion), until: (1) Wells Fargo comes into complete compliance with the

Agreed Judgment, including removing any reference that the De La Fuentes presently owe late charges of $78.72; and (2) Wells Fargo delivers to the Clerk of Court a check for the amount of $11,825.60.

Finally, this Court will hold a hearing on May 28, 2010 to determine if Wells Fargo is in complete compliance as set forth above.[25] At this hearing, Wells Fargo has the burden to prove that it is in compliance with the Agreed Judgment in every respect. In order to emphasize to Wells Fargo the importance of proving that it is in complete compliance with the Agreed Judgment, the Court wants Wells Fargo to know that if the Court finds at the end of this hearing that Wells Fargo is still in violation of the Agreed Judgment or has failed to deliver the check for $11,825.60 to the Clerk of Court, the Court will also require Wells Fargo to pay the amount of $2,600.80 to the Clerk of Court. This amount is 4% of the principal balance that the De La Fuentes will owe Wells Fargo as of the date of that hearing pursuant to the amortization schedule attached to the Agreed Judgment. The figure of 4% is the same percentage that Wells Fargo has used to calculate late charges when the De La Fuentes have made untimely loan payments.

*ii. Compensatory fine*

Ms. De La Fuente testified that her husband and she have not suffered any damages as a result of Wells Fargo's violation of the Agreed Judgment. [February 23, 2010 Tr. 16:15–17:10].

[25] On April 5, 2010, the De La Fuentes submitted a Status Report [Adv. Doc. No. 38] to which were attached documents that were not introduced into the record at either the February 9 or the February 23 Hearing because they were generated well after February 23. These documents purport to be from the Wells Fargo's Business Online Account Activity screen as of April 5, 2010. The online documents reflect that the outstanding principal balance is incorrect and that there are still late charges of $78.72, which is also inaccurate. At the hearing to be held on May 28, 2010, the De La Fuentes will be given an opportunity to rebut any evidence that Wells Fargo introduces to show compliance with the Agreed Judgment. And, so that there is no misunderstanding, the burden will be on Wells Fargo to prove that it is in complete compliance with the Agreed Judgment.

Accordingly, this Court declines to grant any such relief as it would relate to severe emotional distress, lost wages, or lost profits. However, the De La Fuentes have suffered damages insofar as they have overpaid Wells Fargo by $220.70 (*i.e.*, $22.07 x 10 months), and Wells Fargo has never returned these funds. Accordingly, Wells Fargo must, by no later than May 21, 2010 return the sum of $220.70. At the hearing to be held on May 28, 2010, the Court will expressly inquire whether these funds have been returned to the De La Fuentes.

*iii. Reasonable attorneys' fees and costs incurred by the De La Fuentes*

**a. Power of this Court to award attorneys' fees to the De La Fuentes as damages resulting from Wells Fargo's contemptuous behavior**

Under Fifth Circuit precedent, "'[c]ivil contempt can serve two purposes,' either coercing compliance with an order or 'compensat[ing] a party who has suffered unnecessary injuries or costs because of contemptuous conduct.'" *In re Bradley*, 588 F.3d at 263–64. Attorneys' fees incurred in rectifying another party's contemptuous conduct are a type of injury or cost that can be compensated in a suit for civil contempt. *See, e.g., Travelhost, Inc. v. Blandford*, 68 F.3d 958 (5th Cir. 1995).

**b. Standard for evaluating reasonableness in attorneys' fees requests**

In determining what is reasonable for an attorneys' fees award, bankruptcy courts must follow a three step process outlined in *First Colonial*: (1) ascertain the nature and extent of the

services supplied by the attorney with reference to the time records submitted; (2) assess the value of the services; and (3) briefly explain the findings and reasons upon which the award is based, including a discussion of how each of the twelve factors from *Johnson* affected the court's decision. *In re First Colonial Corp of Am.*, 544 F.2d 1291, 1299–1300 (5th Cir. 1977); *See Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974).

