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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35402

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60032

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellees.

No. 16-60033

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown
Appellees.

No. 16-60039

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60040

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60042

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60043

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: April 23, 2018

Before EDWARD LEAVY, RICHARD A. PAEZ, and CARLOS T. BEA, Circuit Judges.

OPINION

BEA, Circuit Judge:

This case arises out of a complex set of bankruptcy proceedings. Appellant Bradley Taggart was a real estate developer who owned a 25% interest in Sherwood Park Business Center, LLC ("SPBC"). Appellees and Cross-Appellants Terry Emmert and Keith Jehnke also each

owned a 25% interest in SPBC. In 2007, Taggart allegedly transferred his share of SBPC to his attorney in this action, John Berman.

When Emmert and Jehnke learned that Taggart had transferred his interest in SPBC to Berman, they sued Taggart and Berman in Oregon state court, asserting that the transfer breached SPBC's operating agreement because Taggart did not provide the notice required to allow Emmert and Jehnke to exercise their right of first refusal to buy Taggart's interest at the agreed upon price. The state court action also sought attorneys' fees pursuant to the operating agreement. Taggart filed an answer to the state court action, sought to dismiss the action, and filed a counterclaim for attorneys' fees pursuant to the operating agreement.

On November 4, 2009, shortly before trial in the state court action, Taggart filed a voluntary Chapter 7 Bankruptcy petition (the "Petition"). The state court action was stayed pending the resolution of Taggart's bankruptcy Petition. On February 23, 2010, Taggart received his discharge in the bankruptcy proceedings.

After the discharge, Emmert and Jehnke, represented by attorney Stuart Brown, continued the state court action against Berman and Taggart. As part of the litigation, Brown served Taggart with a subpoena for a deposition. Taggart, represented by Berman, moved for a protective order that would allow him not to appear at the deposition, but the state trial court never ruled on the motion. Nonetheless, Taggart appeared for his deposition.

Prior to trial, Berman moved on Taggart's behalf to dismiss the claims against Taggart in light of the bankruptcy discharge. The state court denied the motion, finding that Taggart was a necessary party to Emmert and Jehnke's claims seeking to expel Taggart from SPBC, but the parties agreed that no monetary judgment would be awarded against Taggart. Taggart did not appear at or participate in the trial, but Berman orally renewed his motion to dismiss on Taggart's behalf at the close of evidence. The state court once again denied the motion.

After trial, the state court issued findings of fact and conclusions of law that unwound the transfer of Taggart's interest in SPBC to Berman and expelled Taggart from SPBC. Brown submitted a proposed judgment, to which Berman objected. Taggart appeared at the hearing for entry of the judgment and provided testimony and argument.

Following the hearing, the state court entered a judgment that allowed any party to petition for attorneys' fees. The litigation regarding attorneys' fees spawned a complex, interrelated web of litigation in both state and federal court.

First, Brown filed a petition for attorneys' fees in state court on behalf of SPBC, Emmert, and Jehnke. Brown's fee petition sought to recover fees against both Berman and Taggart, but limited the request for fees against Taggart to those fees that had been incurred after the date of Taggart's bankruptcy discharge. In the fee petition, Brown alerted the state court to the existence of Taggart's bankruptcy discharge and argued that Taggart could still be held liable for attorneys' fees incurred after Taggart's discharge because Taggart had "returned to

the fray." That is, SPBC, Emmert, and Jehnke claimed Taggart had willingly engaged in opposing them in the state court action after Taggart obtained his bankruptcy discharge. Taggart opposed Brown's petition for attorneys' fees, arguing his bankruptcy discharge barred any claim for attorneys' fees, whether they were incurred before or after his discharge in bankruptcy.

While the attorneys' fee petition was pending in state court, Taggart moved the bankruptcy court to reopen his bankruptcy proceeding. The day the bankruptcy court reopened Taggart's bankruptcy proceeding, Taggart filed a motion seeking to hold Brown, Jehnke, Emmert, and SPBC (collectively, the "Creditors") in contempt for violating the discharge by seeking an award of attorneys' fees against him in the state court action.

Meanwhile, the state trial court issued a ruling awarding attorneys' fees to SPBC, but not Jehnke and Emmert. The state court ruled that Taggart could be held liable for attorneys' fees that were incurred after his bankruptcy discharge because he had "returned to the fray."[1] Taggart appealed the state court's determination to the Oregon Court of Appeals. *See Sherwood Park Bus. Ctr., LLC v. Taggart*, 341 P.3d 96 (Or. Ct. App. 2014).

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[1] Whether Taggart had "returned to the fray" was significant because if a debtor "returns to the fray" by engaging in post-bankruptcy petition litigation, a creditor may seek an attorneys' fee award if the new litigation was not within the "fair contemplation of the parties" prior to the bankruptcy petition. *See In re Castellino Villas, A. K. F. LLC*, 836 F.3d 1028, 1034–37 (9th Cir. 2016).

Subsequently, the bankruptcy court denied Taggart's motion for contempt, finding that the state court had correctly decided the issue: whether Taggart had indeed "returned to the fray." Taggart appealed the bankruptcy court's ruling to the district court. The district court reversed, finding that Taggart's actions were insufficient to constitute a "return to the fray" and, as a result, the discharge injunction barred the attorneys' fee claim. The district court remanded to the bankruptcy court for a determination of whether the Creditors "knowingly violated the discharge injunction in seeking attorney fees."[2]

On remand, the bankruptcy court found the Creditors had knowingly violated the discharge injunction by seeking attorneys' fees in the state action and entered an order holding them in contempt. Following further proceedings, the bankruptcy court awarded sanctions against SPBC, Emmert, Jehnke, and Brown's estate,[3] pursuant to the court's contempt ruling.

The Creditors appealed the bankruptcy court's contempt ruling to the Bankruptcy Appellate Panel ("BAP"). On appeal, the BAP reversed the bankruptcy court's finding of contempt. The BAP reasoned that the Creditors could not be held in contempt unless they "knowingly" violated the discharge injunction. Because the BAP found that the Creditors had a good faith belief that the discharge injunction did not apply to their attorneys' fee

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[2] Emmert, Brown, Jehnke, and SPBC filed a notice of appeal of the district court's decision. This court dismissed the appeal because the district court's ruling was not a final order.

[3] Brown passed away in 2013. Shelley Lorenzen represents Brown in this litigation as the executor of his estate.

claim, it concluded that they had not "knowingly" violated the discharge injunction.

In the meantime, the Oregon Court of Appeals reversed the state trial court's ruling regarding attorneys' fees. *See Taggart*, 341 P.3d at 102–04. In line with the district court, the Oregon Court of Appeals held that Taggart's actions were not sufficiently affirmative or voluntary to constitute a "return to the fray." *Id.* As a result, the court concluded that the discharge injunction barred the recovery of attorneys' fees. *Id.*

Ultimately, the Creditors were barred from pursuing attorneys' fees against Taggart by the rulings of both the district court and the Oregon Court of Appeals. Additionally, due to the BAP's ruling, the Creditors were not liable for sanctions for knowingly violating the discharge injunction by seeking attorneys' fees against Taggart in the state court litigation.

Taggart filed a notice of appeal challenging the BAP's decision to reverse the bankruptcy court's contempt findings against the Creditors. The Creditors filed a notice of cross-appeal challenging the district court's ruling that Taggart had not returned to the fray in the state court litigation.

I

We begin with Taggart's appeal, in which he argues that the BAP committed reversible error when it held that the Creditors could not be held in contempt because they did not *knowingly* violate the discharge injunction. A discharge under Chapter 7 of the bankruptcy code "discharges the debtor from all debts that arose before the date of the" bankruptcy petition. 11 U.S.C. § 727(b). Once

issued, the discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A bankruptcy court may enforce the discharge injunction by holding a party in contempt for knowingly violating the discharge. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006).

In this case, after the district court concluded that Taggart had not "returned to the fray," it remanded the case to the bankruptcy court for a determination of whether the Creditors should be held in contempt. The bankruptcy court determined that the Creditors were aware of the discharge order, but proceeded with their efforts to recover attorneys' fees from Taggart. The bankruptcy court concluded that it was irrelevant whether the Creditors held a subjective good faith belief that the discharge injunction did not apply to their claim. As a result, the bankruptcy court held that the Creditors had committed a knowing violation of the discharge injunction and it held them in contempt.

On appeal, the BAP reversed. The BAP concluded that the Creditors had a subjective good faith belief that their claim was exempt from the discharge injunction. In light of this good faith belief, the BAP held that the Creditors did not "knowingly" violate the discharge injunction, even though an actual violation had occurred.

We review the BAP's decisions de novo. *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998). The bankruptcy court's decision to impose contempt sanctions is reviewed for an abuse of discretion. *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003). A bankruptcy court abuses its discretion if its decision is based on an incorrect legal

rule, or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 577 (1985)).

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002) (quoting *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)). As noted above, a bankruptcy court may hold a party in contempt for knowingly violating the discharge injunction. *Zilog*, 450 F.3d at 1007. We have adopted a two-part test for determining the propriety of a contempt sanction in the context of a discharge injunction: "[T]o justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069.