### c. Step one of the *First Colonial* analysis

With respect to the first of the three steps of the *First Colonial* analysis, this Court has ascertained the nature and extent of Walker & Patterson, PC's (W & P) services through a review of W & P's time records, which were introduced into evidence as Exhibit 5,[26] and the testimony given by Patterson at the February 23 Hearing.

W & P's time records and Patterson's testimony indicate that two W & P attorneys—Patterson and Goott—billed the De La Fuentes for professional services related to this matter. According to Exhibit 5, W & P charged the De La Fuentes a total of $3,754.00, representing the total of $3,720.00 in fees (for 15.20 hours of professional services by the two W & P attorneys), and $34.00 in copying charges incurred in relation to the Motion for Contempt. Patterson's testimony indicated that, in addition to the amounts listed on Exhibit 5, the De La Fuentes also seek the fees incurred for services rendered by Goott and Patterson at the February 23 Hearing.

On February 23, 2010, W & P began providing services at 8:30 a.m., according to

[26]Exhibit 5 was admitted without objection under the condition that any of the hearsay statements in this exhibit are not to be part of the record or used for argument.

Patterson's testimony, and finished providing services at 11:08 a.m. [February 23, 2010 Tr., 50:10–12]. This represents a period of approximately two hours and thirty minutes. Expressed purely in units of hours, two hours and thirty minutes converts to 2.5 hours. W & P had two attorneys present for the February 23 Hearing—Patterson, whose professional services, according to Exhibit 5 and his own testimony, are billed at $325.00 per hour; and Goott, whose professional services are billed at $225.00 per hour—representing a combined hourly rate for professional services of $550.00 per hour (*i.e.*, $325.00 per hour + $225.00 per hour = $550.00 per hour). As a result, the De La Fuentes request attorneys' fees and costs in the amount of $1,375.00 for the professional services rendered on February 23 by W & P (*i.e.*, 2.5 hours x $550.00 per hour = $1,375.00). Thus, the total amount of attorneys' fees and costs requested by the De La Fuentes is $5,129.00—*i.e.*, the sum of the amount represented in Exhibit 5 ($3,754.00) and the amount incurred on February 23, 2010 ($1,375.00).

Exhibit 5 breaks the professional services provided by W & P to the De La Fuentes into discrete services, and sets forth the time spent on each service, the attorney providing the service, the hourly rate for the service provided, and the total amount charged for each discrete service. As a result of this specificity, the Court is able to determine the amount of time allocated to each service and the value of the services rendered. In other words, the time records submitted by W & P allow this Court to determine the nature and extent of the services supplied by each attorney at W & P. Patterson testified that all entries in Exhibit 5 are related to the Motion for Contempt, and, pursuant to W & P policy, were reviewed to eliminate duplicate billing. Of the 15.20 hours billed as represented in Exhibit 5, much of this time was spent drafting the Motion for Contempt or preparing for the February 9 Hearing; there was also time spent consulting with the De La Fuentes and

communicating with counsel for Wells Fargo. Goott rendered the vast majority of the services for which fees are requested.

Although the fees sought by the De La Fuentes for services provided on February 23 are not itemized in a time sheet, this Court concludes that the circumstances surrounding the rendering of the services for which the fees are sought (specifically that these services were provided at a hearing before the Court) make reference to a time sheet unnecessary, as the Court has no difficulty determining the nature and extent of the services rendered by W & P's attorneys. The fees incurred on February 23 are unquestionably the result of the services provided that related to the February 23 Hearing. And, under these circumstances, the Court believes it reasonable to find that the services provided while Patterson and Goott were in the Courtroom on February 23 for which fees are sought should be characterized as necessary services that have produced a successful result for the De La Fuentes.

**d. Step two of the *First Colonial* analysis**

With respect to the second of the three steps of the *First Colonial* analysis, the Court concludes that the professional services rendered by W & P were highly valuable to both the De La Fuentes and the integrity of the bankruptcy system. Wells Fargo has, before and after the entry of the Agreed Judgment on the docket, kept incorrect records on the De La Fuentes' home loan. The record before this Court demonstrates that no amount of protest from the De La Fuentes themselves was adequate to cause Wells Fargo to respond and fix the problem. Moreover, Wells Fargo, when dealing directly with the De La Fuentes, overcharged them on their monthly payments for their

homestead loan. Again, the record indicates that no amount of protest from the De La Fuentes alone was adequate to persuade Wells Fargo to rectify the errors and comply with the Agreed Judgment.

In light of this pattern in Wells Fargo's behavior, it is reasonable to assume that Wells Fargo would have gone on treating the De La Fuentes in this manner had they not enlisted the assistance of counsel to assert their rights. In fact, the significant value of W & P's services is at least partially demonstrated by the fact that it was not until after W & P filed the Motion for Contempt on behalf of the De La Fuentes that Wells Fargo even began to respond, albeit slowly and incompletely, to the De La Fuentes' complaints. Moreover, as this Court has spelled out in this opinion, W & P obtained a vindication of the De La Fuentes' rights through the prosecution of the Motion for Contempt. This Court now has notice of Wells Fargo's failures and misdeeds with respect to the De La Fuentes, and will take steps to ensure Wells Fargo's compliance with the Agreed Judgment. Moreover, W & P's services have proven valuable to the integrity of the bankruptcy system. As discussed above, the integrity of the bankruptcy system relies on the good faith of both debtors **and** creditors. However, no court can monitor all of the parties outside the courtroom to ensure good-faith compliance with its orders, and therefore must rely on the parties themselves to bring non-compliance to that court's attention. Here, W & P, in filing the Motion for Contempt, served just that role. By filing the Motion for Contempt, W & P brought Wells Fargo's violation of the Agreed Judgment to the attention of this Court so that it can coerce Wells Fargo into compliance and protect the integrity of the bankruptcy system. In sum, W & P's services in filing the Motion for Contempt and advocating for the De La Fuentes in this dispute resulted in great value to both the De La Fuentes in particular and the bankruptcy system in general.

In addition to obtaining valuable results for the De La Fuentes, W & P tailored its services

to limit unnecessary work. A review of Exhibit 5 indicates that W & P only billed the De La Fuentes for services provided which were necessary to the representation (*i.e.*, services which would be of value to the De La Fuentes), with one minor exception. At the February 9 Hearing, both Patterson and Goott were present in the courtroom to represent the De La Fuentes, and Exhibit 5 reflects that the De La Fuentes were billed for the time of both attorneys. However, at that February 9 hearing, Patterson did not introduce evidence into the record, adduce testimony, or appear to provide other services specifically pertinent to the representation of the De La Fuentes. In addition, Patterson conceded at the February 23 Hearing that Goott had primarily handled the matter of the Motion for Contempt, so his presence cannot be justified on the basis of a greater familiarity of the case. Finally, Goott, though not possessing the same wealth of experience that Patterson does, has worked at W & P for approximately six years and has capably represented the De La Fuentes at both the February 9 Hearing and February 23 Hearing. Thus, Patterson's presence was not necessary on the basis of his greater experience in representing debtors in bankruptcy court. As a result, this Court concludes that Patterson's presence at the February 9 Hearing did not provide any substantial value to the De La Fuentes.[27] Therefore, this Court will remove the $585.00 billed to the De La Fuentes for the 1.8 hours Patterson spent at the February 9 Hearing from its consideration of the amount of approved fees. In other words, this Court will assess the De La Fuentes' attorneys' fee request as being for $4,544.00 (*i.e.*, $5,129.00 – $585.00 = $4,544.00) rather than $5,129.00.