Only the first prong of the test is at issue here. To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. *Zilog*, 450 F.3d at 1007–08; *see also Dyer*, 322 F.3d at 1191–92 (rejecting an attempt to infer knowledge of the automatic stay based on knowledge of the bankruptcy proceedings in the context of a contempt

ruling).[4] Additionally, the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. *Zilog*, 450 F.3d at 1009 n.14 ("To the extent that the deficient notices [from the bankruptcy court and opposing counsel] led the [creditors] to believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness.").

In this case, the bankruptcy court abused its discretion by concluding that the Creditors knowingly violated the discharge injunction. Specifically, the bankruptcy court abused its discretion by applying an incorrect rule of law. *See Hinkson*, 585 F.3d at 1262. The bankruptcy court held that a good faith belief that the discharge injunction was inapplicable to the Creditors' claims was irrelevant for purposes of determining whether there was a "knowing" violation of the discharge injunction. This holding conflicts with *Zilog*, where we stated that even an unreasonable belief that the discharge injunction did not apply to a creditor's claims would preclude a finding of contempt. 450 F.3d at 1009 n.14.

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[4] Although *Dyer* dealt with a violation of the automatic stay, rather than a violation of the discharge injunction, the sanctions at issue were not imposed under the bankruptcy code provision that specifically allows sanctions for a violation of the automatic stay, 11 U.S.C. § 362(h). *Dyer*, 322 F.3d at 1189. Rather, sanctions were imposed under the bankruptcy court's 11 U.S.C. § 105(a) contempt authority, thereby invoking the standard that applies when there is a violation of the discharge injunction. *Id.*

It is true, as Taggart points out, that language from our prior opinions in *Bennett* and *Dyer* appears to be somewhat in tension with *Zilog*.[5] However, neither *Bennett* nor *Dyer* held that a creditor's subjective good faith belief that the discharge injunction is inapplicable is irrelevant to the contempt analysis. In fact, *Bennett* expressly states that the creditor must know that the discharge injunction is "applicable" to the creditor's claims, and *Dyer* cited that holding with approval. *Bennett*, 298 F.3d at 1069; *Dyer*, 322 F.3d at 1192. Regardless, *Zilog*'s statement of the law is clear, directly addresses the question at issue in here, and is binding on this court.

In this case, as the BAP found, the Creditors possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that Taggart had "returned to the fray," and Taggart does not contend otherwise. Much like the creditors in *Zilog* relied on statements by the debtor's counsel and the bankruptcy court in concluding that their claims were not impacted by the discharge injunction, the Creditors relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees. Although the Creditors—like the creditors in *Zilog*—were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt. *Zilog*, 450 F.3d at 1009 n.14. As a result, the BAP did not

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[5] Taggart specifically highlights language from *Dyer*, which states: "In determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 322 F.3d at 1191 (quoting *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

err when it reversed the contempt sanctions entered by the bankruptcy court against the Creditors.

II

Because we have determined that the Creditors cannot be held in contempt for any alleged violation of the discharge injunction, we need not reach the arguments raised in the Creditors' cross-appeal regarding the district court's holding that the Creditors violated the discharge injunction by seeking an attorneys' fee award in the state court litigation.[6] Even if the Creditors did violate the discharge injunction—and we express no opinion as to whether they did or did not—they cannot be held in contempt for that alleged violation. As discussed above, they acted pursuant to their good faith belief that, due to Taggart's "return to the fray," the discharge injunction did not apply to their claims. As a result, we decline to reach the issues raised by the Creditors' Cross-Appeal.

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[6] After the district court's decision in this case, but before the parties completed their briefing in our court, another Ninth Circuit panel issued an opinion in *In re Castellino Villas, A. K. F. LLC*, 836 F.3d 1028, 1034 (9th Cir. 2016). Lorenzen's briefing to this court recognized the *Castellino Villas* opinion and noted that, in Lorenzen's view, *Castellino Villas* commands resolution of whether Creditors violated the discharge against the Creditors. At the time of briefing in this case, *Castellino Villas* had been decided, but could have been reheard by an en banc panel of this court or overturned or modified by the Supreme Court. Lorenzen requested that we deem her cross-appeal withdrawn if *Castellino Villas* was not overturned or modified. Because *Castellino Villas* has neither been overturned nor modified, we grant Lorenzen's request to withdraw her cross-appeal. Therefore, we do not address it.

III

In light of the above, we **AFFIRM** the BAP's opinion reversing the bankruptcy court's order entering contempt sanctions against the Creditors.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35402

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown; et al.,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60032

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellees.

No. 16-60033

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown
Appellees.

No. 16-60039

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60040

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60042

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60043

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: September 7, 2018

Before LEAVY, PAEZ, and BEA, Circuit Judges.

ORDER

The panel has voted to grant each amicus curiae motion. The motions for leave to file amici curiae briefs are **GRANTED**.

The panel has voted to deny Appellee's petition for panel rehearing. The panel has also voted to deny Appellee's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehear-

ing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. OR-15-1119-JuKiF
BAP No. OR-15-1158-JuKiF

In re: BRADLEY WESTON TAGGART,
Debtor.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of the Estate of Stuart Brown,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: April 12, 2016

Before JURY, KIRSCHER, and FARIS, Bankruptcy Judges.

OPINION

JURY, Bankruptcy Judge:

Sherwood Park Business Center, LLC (SPBC) commenced a state court lawsuit against chapter 7[1] debtor, Bradley Weston Taggart (Debtor), BT of Sherwood, LLC (BT), and Debtor's attorney John M. Berman (Mr. Berman), prior to Debtor's bankruptcy filing. Terry W. Emmert (Mr. Emmert), Keith Jehnke (Mr. Jehnke), and Debtor were members of SPBC. The litigation arose due to Debtor's transfer of his membership interest in SPBC to another LLC entity. The membership was ultimately purchased by Mr. Berman, in violation of SPBC's operating agreement. Among other things, SPBC sought to unwind Debtor's transfer of his membership interest and expel him from the company. Debtor and BT answered the complaint and asserted a counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC for attorneys' fees.

Debtor filed his bankruptcy petition on the eve of the state court trial and subsequently received his discharge. Mr. Emmert and Mr. Jehnke, represented by Stuart M. Brown (Mr. Brown),[2] resumed the state court litigation postpetition. They sought no money judgment against Debtor due to his discharge. The action ultimately went to trial. Debtor did not appear, although Mr. Berman did. After trial, the state court ruled in favor of SPBC by unwinding Debtor's transfer of his membership interest and reinstating Mr. Emmert's and Mr. Jehnke's right of first

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2] Shelley A. Lorenzen (Ms. Lorenzen) is the executor of Mr. Brown's estate.

refusal to purchase the interest under the SPBC operating agreement.

Mr. Brown later filed a petition (Petition) in the state court on behalf of Mr. Emmert, Mr. Jehnke, and SPBC, seeking attorneys' fees and costs for the period after Debtor's discharge. At the same time, he sought a ruling from the state court on the issue whether the discharge injunction applied to the post-discharge fee request, asserting that Debtor had "returned to the fray" under the holding in *Boeing North American, Inc. v. Ybarra (In re Ybarra),* 424 F.3d 1018 (9th Cir. 2005). Debtor opposed, arguing that he had not voluntarily returned to the fray under the *Ybarra* rule. After a hearing, at which Debtor testified, the state court issued a written ruling, finding that Debtor had returned to the fray and thus the discharge injunction did not apply to the post-discharge request for attorneys' fees and costs under the *Ybarra* rule. The state court awarded SBPC its attorneys' fees and costs, but denied fees and costs as to Mr. Emmert and Mr. Jehnke.

Prior to the state court's ruling, Debtor reopened his bankruptcy case and filed a motion seeking to hold Mr. Emmert, Mr. Jehnke, and Mr. Brown (collectively, Appellants) in contempt for violating the discharge injunction under § 524(a)(2). The bankruptcy court ruled on the matter after the state court had ruled. The bankruptcy court denied Debtor's motion, finding no error with the state court's ruling on the applicability of the discharge injunction under *Ybarra.* Upon its own de novo review, the bankruptcy court also found that the record supported the finding that Debtor had voluntarily returned

to the fray in the state court litigation and thus the discharge injunction did not apply to Appellants' request for post-discharge attorneys' fees. At Mr. Brown's request, the state court entered judgment in favor of SPBC pursuant to its previous award.

Debtor appealed the bankruptcy court's decision to the district court. The district court reversed, finding that Debtor's actions in the state court litigation were not sufficiently affirmative and voluntary to be considered returning to the fray under the *Ybarra* rule. The district court remanded the matter to the bankruptcy court to determine whether Appellants knowingly violated the discharge injunction by seeking attorneys' fees in the state court.

On remand, the bankruptcy court found that Debtor had proved by clear and convincing evidence that Appellants willfully violated the discharge injunction since they were aware of the discharge injunction and intended the actions which violated it. The court entered an order for contempt. After a subsequent hearing, the bankruptcy court entered a judgment awarding sanctions in favor of Debtor against Mr. Emmert, Mr. Jehnke, SPBC, and Mr. Brown.

Mr. Emmert, Mr. Jehnke, and SPBC filed a timely appeal from the judgment (BAP No. OR–15–1119). Ms. Lorenzen, as executor for Mr. Brown's estate, filed a separate notice of appeal from the same judgment (BAP No. OR–15–1158). As further discussed below, we conclude that the bankruptcy court erred by applying an incorrect legal standard to determine whether Appellants had actual knowledge that the discharge injunction applied to their fee request in the state court as required under the

holding in *Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996 (9th Cir. 2006). Accordingly, we REVERSE the bankruptcy court's finding of contempt and VACATE the judgment awarding sanctions.

I. FACTS[3]

A. Prepetition Events And Debtor's Bankruptcy Filing

Debtor was a general contractor who operated through a corporation, Builders, Inc. (Builders). He developed several business parks, anchored by tenants who also were owners. In October 1999, SPBC was formed to build and operate a two-building business park in Sherwood, Oregon. SPBC was initially owned by four members, each with a 25% member interest: Debtor, Mr. Jehnke, John Hoffard, and Anthony Benthin. Debtor was designated as the manager. At some point, Mr. Emmert succeeded to the member interest of Mr. Benthin in SPBC.[4] The operating agreement governed the operations of SPBC, including transfers of ownership. Under the agreement, members had the right of first refusal before any transfer was made and any transfer of a membership interest had to be approved by a majority of the other members.

In late 2004, Debtor began experiencing financial difficulty. In connection with Builders, he stopped paying

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[3] Many of the background facts are set forth in the bankruptcy court's Memorandum Decisions dated December 9, 2011, and December 16, 2014.

[4] Mr. Hoffard apparently joined with Debtor in filing the counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC.

the payroll withholding to the Oregon Department of Revenue (ODR) and the Internal Revenue Service (IRS) and began diverting funds intended for the business to his own use. Tax liens of about $250,000 were placed against him as a result of unpaid withholdings for Builders.

At some point in 2004, Mr. Emmert acquired a 50% ownership interest in Builders. Thereafter, relations between Debtor and Mr. Emmert became contentious.

In 2005, Debtor encouraged three creditors to file an involuntary bankruptcy petition against Builders, which had become insolvent while the SPBC buildings were being constructed. The IRS claim in the Builders' bankruptcy case for unpaid withholding was (with interest) about $400,000, and the ODR had filed liens for about $110,000. These liens were filed in Washington and Deschutes Counties and attached to all real and personal property that was either owned by Debtor in late 2005 or acquired after the date.

Mr. Jehnke replaced Debtor as the SPBC manager in 2005.

It was also discovered sometime in late 2004 or early 2005 that Debtor had diverted about $30,000 in cash from SPBC for his own purposes. These funds were designated for a deposit for steel building materials. Because Debtor refused to return the money or otherwise apply it to the building materials, SPBC initiated an arbitration. The arbitrator found that Debtor converted the funds and breached his fiduciary duty to SPBC. In 2008, the award was confirmed in a judgment in favor of SPBC and against Debtor. Mr. Berman represented Debtor in the arbitration and paid the award on Debtor's behalf.

Debtor's financial condition subsequently deteriorated further. In mid-2007, Debtor, with the assistance of Mr. Berman, formed BT and transferred his 25% member interest in SPBC to BT. Debtor pursued this so that he could sell his interest in the new LLC without complying with the restrictions imposed by SPBC's operating agreement for the sale of his membership interest. Unable to sell his interest in BT to a third party, Debtor transferred his entire membership interest in BT to Mr. Berman in exchange for payments totaling $200,000. Mr. Berman became a member in SPBC.

In September 2008, SPBC filed a complaint against Debtor, BT, and Mr. Berman in the state court, asserting claims for breach of fiduciary duty, expulsion due to breach of contract, attorneys' fees, and declaratory relief (State Court Lawsuit). An amended complaint asserted essentially the same claims with elaborating allegations. SPBC sought to expel Debtor from the company and to unwind the transfers between Debtor and BT so that Mr. Emmert and/or Mr. Jehnke could purchase Debtor's membership interest. In October 2009, Debtor filed an answer to the amended complaint, asserting affirmative defenses and stating a counterclaim for attorneys' fees against Mr. Emmert, Mr. Jehnke, and SPBC.

On November 4, 2009, the day that the trial in the State Court Lawsuit was to begin, Debtor filed a chapter 7 petition. In Schedule B, Debtor did not mention any interest in either SPBC or BT, but he did include a potential attorneys' fee award on his counterclaim in the State Court Lawsuit. Shortly after the filing, the chapter 7 trustee in Debtor's case filed a report of no assets available

for distribution, and Debtor received his discharge by order entered on February 23, 2010. The State Court Lawsuit was stayed while Debtor's case was pending.

B. Post-discharge Events

1. The State Court Proceedings

After Debtor received his discharge, Mr. Brown resumed the State Court Lawsuit on behalf of Mr. Jehnke and Mr. Emmert. He served Debtor with a subpoena for a deposition on April 9, 2010. Mr. Berman filed a motion for a protective order on Debtor's behalf, requesting that the subpoena be quashed. Evidently the state court denied the motion because Debtor appeared for his deposition and was examined.

The state court scheduled the trial for May 18, 2010. The day before, Mr. Berman filed a motion to dismiss the claims against Debtor. Mr. Berman asserted that dismissal was proper since the claims against Debtor related solely to his pre-bankruptcy conduct and thus were subject to his discharge. The motion did not mention Debtor's counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC for attorneys' fees.

The motion to dismiss was argued on the first day of the trial. Mr. Brown agreed that his clients would not be seeking monetary relief against Debtor, but argued that Debtor was a necessary party with respect to the expulsion claim. The state court ruled that no money judgment would be entered against Debtor, but otherwise denied the motion to dismiss. Mr. Berman renewed the motion to dismiss the claims against Debtor at the end of trial. The state court denied the motion. Debtor did not appear or testify at the trial.

Following the trial, the state court generally found in favor of SPBC. Mr. Brown drafted the Findings of Fact and Conclusions of Law (Findings and Conclusions) which the state court later signed. All counterclaims of Debtor and BT were dismissed with prejudice. Debtor's transfer of his interest in SPBC was unwound and the right of first refusal to purchase the interest according to the provisions in the operating agreement was triggered. The judgment provided that the purchase price shall be the fair market value of SPBC as of the date of entry of judgment, multiplied by Debtor's 25% interest less any unpaid post-bankruptcy petition attorneys' fees and costs, and any prevailing party fees which might be assessed against Debtor under Oregon law. The Findings and Conclusions were entered on July 29, 2010.

Although the issue of attorneys' fees was discussed, that issue was not decided at the judgment stage. The state court entered a general judgment on May 26, 2011. Debtor and BT appealed the judgment.

Subsequently, Mr. Brown filed the Petition seeking attorneys' fees and costs on behalf of Mr. Emmert, Mr. Jehnke, and SPBC.[5] The Petition acknowledged that Debtor's liability for fees, if any, "would be limited to fees incurred after he filed for bankruptcy on November 4, 2009[,]" citing *In re Ybarra.*

In opposition, Debtor argued:

> Not only have I not sought to be involved with this litigation at any time, especially after my bankruptcy,

[5] The attorney who represented SPBC authorized Mr. Brown to file the Petition on behalf of SPBC.

> but I sought to be dismissed prior to the recent trial. I note that Emmert and Jehnke contend that I 'joined the fray' by seeking a protective order. . . . Any legal fees incurred by Emmert and Jehnke in this matter were mostly not in litigation with me because I did not have much to do with this case. . . . It is submitted that when I received a discharge in bankruptcy, that discharge protected me from any liability such as being sought in this matter, both for attorney fees and for any costs. It is important to point out that I sought nothing in this litigation.

Mr. Brown clarified at the August 1, 2011 hearing on the Petition that only post-discharge attorneys' fees and costs were sought from Debtor. In arguing that Debtor returned to the fray under the *Ybarra* rule, Mr. Brown noted that on the one hand, Mr. Berman will say he does not represent Debtor and will not accept service, but on the other hand, Mr. Berman will come into court and file something on behalf of Debtor. Next, he pointed out that Debtor had moved for a protective order post-discharge, filed a motion to dismiss the claims against him, and never dismissed his counterclaim for an award of attorneys' fees and costs. Mr. Brown further asserted that Debtor claimed the attorneys' fees that might be awarded to him in the litigation as an asset in his bankruptcy case. This evidence, according to Mr. Brown, showed that Debtor had not abandoned his counterclaim for attorneys' fees against Mr. Emmert, Mr. Jehnke, and SPBC. Finally, Mr. Brown argued that although Debtor claimed to have asked to be dismissed from the litigation, this was not true. Rather, Debtor asked for dismissal of the claims against him on the grounds that those monetary claims

were discharged by his bankruptcy. Mr. Brown maintained that all these facts showed that Debtor was participating in the litigation going forward.

Mr. Berman called and examined Debtor as a witness at the hearing on the Petition. Debtor testified that he was tired of the litigation that had been going on for years and that he never intended to participate in any manner in the lawsuit after his bankruptcy discharge. He also testified that after he filed his bankruptcy petition, he did nothing to attempt to assert his right under the state court counterclaim for attorneys' fees. At another point, Mr. Berman stated on the record that he was representing Debtor. Finally, in argument, Mr. Berman again noted that Debtor had no involvement in the case. At that point, Mr. Berman informed the state court that Debtor had filed a motion for contempt in the bankruptcy court alleging that Appellant had violated the discharge injunction. Mr. Berman opined that the state court could decide the matter or wait and hear what the bankruptcy court said. After the hearing concluded, the state court took the matter under advisement.