### e. Step three of the *First Colonial* analysis

[27]However, this Court concludes that Patterson did provide value to the De La Fuentes by being present at the February 23 Hearing due to his role as the sole witness called to testify on the De La Fuentes' request for attorneys' fees and costs incurred in prosecuting the Motion for Contempt.

Finally, as required by the third step of the *First Colonial* three-step analysis, this Court sets forth its conclusions using the twelve factors set forth in *Johnson*.

(1). Time and labor required

As already noted, according to Exhibit 5, W & P's attorneys spent 15.2 hours drafting the Motion for Contempt, preparing for hearings, representing the De La Fuentes at the February 9 Hearing, and consulting with their clients and opposing counsel. W & P's attorneys also spent a combined 5.2 hours providing services in relation to the the February 23 Hearing. The Court concludes that Exhibit 5 is sufficiently detailed (and the services provided on February 23 self-evident enough) to allow this Court to conclude that, with the exception of Patterson's presence at the February 9 Hearing, the services rendered by the W & P personnel were necessary and resulted in a tangible, identifiable, and material benefit for the De La Fuentes. In sum, this Court concludes that this factor weighs in favor of concluding that all of the compensation for which the De La Fuentes seek reimbursement—with one exception—is reasonable. The Court has already concluded that it should reduce the requested reimbursement by $585.00. With that said, after the $585.00 is removed from the De La Fuentes attorneys' fees request, the time and labor expended on prosecuting the Motion for Contempt is in line with the time and labor required to prosecute the Motion for Contempt competently. Accordingly, this factor favors a finding that the De La Fuentes' fee request is reasonable.

(2). Novelty and difficulty of the questions

No evidence was introduced, nor testimony adduced, as to the novelty and difficulty of the legal questions involved in prosecuting the Motion for Contempt. In this Court's view, the questions presented by the Motion for Contempt were neither novel nor difficult. The test for civil contempt has been handed down by clear Fifth Circuit precedent. It requires that the De La Fuentes show only that (1) there was an order from this Court; (2) Wells Fargo is required to perform certain actions under this order; and (3) Wells Fargo has failed to perform all of these actions. Proof of each of these elements was easily obtained as they consisted of the Agreed Judgment and printed documents from Wells Fargo's own Business Online Account Activity portal and Monthly Mortgage Statements.

It is this Court's view that, although this factor may facially weigh against the reasonableness of the De La Fuentes' attorneys' fees request, a review of W & P's time records indicates that W & P's attorneys did not spend excessive time on this matter, even considering the relatively mundane nature of the questions presented. W & P's attorneys spent, excluding time spent at both the February 9 and February 23 Hearings, only 11.6 hours drafting and prosecuting the Motion for Contempt. This Court discerns no unnecessary entries on Exhibit 5, particularly in light of the fact that Goott, the junior attorney working on the matter (with a lower hourly billing rate than Patterson), did the lion's share of the work. Even the most basic, straightforward matters still require some time and attention to be performed competently—basic drafting and editing of pleadings and motions, consultation with clients, settlement negotiations with opposing counsel, time in hearings—and these are the only items reflected in Exhibit 5 as services provided by W & P. It would be nonsensical to say that the De La Fuentes should not be compensated for the attorneys'

fees they incurred in vindicating their rights against a bad-faith creditor simply because they had such a strong and straightforward case. As such, this Court treats this factor as neither favoring nor disfavoring a finding that the De La Fuentes' fee request is reasonable.

(3). Skill required to perform the legal services properly

The legal services provided by W & P required general trial skills. Both W & P attorneys who provided services to the De La Fuentes have experience in bankruptcy and representing clients at hearings, and displayed their competence in this case. As with the factor above, regarding the novelty and difficulty of the questions presented, this dispute did not require a particularly high level of skill to perform the legal services properly. However, as also noted above, W & P's attorneys performed their services for this dispute with relative economy. Therefore, this Court treats this factor as favoring a finding that the De La Fuentes' fee request is reasonable.