On August 11, 2011, the state court issued a letter opinion (Letter Opinion) addressing the Petition. The Letter Opinion states in relevant part:

> The court notes that *In re Ybarra*, 424 F[.]3d 1018 (9th Cir. 2005) holds that the trial court has power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition. This is consistent with the federal case law the court reviewed.

> Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement.
>
> The answer also sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at the time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather he continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees.
>
> The court awards attorney fees in favor of BT of Sherwood [sic-actually, SPBC] in the amount sought at oral argument. My notes are difficult to decipher but I believe that amount was $44,691.50. (It may be accurately $44,611.50 as the ten column is the one I am having trouble reading.) Costs and disbursements sought as well as the standard prevailing party fee are also appropriate.
>
> [SPBC] is the prevailing party with respect to Brad Taggart (as noted above) . . . .

In the end, the state court granted SPBC its attorneys' fees and costs, but denied Mr. Emmert's and Mr. Jehnke's requests.

2. The Bankruptcy Court Proceedings

Meanwhile, about one month earlier, on July 13, 2011, Debtor had reopened his case and filed a motion in the bankruptcy court seeking to hold Mr. Brown, Mr. Emmert, and Mr. Jehnke in contempt for seeking attorneys'

fees and costs in the state court in violation of the discharge injunction under § 524. Debtor repeated his arguments that he made no claim to any interest in SPBC and that he filed bankruptcy because he did not want any further involvement with SPBC, Mr. Emmert, or Mr. Jehnke. He further reiterated that he did not participate in the state court trial and made no claims in the trial. Finally, he contended that the request for attorneys' fees in the state court was causing him extreme emotional distress and that Mr. Brown, Mr. Emmert, and Mr. Jehnke were denying him a fresh start. Debtor sought sanctions consisting of his attorneys' fees and costs, $50,000 for emotional distress, and $100,000 in punitive damages for Appellants' intentional violation of the discharge injunction.

The bankruptcy court held an evidentiary hearing on November 14, 2011. The court acknowledged that the state court had concurrent jurisdiction to decide whether the discharge injunction was violated, but its decision had no effect if the state court "got it wrong." The bankruptcy court also observed that it had to determine whether Debtor's involvement in the state court litigation, either directly or through Mr. Berman, fit within the *Ybarra* rule. The bankruptcy court took the matter under advisement.

On December 9, 2011, the court issued its decision. Finding that the state court applied the correct legal standard under *Ybarra,* the bankruptcy court concluded that the state court's factual findings regarding Debtor's return to the fray were not clearly erroneous. After conducting an independent review of the state court proceedings, the bankruptcy court observed that due to the

"mixed record," it was not sure whether any of Debtor's actions, on his own or through Mr. Berman, would establish that Debtor renewed active participation in the State Court Lawsuit post-discharge. Apparently, the pivotal fact for the bankruptcy court's analysis was the state court's determination that Debtor's attempted transfer of his membership interest in SPBC was ineffective and thus would be unwound, and that Debtor would be paid for that interest.[6] Accordingly, the bankruptcy court found that Debtor re-engaged in the State Court Lawsuit, effectively returning to the fray for *Ybarra* purposes. The court concluded that Debtor did not meet his burden of proof by clear and convincing evidence showing that Appellants had willfully violated the discharge injunction.

On January 18, 2012, Mr. Brown submitted a supplemental judgment (Supplemental Judgment) to the state court in connection with its previous award of attorneys' fees and costs to SPBC.

On January 23, 2012, the bankruptcy court entered the order denying Debtor's motion for contempt. Debtor moved for reconsideration, which the bankruptcy court denied.

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[6] In other words, although Debtor claimed he asserted no interest in SPBC in the litigation, because the state court unwound the transfer of his membership interest, he was once again a member of SPBC. The return to the status quo gave Mr. Emmert and/or Mr. Jehnke the right of first refusal to purchase his interest as per the operating agreement. Therefore, Debtor would receive payment for his interest from one of them, separate and apart from the monies paid to him by Mr. Berman.

3. The District Court Proceedings

Debtor appealed the bankruptcy court's order denying his motion for contempt to the district court. The district court reversed, based on its conclusion that Debtor's actions in the state court were not sufficiently affirmative and voluntary to be considered returning to the fray under *Ybarra.* The district court remanded the matter to the bankruptcy court to consider whether Debtor had proven that Appellants "knowingly" violated the discharge injunction in seeking the attorneys' fees and costs in the state court.[7]

4. The Remand Proceedings

On November 7, 2014, the bankruptcy court heard further oral argument on the issue whether Appellants "willfully" violated the discharge injunction and took the matter under advisement.

On December 16, 2014, the bankruptcy court issued its decision. The court recited the two-part test in the Ninth Circuit for determining whether there was a willful violation of the discharge injunction set forth in *Zilog.* In *Zilog,* the Ninth Circuit cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable

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[7] Mr. Emmert, Mr. Jehnke, and SPBC recognized in their reply brief that we have no jurisdiction to review the district court's order. Ms. Lorenzen recognized this as well in her opening brief. We express no opinion on the question whether Debtor "returned to the fray," because that issue is before the Ninth Circuit, not us.

and (2) intended the actions which violated the injunction." 450 F.3d at 1007 (citing *Renwick v. Bennett (In re Bennett),* 298 F.3d 1059, 1069 (9th Cir. 2002) (citing *Hardy v. United States (In re Hardy),* 97 F.3d 1384, 1390 (11th Cir. 1996)).

Although the bankruptcy court cited the correct test for a finding of willfulness from *Zilog,* it instead used the test from *Hardy* in connection with the first prong of the test—the actual knowledge requirement. There, the knowledge requirement is phrased as whether the defendant in the contempt action "knew that the [discharge injunction] was invoked." *In re Hardy,* 97 F.3d at 1390. Further relying on *Hardy,* the bankruptcy court found that this test did not allow the court to consider Appellants' subjective beliefs, good faith or otherwise, regarding whether, as a legal matter, the discharge applied to the proceedings. As a result, the court concluded that the test for actual knowledge was akin to a strict liability test. The court further decided that neither the state court's prior decision or its decision on the applicability of *Ybarra* insulated Appellants from a "willfulness" finding. Apparently, the bankruptcy court reached that conclusion on the basis that the state court's decision was wrong and its decision was reversed.

Based on this reasoning, the bankruptcy court decided that Debtor had proved the actual knowledge requirement by clear and convincing evidence. In other words, Appellants had actual knowledge of the discharge injunction at the time they filed the Petition in the state

court requesting attorneys' fees and costs. The court concluded: "As such they are charged with knowledge of the discharge injunction."[8]

In considering whether Appellants intended the actions which violated the discharge injunction, the bankruptcy court found that there was no dispute. Mr. Brown testified he prepared and submitted the Supplemental Judgment. Because Mr. Brown would not have proceeded without approval from his clients, and because the record did not reflect that Mr. Emmert and Mr. Jehnke had instructed Mr. Brown not to proceed with the Petition, the court found that they also intended the actions that led to the entry of the Supplemental Judgment. The court thus found Debtor had proved the second element of the willfulness test by clear and convincing evidence. The bankruptcy court found the Supplemental Judgment void and entered an order holding Appellants in contempt for violating the discharge injunction.

Subsequently, the bankruptcy court held an evidentiary hearing regarding Debtor's damages and issued a written decision on March 17, 2015. While Debtor requested emotional distress damages of $50,000, the bankruptcy court ultimately found that he was entitled to $5,000, awarded jointly and severally against Appellants. With respect to the attorneys' fees and costs, the bankruptcy court awarded fees in the amount of $101,450 and costs of $4,143.71 for a total of $105,593.71, jointly and

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[8] We assume the bankruptcy court made this finding because Mr. Emmert and Mr. Jehnke had requested their attorneys' fees and costs and not because they sought entry of the Supplemental Judgment which only applied to SPBC.

severally against Mr. Emmert, Mr. Jehnke, and SPBC, and attorneys' fees and costs totaling $92,118.71 against Mr. Brown's estate, payable jointly and severally as part of the total attorneys' fees and costs award against Appellants.

Finally, Debtor requested $100,000 in punitive damages, which he later reduced to $20,000. As to Mr. Brown, the court found punitive damages were not appropriate since they would serve no deterrent purposes with respect to his estate. The court awarded $2,000 in punitive damages jointly and severally against Mr. Emmert, Mr. Jehnke, and SPBC.

The bankruptcy court entered the order on March 26, 2015. Four days later, the court entered the judgment regarding the sanctions.