(4). Preclusion of other employment due to acceptance of this case

Exhibit 5, along with Patterson's testimony, indicates that the acceptance of this dispute required W & P attorneys to devote time to this matter from November 18, 2009 to February 23, 2010. There is nothing in the record indicating that W & P had to refuse employment in other matters by accepting the representation of the De La Fuentes. Accordingly, this factor neither favors nor disfavors a conclusion that the De La Fuentes' fee request is reasonable.

(5). Customary fee

At the February 23 Hearing, Patterson testified that his own billing rate of $325.00 per hour is based on his 20 years of experience practicing bankruptcy law and his certification in consumer bankruptcy law. [February 23, 2010 Tr. 48:15–21]. Patterson also testified that Goott's billing rate of $225 per hour reflects the market rate for the services she provides. [February 23, 2010 Tr. 48:22–49:7]. Given the experience of these individuals, this Court concludes that W & P's hourly rates are actually lower than those charged by similarly experienced and talented attorneys in the Southern District of Texas. Accordingly, this Court concludes that this factor weighs in favor of a conclusion that the De La Fuentes' attorneys' fee request is reasonable.

(6). Whether the fee is fixed or contingent

Exhibit 5 and Patterson's testimony reflect that the De La Fuentes' attorneys' fee agreement with W & P was not contingent, and nothing in the record indicates that the attorneys' fee agreement was a fixed fee. Exhibit 5, along with Patterson's testimony, reflects a straightforward hourly billing system. Because, as stated above, both the hourly rate and the number of hours billed for this matter are reasonable, this Court concludes that the hourly billing system used is at least as beneficial to the De La Fuentes, if not more so, than if the fee arrangement was a fixed fee or a contingent fee. Indeed, given that prosecuting a motion for contempt in a consumer bankruptcy context rarely results in an award of damages to the debtors, a contingent fee arrangement is wholly impractical. Accordingly, this factor favors a conclusion that the De La Fuentes attorneys' fee request is reasonable.

(7). Time limitations imposed by the client or other circumstances

By the time that the De La Fuentes contacted W & P regarding Wells Fargo's failure to comply with the Agreed Judgment, the De La Fuentes were extremely frustrated and scared. They were justified in having such feelings given that Wells Fargo had led them on a severe run-around by failing to comply with the terms of the Agreed Judgment. In short, there were special circumstances in this matter; rarely, does a party to an Agreed Judgment violate the terms to which it has agreed to such a large extent and for such a long period of time. W & P's actions on behalf of the De La Fuentes were taken to deal with these special circumstances. Thus, this Court concludes that this factor strongly favors the De La Fuentes' attorneys' fee request as reasonable.

(8). Amount involved and the results obtained

There is no question, and the Court so concludes, that with the entry of this Memorandum Opinion and its related order on the docket, W & P obtained a tangible, identifiable, and material benefit for the De La Fuentes. In his closing, counsel for Wells Fargo, John Ely (Ely), argued that the fee request is not reasonable because it is in excess of the "initial amount to be written down in this account" [February 23, 2010, Tr. 56:21–24]—i.e., that because the incorrect principal balance that Wells Fargo failed to correct was overstated by approximately $5,000.00, it is unreasonable to award attorneys' fees of $5,144.00, and that the fees awarded should be a percentage of the error.

The weakness in this argument is that the overstated principal balance has been just one of the errors made by Wells Fargo. Ely overlooks the fact that Wells Fargo has incorrectly been

requiring the De La Fuentes to pay $984.00 per month, rather than $961.93; that it has been incorrectly asserting that the De La Fuentes are in default by $8,934.72, and then $9,421.52, and then $9,698.02; that it has also failed to account for the $220.70 that should be in the "suspense account"; and that it continues to incorrectly state that the De La Fuentes owe late charges of $72.78. Given all of these problems, the Court concludes that attorneys' fees of $4,544.00 is an eminently reasonable amount to require Wells Fargo to make these corrections.