On April 13, 2015, Mr. Emmert, Mr. Jehnke, and SPBC filed a timely notice of appeal from the judgment. On the same day, Ms. Lorenzen filed a motion to extend the time for appeal. After a hearing, the bankruptcy court granted the motion on April 27, 2015, extending the time to file a notice of appeal for fourteen days after the entry of the order. On May 11, 2015, Ms. Lorenzen filed a timely notice of appeal from the judgment.[9]

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[9] The Panel issued a one-judge order requiring Ms. Lorenzen to file a response as to why BAP No. OR–15–1158 should not be dismissed as untimely as it appeared the notice of appeal was filed one day late. The confusion arose due to the entry of a wrong event code on May 11, 2015, which was later corrected on the following day. The Panel deemed her appeal timely and a briefing schedule was set.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Did the bankruptcy court abuse its discretion by finding that Appellants willfully violated the discharge injunction?

IV. STANDARDS OF REVIEW

Determining whether the bankruptcy court applied the correct legal standard is a question of law that the panel reviews de novo. *See Bell Flavors & Fragrances, Inc. v. Andrew (In re Loretto Winery, Ltd.),* 107 B.R. 707, 709 (9th Cir. BAP 1989).

The bankruptcy court's finding of a willful violation of § 524 is reviewed for clear error. *Sciarrino v. Mendoza,* 201 B.R. 541, 543 (E.D.Cal.1996) (citing *McHenry v. Key Bank (In re McHenry),* 179 B.R. 165, 167 (9th Cir. BAP 1995)) (reviewing a willful violation of the automatic stay). A finding is clearly erroneous when it is illogical, implausible, or without support in the record. *United States v. Hinkson,* 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

We review the decision to impose sanctions for contempt for an abuse of discretion. *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178, 1191 (9th Cir. 2003); *Nash v. Clark Cty. Dist. Atty's Office (In re Nash),* 464 B.R. 874, 878 (9th Cir. BAP 2012). We review for clear error the trial court's factual findings in support of a punitive damages award. *Bergen v. F/V St. Patrick,* 816 F.2d 1345, 1347 (9th Cir. 1987).

A bankruptcy court abuses its discretion if its decision is based on an incorrect legal rule, or if its findings of fact were illogical, implausible, or without support in the record. *Hinkson,* 585 F.3d at 1262.

V. DISCUSSION

In a chapter 7 case, with exceptions not relevant here, "[t]he [bankruptcy] court shall grant the debtor a discharge." § 727(a). When entered, that order "discharges the debtor from all debts that arose before the date of the [bankruptcy filing]." § 727(b). Section 524(a) prescribes the legal effect of a discharge:

> (a) A discharge in a case under this title—. . . (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

"The purpose of the discharge injunction is to protect the debtor from having to put on a defense in an improvident state court action or otherwise suffer the costs, expense and burden of collection activity on discharged debts." *In re Eastlick,* 349 B.R. 216, 229 (Bankr.D.Idaho 2004) (citing *Levy v. Bank of the Orient (In re Levy),* 87 B.R. 107, 108 (Bankr.N.D.Cal.1988).

A. Contempt Standards: Willful Violation of Discharge Injunction

A party who knowingly violates the discharge injunction under § 524(a)(2) can be held in contempt under § 105(a). "The standard for finding a party in civil contempt

is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." *In re Bennett,* 298 F.3d at 1069. In *Bennett,* the Ninth Circuit went on to say that "[a]s discussed by the Eleventh Circuit in *Hardy,* to justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.* (citing *In re Hardy,* 97 F.3d at 1390 (citing *Jove Eng'g, Inc. v. Internal Revenue Serv.,* 92 F.3d 1539, 1555 (11th Cir. 1996))).

Later, in *Dyer* the Ninth Circuit again cited *Hardy* in connection with its analysis regarding the distinction between sanctions authorized for a "willful" violation of the automatic stay under § 362(k) and those imposed under the bankruptcy court's contempt power contained in § 105(a). The Ninth Circuit explained that "[i]n determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 322 F.3d at 1190 (citing *In re Hardy,* 97 F.3d at 1390; *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949) (Because civil contempt serves a remedial purpose, "it matters not with what intent the defendant did the prohibited act.")). The Ninth Circuit subsequently noted:

> Under both [§ 362(k) and § 105(a)], the threshold question regarding the propriety of an award turns not on a finding of 'bad faith' or subjective intent, but rather

> on a finding of 'willfulness,' where willfulness has a particularized meaning in this context:
>
> '[W]illful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.'

322 F.3d at 1191 (quoting *Havelock v. Taxel (In re Pace),* 67 F.3d 187, 191 (9th Cir. 1995)) (citing *In re Hardy,* 97 F.3d at 1390).

The *Dyer* court further expounded on the actual knowledge aspect of "willful" for contempt by noting that unlike § 362(k), where a party with knowledge of bankruptcy proceedings is charged with knowledge of the automatic stay, in the context of contempt, actual knowledge of the automatic stay is required. *Id.* at 1191–92 ("Generally, a party cannot be held in contempt for violating an injunction absent knowledge of that injunction."). Applying these principles, the Ninth Circuit declined to affirm the bankruptcy court's decision finding Mr. Lindblade and his attorney in contempt because it was not clear that they were aware of the automatic stay injunction at the time they recorded a deed of trust. The court opined: "They may not have been familiar with that particular Code provision." *Id.* at 1191;[10] *see also In re Zilog,* 450 F.3d at 1008 (noting that *Dyer* "simply reiterates the well-established proposition that only actual

[10] Ultimately the Ninth Circuit affirmed on a different ground which is not relevant here.

knowledge of the discharge injunction suffices for a finding of contempt").

Three years later in *Zilog,* the Ninth Circuit again reiterated its approval of *Hardy's* two-part test for finding a willful violation of the discharge injunction as stated in *Bennett* and *Dyer. In re Zilog,* 450 F.3d at 1007, 1008 n. 12 (noting that a contempt order entered for violation of the automatic stay or discharge injunction is governed by the same standards, namely those applicable to all civil contempt proceedings). In *Zilog,* the Ninth Circuit provided further guidance on the "actual knowledge" requirement under the first prong of the test. First, the court made clear that whether a party has actual knowledge of the injunction is a fact-based inquiry and must be found; it can neither be presumed nor imputed. *In re Zilog,* 450 F.3d at 1007–08. Second, the Ninth Circuit further explained there must be evidence showing that the alleged contemnor was aware of the discharge injunction and that it was applicable to his or her claim. *Id.* at 1009.

> To be held in contempt, the [alleged contemnors] must not only have been aware of the discharge injunction, but must also have been aware that the injunction applied to their claims. To the extent that the deficient notices led the [alleged contemnors] to believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness. *Id.* at n. 14.

Taken together, *Bennett, Dyer,* and *Zilog,* demonstrate that the Ninth Circuit has crafted a strict standard for the actual knowledge requirement in the context of

contempt before a finding of willfulness can be made. This standard requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one. Of course, subjective self-serving testimony may not be enough to rebut actual knowledge when the undisputed facts show otherwise. *See Chionis v. Starkus (In re Chionis),* BAP No. CC–12–1501–KuBaPa, 2013 WL 6840485, at *6 (9th Cir. BAP Dec. 27, 2013) (reversing the bankruptcy court's finding that actual knowledge of the discharge injunction was not shown based on alleged contemnor's self-serving testimony when the undisputed facts showed otherwise).

With respect to the second prong—the intent requirement for a finding of willfulness—the analysis concerning a "willful" violation of the discharge injunction is the same as a finding of willfulness in connection with violation of the automatic stay under § 365(k). In connection with the second prong's intent requirement, we have previously observed that "the bankruptcy court's focus is not on the offending party's subjective beliefs or intent, but on whether the party's conduct in fact complied with the order at issue." *Rosales v. Wallace (In re Wallace),* BAP No. NV–11–1681–KiPaD, 2012 WL 2401871, at *5 (9th Cir. BAP June 26, 2012) (citing *Bassett v. Am. Gen. Fin. (In re Bassett),* 255 B.R. 747, 758 (9th Cir. BAP 2000), *rev'd on other grounds,* 285 F.3d 882 (9th Cir. 2002) (stating that courts have applied an objective test in determining whether an injunction should be enforced via the contempt power) (citing *In re Hardy,* 97 F.3d at 1390); *see*

also In re Dyer, 322 F.3d at 1191 (noting that a "willful violation" does not require a specific intent to violate the automatic stay).

Accordingly, each prong of the Ninth Circuit's two-part test for a finding of contempt in the context of a discharge violation requires a different analysis, and distinct, clear, and convincing evidence[11] supporting that analysis, before a finding of willfulness can be made. This is consistent with the Ninth Circuit's reluctance "to hold an unwitting creditor in contempt." *In re 1601 W. Sunnyside Dr. # 106, LLC,* 2010 WL 5481080, at *4 (Bankr.D.Idaho Dec. 30, 2010).

B. The *Ybarra* Rule

While a discharge in bankruptcy generally relieves a debtor from all prepetition debts, the Ninth Circuit has adopted a different standard for determining for discharge purposes when an attorney's fee claim arises. "Under that standard, even if the underlying claim arose prepetition, the claim for fees incurred postpetition on account of that underlying claim is deemed to have arisen postpetition if the debtor 'returned to the fray' postpetition by voluntarily and affirmatively acting to commence or resume the litigation with the creditor." *Bechtold v. Gillespie (In re Gillespie),* 516 B.R. 586, 591 (9th Cir.

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[11] The clear and convincing evidence standard requires the moving party to "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984). Factual contentions are highly probable if the evidence offered in support of them "instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition." *Id.*

BAP 2014) (citing *In re Ybarra*, 424 F.3d at 1026–27). The rule is invoked to prevent a debtor from using the discharge injunction as a sword that enables him or her to undertake risk-free postpetition litigation at others' expense. *Id.* (citing *In re Ybarra*, 424 F.3d at 1026). "The *Ybarra* rule applies regardless of whether the litigation begins prepetition or postpetition, regardless of the nature of the underlying claim, and regardless of the forum in which the postpetition litigation takes place." *Id.* at 591–92 (citing *In re Ybarra*, 424 F.3d at 1023–24).

C. Analysis

Due to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs. Whether a debtor voluntarily returns to the fray under the *Ybarra* rule is a factual question subject to dispute as demonstrated by the state and bankruptcy courts' ruling on the one hand, and the district court's ruling the other hand. A creditor seeking to invoke the *Ybarra* rule would necessarily need to seek such a determination from a court.

Section 524(a)(2) clearly was not designed to prohibit actions that seek an *Ybarra* determination. We have previously said that a party seeking a bankruptcy court determination regarding the scope of the discharge should file an adversary complaint seeking declaratory relief. *See Ruvacalba v. Munoz (In re Munoz),* 287 B.R. 546, 556 (9th Cir. BAP 2002). Appellants' request for a *Ybarra* ruling in the state court was essentially the same as a request for declaratory relief regarding the scope of the discharge. We fail to see how following this procedure equates to a violation of § 524(a)(2). On Debtor's novel

theory of the discharge, any person, creditor or non-creditor, who sought declaratory relief regarding the scope of the discharge injunction would forever be barred, under pain of contempt sanctions, from filing an adversary proceeding to seek a court's ruling on the issue.[12] Appellants should be praised, not sanctioned, for having followed a correct procedure to resolve the *Ybarra* issue.

Further, once the state court decided that the discharge did not bar Appellants' claim for attorneys' fees, Appellants were entitled to rely on that decision. A party who acts in reliance on a facially valid determination that the discharge does not apply cannot be guilty of "willfully" violating the discharge injunction.[13]

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[12] At oral argument, Debtor's attorney took the position that Appellants proceeded in the state court at their own risk since only the bankruptcy court had authority to decide the scope of the injunction. This proposition is not correct. In *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLC (In re Pavelich),* 229 B.R. 777 (9th Cir. BAP 2000), we noted: "With respect to the discharge itself, state courts have the power to construe the discharge and determine whether a particular debt is or is not within the discharge." *Id.* at 783. The Panel further stated that if the state court construes the discharge correctly, its judgment will be enforced. However, if the state court construed the discharge incorrectly, then its judgment may be void and subject to collateral attack in federal court. To the extent Debtor collaterally attacked the state court's ruling in the bankruptcy court, the bankruptcy court not only upheld the state court's ruling, but independently found that he had entered the fray under *Ybarra.*

[13] One might argue that, because a state court decision incorrectly construing the scope of the discharge is not only erroneous, but also void, *In re Pavelich,* 229 B.R. at 782, reliance on such a determination is no defense. But, as we explain below, in order to recover for a violation of the discharge injunction, the debtor must establish the actor's subjective state of mind. In this case, there is no reason to think

Even if Appellants had not raised the *Ybarra* question to the state court, we would overturn the bankruptcy court's decision on other grounds. Although the bankruptcy court recited the *Zilog* test, it applied the wrong legal standard for determining whether Appellants had the sort of actual knowledge necessary for a finding of willfulness. As a result, its factual findings were clearly erroneous.

Despite citing the two-part test in *Hardy* with approval in *Bennett, Dyer,* and *Zilog,* the Ninth Circuit has never adopted the test word for word. Under the first prong, the *Hardy* test states that a defendant will be held in contempt if it "knew that the [discharge injunction] was invoked." Since adopting the *Hardy* test, the Ninth Circuit has always replaced the word "invoked" with the word "applicable." Therefore, the bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test as restated.

By adopting the *Hardy* test, the bankruptcy court improperly "charged" Appellants with actual knowledge of the discharge injunction simply because it had been entered at the time they sought their attorneys' fees in the state court. Rather than conducting any inquiry into whether Appellants were aware that the discharge injunction applied to their fee request as instructed in *Zilog,* the court imputed such awareness by strict liability. It is certainly possible that Appellants held an objectively reasonable belief that, for reasons specific to Debtor's conduct in the state court, the discharge injunction did

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that Appellants subjectively knew or believed that the state court's decision was wrong.

not apply to their post-discharge attorneys' fee request under the *Ybarra* rule. In any event, as stated above, they followed the proper procedure by seeking the court's decision on the scope of the discharge.

The bankruptcy court also improperly found that Appellants were not "insulated" from a willfulness finding after the state court and bankruptcy court found in their favor—apparently on the basis that the state court got it wrong and the bankruptcy court was reversed by the district court. This reasoning is more in line with the standard for finding a willful violation of the automatic stay under § 362(k), where a legitimate dispute as to a creditor's right to take the action that violates the automatic stay may not relieve a willful violator of the consequences of his or her act.

Finally, the court concluded that Appellants' subjective or good faith beliefs were irrelevant. Although this strict liability analysis may be either consistent with the standards for a willful violation of the automatic stay because there is no specific intent requirement embedded in § 362(k) or with an analysis under the second prong of the test for deciding willfulness, it cannot apply to the first prong of the discharge violation test which requires actual knowledge of applicability.

Taken together, the bankruptcy court's "strict liability" analysis is closer to the standards for finding a willful violation of the automatic stay under § 362(k), which is the derivation of the *Hardy* test. Alternatively, at best, the court's analysis conflated the objective inquiry under the second prong of the willfulness test regarding intent with the fact intensive inquiry under the actual knowledge requirement in the first prong.

Due to the application of an improper legal standard, the bankruptcy court's factual findings regarding Appellants' actual knowledge are clearly erroneous and not supported by the record. It is undisputed that Appellants had actual knowledge that Debtor's discharge had been entered at the time they sought the post-discharge attorneys' fees under the *Ybarra* rule in the state court. However, they could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated. Once the bankruptcy court confirmed the state court's ruling and made its own independent decision on the matter, ruling in Appellants favor, all doubts regarding whether the discharge injunction applied were resolved; i.e., under *Ybarra,* the post-discharge fee request fell outside the scope of the discharge injunction. The bankruptcy court's ruling was binding on Debtor and SPBC until it was overruled.[14]

This is not a case where Appellants knew of the discharge injunction and continued to press their attorneys' fee claim in the state court under the assumption that the discharge injunction did not apply to them. Rather, all along the way, they sought a judicial determination that the discharge injunction did not apply. We fail to see how the *Zilog* standard for actual knowledge is met under these facts.

In the end, there is no clear and convincing evidence in the record that shows Appellants had actual knowledge

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[14] While Debtor suggests that Appellants were dilatory in vacating the Supplemental Judgment, this was not a basis for the bankruptcy court's ruling.

that the discharge injunction applied to their post-discharge fee request in the state court. The facts actually suggest the opposite. Although the discharge order was in place at the time Appellants made their fee request in the state court, the order itself did not advise Appellants of the scope of the injunction under the *Ybarra* rule. Nor could it, since that was up to a court of competent jurisdiction to decide the question as to whether Debtor voluntarily returned to the fray.

VI. CONCLUSION

For the reasons stated, we REVERSE the bankruptcy court's finding of contempt and VACATE its judgment awarding sanctions.

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF OREGON

No. 09-39216-rld7

In re: BRADLEY WESTON TAGGART,
Debtor.

Filed: December 16, 2014

MEMORANDUM OPINION

RANDALL L. DUNN, Bankruptcy Judge.

Factual Summary[1]

Bradley Weston Taggart ("Mr.Taggart) filed a Chapter 7[2] petition on the eve of trial in litigation in Washington County, Oregon Circuit Court ("Litigation") through

[1] This factual summary is brief. A detailed recitation of the underlying facts can be found in (1) this court's Memorandum Opinion entered December 9, 2011 (#64 on the docket), (2) the Opinion and Order entered August 7, 2012 on Mr. Taggart's appeal to the United States District Court for the District of Oregon (#105 on the docket), and (3) a decision of the Oregon Court of Appeals with respect to an appeal of the supplemental judgment entered postpetition in the Litigation (*see Sherwood Park Business Center, LLC v. Taggart*, -- P.3d --, 2014 WL 6693829 (Or. App.) (November 26, 2014)).

[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–

which Sherwood Park Business Center, LLC ("SPBC")[3] asserted claims against Mr. Taggart for breach of fiduciary duty, expulsion, breach of contract, attorneys fees and declaratory relief. The claims arose from (1) Mr. Taggart's conduct as the managing member of SPBC, in which he held a 25% member interest, and (2) the validity of Mr. Taggart's attempted transfer of that member interest. The filing of the petition stayed the Litigation.