Moreover, Ely's argument highlights Wells Fargo's misunderstanding of, and nonchalance towards, its mistreatment of the De La Fuentes. The stakes in this dispute are not simply limited to the difference between the correct principal balance according to the Agreed Judgment and the incorrect principal balance as set forth in Wells Fargo's records, but also the ability of the De La Fuentes to conduct their affairs without the harassment of a bad-faith creditor, without constant battles over the correct amount of their monthly payment, and without worries of further threats that Wells Fargo will improperly foreclose on their homestead. Coercing Wells Fargo to comply with the Agreed Judgment will potentially forestall a great deal of financial harm to the De La Fuentes that could have occurred as a consequence of further violations of the Agreed Judgment. Indeed, the worst case scenario could see the De La Fuentes lose their home because Wells Fargo—using incorrect numbers in violation of the Agreed Judgment—proceeds to give notice of default, post the homestead for foreclosure, and hold a foreclosure sale.

Under these circumstances, W & P has efficiently achieved the De La Fuentes' objective of obtaining both accuracy and peace of mind, and the amount requested (excluding the $585.00 billed for Patterson's presence at the February 9 Hearing) of $4,544.00 is by no means out of line given the good results that were obtained and the potential harm that could have befallen the De La

Fuentes without W & P's services. Accordingly, this factor strongly favors a conclusion that the De La Fuentes attorneys' fee request is reasonable.

(9). Experience, reputation, and ability of the attorney

Patterson has approximately twenty years experience practicing bankruptcy law, is board certified in consumer bankruptcy law, and has successfully tried numerous adversary proceedings in this Court. Goott has approximately five to six years of experience in bankruptcy law and although she has less experience than Patterson in trying suits in this Court, she has successfully prosecuted motions and suits in this Court and is an effective advocate for her clients. Accordingly, this factor strongly favors a conclusion that the De La Fuentes' attorney fee request is reasonable.

(10). "Undesirability of the case"

What makes the circumstances of this case undesirable is that W & P had to perform services for the De La Fuentes at all, when the De La Fuentes thought that all matters had been resolved through the entry of the Agreed Judgment. Having to enforce the Agreed Judgment leaves clients such as the De La Fuentes to wonder about the effectiveness of their own counsel, who then have to turn around and re-sue the bad-faith creditor (here, Wells Fargo) in order to not only obtain the result that everyone thought had already been achieved, but also to regain the confidence of the consumer debtor. Accordingly, this factor favors a conclusion that the De La Fuentes' attorneys' fee application is reasonable.

(11). Nature and length of the professional relationship with the client

There is nothing in the record addressing this factor. Accordingly, the Court concludes that this factor neither favors no disfavors a conclusion that the De La Fuentes attorneys' fee application is reasonable.

(12). Awards in similar cases

There is nothing in the record addressing this factor. Accordingly, the Court concludes that this factor neither favors no disfavors a conclusion that the De La Fuentes attorneys' fee application is reasonable.

**f. Attorneys' fees and expenses in the amount of $4,544.00 should be awarded to the De La Fuentes**

A review of the twelve factors indicates that eight factors favor a conclusion that the De La Fuentes attorneys' fee application is reasonable; and the other four factors tip the scale in neither direction. Under these circumstances, the Court concludes that the De La Fuentes attorneys' fee application is reasonable so long as a reduction of $585.00 is made from the requested fee award of $5,129.00. Accordingly, this Court awards the De La Fuentes $4,544.00 (*i.e.*, $5,129.00 – $585.00 = $4,544.00) in attorneys' fees and expenses. Wells Fargo shall deliver a check in this amount to W & P by the close of business on May 21, 2010.

## V. CONCLUSION

"In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Pub.L. No. 109-8, 119 Stat. 23 (2005). The BAPCPA is a 'comprehensive package of reform measures' designed 'to improve bankruptcy law and practice by restoring personal responsibility and integrity to the bankruptcy system and [to] ensure that the system is fair for both debtors and creditors.'" *Hersh v. U.S. (ex rel. Mukasey)*, 553 F.3d 743, 746 (5th Cir. 2008) (quoting H.R.Rep. No. 109-31(I), 109th cong. 1st Sess. pt. 1, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. Vol. 4 at 88, 89). The passing of BAPCPA was applauded by the financial industry. The American Financial Services Association (AFSA), a financial industry lobbying entity which Wells Fargo has been and continues to be involved in, lobbied vigorously for BAPCPA and applauded its passage. An AFSA press release sent out on the day BAPCPA went into effect, stated that: "[t]he bankruptcy law going into effect today . . . *encourages personal accountability and responsibility*, the law also will bring changes to an overburdened, antiquated system, allowing it to better serve those in need of bankruptcy relief."[28] (emphasis added).

This Court certainly agrees that personal accountability and responsibility are critical to

[28]Press Release, American Financial Services Association, Statement Regarding Today's Enactment of The Banktruptcy Abuse Prevention and Consumer Protection Act of 2005 (Oct. 17, 2005). American Financial Services Association (AFSA) is a trade association for the financial services industry. *See* http://afsaonline.org. Wells Fargo Financial, a division of Wells Fargo & Company, is a member of AFSA. Fact Sheet, American Financial Services Association (Oct. 17, 2005). Wells Fargo Financial has two representatives working for AFSA: Dennis E. Young (CFO, Wells Fargo Financial and Chairman of AFSA's Financial Relations Committee), David Kvamme (President and CEO, Wells Fargo Financial, and Member of the AFSA Board of Directors). *Id.* Thomas P. Shippee, while President & CEO of Wells Fargo Financial, was on the AFSA Board of Directors when this statement was made. *See* American Financial Services Association, Annual Report 2004 16 (2005); American Financial Services Association, Annual Report 2005 (2006).

maintaining the integrity of the bankruptcy system. However, in its zeal to see debtors be held personally accountable for their actions, Wells Fargo seems to have forgotten—at least in the case at bar—that the integrity of the bankruptcy system requires the good faith of both debtors **and creditors**. *See In re West Delta Oil Co., Inc.*, 2003 WL 21016578 at *3 n.7 (5th Cir. 2003) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999) ("[t]he court notes that 'the integrity of the bankruptcy system depends on full and honest disclosure by debtors . . . [t]he interests of both the creditors and the bankruptcy court . . . are impaired when the disclosure provided by the debtor is incomplete.' This is no less true when the lack of full and honest disclosure is on the part of the creditor.")); *See also In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) (" . . . a good faith standard protects the jurisdictional integrity of the bankruptcy courts by rendering their powerful equitable weapons (*i.e.*, avoidance of liens, discharge of debts, marshalling and turnover of assets) available only to those debtors and creditors with 'clean hands.'"). Grissom's testimony, and Wells Fargo's own records, indicate that in with respect to the De La Fuentes' loan, Wells Fargo has had difficulty accepting personal accountability and responsibility.

In sum, the De La Fuentes have played by the rules of the bankruptcy system. Wells Fargo however, has not. It has not only generated inaccurate information about the De La Fuentes' loan, but it has done so in violation of the Agreed Judgment. Wells Fargo's conduct in this instance is particularly egregious because agreed orders (such as the Agreed Judgment) are the grease that lubricate the wheels of the bankruptcy system. The bankruptcy practice throughout this country is heavily laden with motions, many of which are resolved through the submission of agreed orders. If the parties to these agreed orders are unwilling to abide by them, then the entire bankruptcy system will break down. The Court hopes that at the May 28 hearing, it will be able to conclude that

Wells Fargo is in complete compliance with the Agreed Judgment.

An order consistent with this Memorandum Opinion will be entered on the docket simultaneously with the entry on the docket of this Opinion.

Signed on this 18th day of May, 2010.

Jeff Bohm
United States Bankruptcy Judge