Mr. Taggart's chapter 7 discharge was entered February 23, 2010. Thereafter, the other SPBC members, Terry W Emmert ("Mr. Emmert") and Keith Jehnke ("Mr. Jehnke"), represented by attorney Stuart M. Brown ("Mr. Brown")[4] (collectively, "Respondents"), resumed the Litigation for the purpose of expelling Mr.

9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

[3] In his Trial Brief on Remand, Mr. Taggart makes an assertion that directly calls into question whether I am disinterested in this matter: "The Operating Agreement was prepared by the Landye, Bennett firm. The form of the Operating Agreement may even have been crafted or used by this Court."

Landye, Bennett is the law firm at which I was managing partner before my appointment to the bench on February 1, 1998. For the record, SPBC's operating agreement reflects that SPBC was organized October 12, 1999. *See* Exhibit 1, at p. 18. Whether the Landye, Bennett firm may have continued to use a form to which I may have contributed my work product as an attorney does not mean that I prepared the SPBC operating agreement. Regardless, I am not called upon to interpret the operating agreement in these proceedings. All I am asked to decide is to review the knowledge and actions of the Respondents after February 23, 2010.

[4] Mr. Brown is now deceased. Shelley A. Lorenzon, the executor of Mr. Brown's estate, is the successor party for Mr. Brown's position.

Taggart from the SPBC. Mr. Taggart moved both to quash his scheduled deposition and to dismiss the Litigation on the basis of the bankruptcy discharge. However, the state court determined that Mr. Taggart was an essential party to resolving the SPBC member expulsion claim and allowed the Litigation to proceed with the proviso that no money judgment would be entered against Mr. Taggart.

Ultimately, the state court entered its "General Judgment" in favor of SPBC which deemed Mr. Taggart's attempted transfer of his member interest null and void. As relevant to the matter before me, the General Judgment expelled Mr. Taggart as a member of SPBC effective January 1, 2008, based upon his wrongful conduct under the operating agreement. The General Judgment awarded Mr. Emmert and Mr. Jehnke the right to purchase Mr. Taggart's member interest on the following terms:

> The purchase price shall be the fair market value of [SPBC] as of the date of entry of judgment multiplied by Taggart's 25% membership interest, less any unpaid postpetition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and necessary proceedings in bankruptcy court or this court.

Respondents then initiated proceedings in the Litigation to recover postpetition attorney fees against Mr. Taggart to be used as an offset against the purchase price of his member interest. An attorney fee award was sought

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For clarity I will continue to refer to the actions taken and positions asserted as those of Mr. Brown.

both by SPBC based on litigating the expulsion claim and separately by Mr. Emmert and Mr. Jehnke based on litigating the transfer of Mr. Taggart's member interest. SPBC sought a fee award against Mr. Taggart personally. Mr. Emmert and Mr. Jehnke sought an award against the alleged purchaser of Mr. Taggart's member interest. Mr. Taggart again asserted that his bankruptcy discharge precluded the imposition of such fees against him. Citing the Ninth Circuit's decision in *Boeing North American, Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018 (9th Cir. 2005), the state court determined that Mr. Taggart had voluntarily returned to the fray, with the result that bankruptcy discharge did not preclude an award of postpetition attorney fees against him in favor on SPBC. The state court then entered its "Supplemental Judgment," which awarded SPBC $45,404.30 in attorney fees and costs from Mr. Taggart. The state court determined that Mr. Emmert and Mr. Jehnke were not entitled to a fee award against the alleged purchaser of Mr. Taggart's member interest.

In response to entry of the Supplemental Judgment, Mr. Taggart filed in this court his Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction Under 11 U.S.C. § 524 ("Contempt Motion").[5] I denied the Contempt Motion following an evidentiary hearing held November 14, 2011 ("2011 Hearing"), on the basis that the state court had correctly determined that Mr. Taggart

[5] An alleged violation of the discharge injunction is pursued, as in this case, by a motion invoking the contempt remedies allowed for in § 105(a). *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509–10 (9th Cir. 2002).

had voluntarily returned to the fray such that *Ybarra* precluded a finding that the discharge injunction had been violated.

On Mr. Taggart's appeal, the United States District Court for the District of Oregon reversed based on its conclusion after de novo review that Mr. Taggart had not voluntarily returned to the fray postpetition within the meaning of *Ybarra.* The Respondents' appeal to the Ninth Circuit was dismissed as interlocutory. The Contempt Motion therefore is before me once again on remand.

Following further briefing and oral argument held November 7, 2014 ("2014 Hearing"), I took determination of the Contempt Motion under advisement.[6]

In deciding this matter, I have considered carefully the testimony presented at the 2011 Hearing on the Contempt Motion, the exhibits admitted at the 2011 Hearing, the supplemental exhibits filed in advance of the 2014 Hearing, and the arguments presented, both in legal memoranda and orally. I further have taken judicial notice of the docket and documents filed in Mr. Taggart's chapter 7 case for the purpose of confirming and ascertaining facts not reasonably in dispute. Federal Rule of Evidence 201; *In re Butts*, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa 2006). In addition, I have reviewed relevant legal

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[6] The current proceedings have been limited to issues regarding liability only. If I decide the Contempt Motion in favor of Mr. Taggart, further proceedings will be scheduled with respect to Mr. Taggart's damages claims.

authorities both as cited to me by the parties and as located through my own research.

In light of that consideration and review, this Memorandum Opinion sets forth the court's findings of fact and conclusions of law under Civil Rule 52(a), applicable with respect to this contested matter under Rules 7052 and 9014.[7]

Jurisdiction

I have jurisdiction to decide the Contempt Motion under 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I) and (*O*).

Discussion

As in my prior Memorandum Opinion, the ultimate question before me is whether, in seeking the Supplemental Judgment, the Respondents violated the discharge injunction provided for in § 524(a)(2).[8]

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[7] This matter, like the underlying Litigation, has been contentious at every step of the way. Accordingly, I expect to be appealed no matter how I decide. As an aid to the parties in their further contests, I note that the standard for review of decisions on motions for contempt in the Ninth Circuit is abuse of discretion. "We review the decision to impose contempt for abuse of discretion, and underlying factual findings for clear error." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003), citing *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).

[8] Section 524(a)(2) provides that, "A discharge in a case under this title—(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ."

An alleged contemnor's violation of the discharge injunction must be "willful" in order to be subject to sanctions for violating the discharge injunction. Under Ninth Circuit law, I apply a two-part test to determine whether the alleged violation was willful. I must find first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction. *See Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2006); *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (9th Cir. 1996). The burden of proof for the moving party is clear and convincing evidence. *See In re Zilog, Inc.*, 450 F.3d at 1007; *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002) ("The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.").

1. *Did the Respondents Know the Discharge Injunction "Applied" ?*

Respondents contend that the first part of the *Zilog* test requires that I find that they knew that Mr. Taggart's discharge "applied" to the proceedings which resulted in the Supplemental Judgment. They suggest the phrasing precludes a finding of willfulness because they held a good faith belief that the discharge injunction did not apply in the Supplemental Judgment proceedings. In effect, I am asked to decide whether a good faith belief that the discharge injunction does not apply to proceedings vitiates the Respondents' knowledge that the discharge injunction was in existence. I hold that it does not. My reasons follow.

In *Zilog,* the Ninth Circuit states:

> A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. [*See In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)] . . . In *Bennett*, . . . [w]e cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069 (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

Since the Ninth Circuit expressly adopted the Eleventh Circuit's willfulness test as set forth in *Hardy,* I reviewed the language in *Hardy* as the source for the test. In *Hardy*, the Eleventh Circuit extended its previously established test for determining whether a violation of the automatic stay was willful.

> In [*Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539 (11th Cir. 1996)], this court adopted a two-pronged test to determine willfulness in violating the automatic stay provision of § 362. Under this test the court will find the defendant in contempt if it: "(1) knew that the automatic stay *was invoked* and (2) intended the actions which violated the stay." *Jove*, 92 F.3d at 1555 [emphasis added]. This test is likewise applicable to determining willfulness for violations of the discharge injunction of § 524.

Hardy, 97 F.3d at 1390.

Whether the Respondents knew the discharge was "invoked" is a simple fact-based inquiry. It does not allow for the subjective belief, good faith or otherwise, regarding whether, as a legal matter, the discharge applied to

the proceedings. This premise is reinforced in the case law. "In determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" *In re Dyer*, 322 F.3d at 1191 (quoting *Hardy*, 97 F.3d at 1390).[9]

Hardy, as adopted by the Ninth Circuit, in effect imposes a strict liability standard as the first element of the willfulness test: "If the court on remand finds, as plaintiff claims, that IRS received notice of Mr. Hardy's discharge in bankruptcy, and was thus aware of the discharge injunction, Mr. Hardy will then have to prove only that the IRS intended the actions which violate the stay." *Hardy*, 97 F.3d at 1390.

In *Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 175 (9th Cir. BAP 2005), the Panel highlighted the sanctity of the discharge injunction, stating that once entered, it was "good against the world." Respondents had a duty to obey the discharge injunction. Only lack of notice of the discharge may serve as a defense to contempt sanctions. *Id.*

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[9] Because courts have equated the willfulness test for automatic stay violations with that for discharge injunction violations, case law discussing automatic stay violations is instructive. The Ninth Circuit BAP has held that in automatic stay violation cases a finding of willfulness merely requires that the creditor know of the automatic stay and that the actions that violate the stay be intentional. No specific intent is required; a good faith belief that the stay is not being violated "is not relevant to whether the act was 'willful' or whether compensation must be awarded." *Morris v. Peralta (In re Peralta)*, 317 B.R. 381, 389 (9th Cir. BAP 2004).

To the extent Respondents suggest that the state court's ruling that *Ybarra* applied to render the Supplemental Judgment proceedings outside the scope of the discharge injunction insulates them from a willfulness finding, I disagree. As I stated in my prior Memorandum Opinion, the state court had "jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly." *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich)*, 229 B.R. 777, 784 (9th Cir. BAP 1999). *See Huse v. Huse–Sporsem, A.S. (In re Birting Fisheries, Inc.)*, 300 B.R. 489, 500 (9th Cir. BAP 2003). The District Court determined that the state court construed the scope of Mr. Taggart's discharge incorrectly. Neither is my prior determination that the state court correctly determined *Ybarra* 's impact on the Supplemental Judgment proceedings helpful to Respondents where it was reversed on appeal.

At the November 2011 Hearing, Mr. Brown testified that after discussion with his co-counsel, he would seek attorney fees postpetition

> . . . for fees from the date the notice of discharge was filed. I think that was February 23rd of . . . 2010.
>
> . . . Technically we could have gone back to [the petition date] . . . but as a practical matter it didn't make any sense. You know, we're not going to get attorney fees from Mr. Taggart in any event except for the offset.

Tr. Of November 2011 Hearing at 83:25–84:9 [Exhibit T]. Thus, it is not disputed that Respondents had actual knowledge that Mr. Taggart's bankruptcy discharge had been entered at the time they sought the Supplemental

Judgment. As such, they are charged with knowledge of the discharge injunction.

Respondents point out that the Supplemental Judgment was awarded only in favor of SPBC. Mr. Brown asserted that because he did not represent SPBC, he could not be held accountable for the actions that resulted in a fee award in favor of SPBC.

However, the record reflects that it was Mr. Brown who prepared and submitted the Supplemental Judgment which resulted in the award of fees in favor of SPBC and against Mr. Taggart. *See* Exhibit 27. When questioned about how he came to submit the judgment on behalf of SPBC, Mr. Brown testified:

> [I]n filing the petition for the judgment, the motion to enter the judgment, and the petition for fees, we [Mr. Brown and SPBC's attorney of record] had a discussion, and the discussion was whether both attorneys needed to file their own or whether one could do it and the other one join. And we decided to go the latter way to save money.

October 12, 2001 Deposition of Mr. Brown at 16:22–17:3 [Exhibit S].

Mr. Emmert and Mr. Jehnke also assert that they cannot be held accountable personally for any action resulting in the Supplemental Judgment, either because the award was in favor of SPBC or because they relied on the advice of their counsel. Mr. Brown testified that he had advised Mr. Emmert and Mr. Jehnke that if a court determined that Mr. Taggart had not returned to the fray, the discharge injunction would preclude a recovery of attorneys fees. *Id.* at 18:3–19:1. Thus, Mr. Emmert and Mr.

Jehnke were on notice that seeking fees from Mr. Taggart might implicate the discharge injunction.

I find that Mr. Taggart has established the first element of the willfulness test by clear and convincing evidence.

2. *Respondents Intended the Actions Which Violated the Injunction.*

By initiating and pursuing proceedings to obtain the Supplemental Judgment, the Respondents violated the discharge injunction. There is no dispute in the record that they intended those actions. As previously stated, Mr. Brown testified he prepared and submitted the Supplemental Judgment. Because Mr. Brown would not have proceeded without approval from his clients, and because the record does not reflect that Mr. Emmert and Mr. Jehnke have at any time asserted they did not instruct Mr. Brown to proceed to seek attorney fees against Mr. Taggart, they also intended the actions that led to the entry of the Supplemental Judgment. I therefore find that Mr. Taggart has established the second element of the willfulness test by clear and convincing evidence.

3. *Consequences From the Violation of the Discharge Injunction.*

Three consequences flow from the above findings.

First, the Supplemental Judgment is void, having been entered in violation of the discharge injunction. *See* § 524(a)(1).[10]

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[10] The Oregon Court of Appeals reversed the entry of the Supplemental Judgment on appeal.

Second, having proven both elements of the willfulness test, Mr. Taggart is entitled to entry of an order holding the Respondents in contempt of for violating his discharge injunction.

Third, Mr. Taggart is entitled to an evidentiary hearing to determine the appropriate amount of sanctions damages this court should impose against Respondents.

Conclusion

Based on the foregoing findings of fact and conclusions of law, I will enter an order holding Respondents in contempt. Further proceedings are appropriate to determine the amount of sanctions damages warranted under the circumstances.

APPENDIX E

UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF OREGON

No. 09-39216-rld7

In re: BRADLEY WESTON TAGGART,
Debtor.

Filed: March 17, 2015

MEMORANDUM OPINION

RANDALL L. DUNN, Bankruptcy Judge:

Following the entry of the Memorandum Opinion (Docket No. 158) and the Order on Motion for Contempt (Docket No. 159) on Bradley Weston Taggart's ("Mr. Taggart") First Amended Motion for Contempt ("Contempt Motion") (Docket No. 42) against Stuart M. Brown ("Mr. Brown"), Terry W. Emmert ("Mr. Emmert"), Keith Jehnke ("Mr. Jehnke") and Sherwood Park Business Center, LLC ("SPBC") (collectively, "Respondents"), I held a hearing ("Hearing") on February 27, 2015 to hear evidence on Mr. Taggart's damages claims. At the Hearing, I admitted Mr. Taggart's Exhibits 28, 29 and 30, without objection; I heard the testimony of Mr. Taggart; and I heard argument and engaged in discussion with counsel. At the end of the Hearing, I closed the evidentiary record.

In addition, the declarations of Mr. Taggart's counsel, John M. Berman and Damon J. Petticord, with itemizations of time and expenses attached, were submitted to support Mr. Taggart's request for an award of attorneys' fees and costs. Since the declarations of counsel only recently had been submitted, I granted counsel for the Respondents until Friday, March 6, 2015, to file any objections to the requested fees and costs. Counsel for the estate ("Estate") of Mr. Brown, who is deceased, advised me by letter that the Estate would not be filing an objection to the fee request of Mr. Taggart's counsel. However, counsel for the other Respondents filed an objection ("Fee Objection") to the request for fees and costs of Mr. Taggart's counsel on March 6, 2015, and Mr. Taggart's counsel filed a response ("Response") to the Fee Objection on March 8, 2015. With these final submissions, I took the matter under advisement.

In considering appropriate damages determinations, I have considered carefully the evidence and arguments presented, focusing particularly on Mr. Taggart's testimony and the declarations of Mr. Berman and Mr. Petticord. In addition I have reviewed relevant legal authorities, both as cited to me by the parties and as discovered through my own research.

Based on that consideration and review, I have come to a decision on what awards of damages are appropriate in this matter. Following are my findings of fact and legal conclusions under Civil Rule 52(a), applicable with respect to this matter under Rules 7052 and 9014.[1]

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[1] Unless otherwise indicated, all chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101–1532; all "Rule"

Damages for Civil Contempt

Mr. Taggart requests awards of damages in three categories, each of which I address in turn, as follows:

A. *Actual Damages*

In the Contempt Motion, Mr. Taggart requested emotional distress damages of $50,000, resulting from stress and its physical manifestations. The Ninth Circuit has held, in the context of a claim for violation of the automatic stay under § 362(h) (now, § 362(k)), that in order for an individual to be entitled to damages for emotional distress, the individual must (1) suffer significant harm, (2) clearly establish the harm, and (3) demonstrate a causal connection between the harm and the claimed violation, distinct "from the anxiety and pressures inherent in the bankruptcy process." *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1149 (9th Cir. 2004). The Ninth Circuit concluded that if an individual established that he "suffered significant emotional harm and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm," such proof would suffice "even in the absence of corroborating evidence." *Id.* at 1151. Judge Brown concluded that emotional distress damages appropriately could be awarded with respect to a contempt claim based on an alleged violation of the discharge injunction, subject to the standards set forth in *Dawson. In re Feldmeier*, 335 B.R. 807, 812–14 (Bankr. D. Or. 2005).

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references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

Accord In re Culpepper, 481 B.R. 650, 660 (Bankr. D. Or. 2012).

At the Hearing, Mr. Taggart testified that he suffered chronically from a psoriasis condition. According to Wikipedia, **"Psoriasis** . . . is a common, chronic, relapsing/remitting, immune-mediated systemic disease characterized by skin lesions including red, scaly patches, papules, and plaques, which usually itch," which is essentially how Mr. Taggart described his condition. Mr. Taggart testified that his psoriasis, which came and went based on his stress levels, had come under control when he received his bankruptcy discharge, and his slate of debts had been wiped clean. However, from the time when the Respondents began their efforts to obtain a personal judgment against him in state court for attorneys' fees and obtained such judgment, Mr. Taggart's psoriasis had flared up, not only on his scalp (where he previously had experienced manifestations of the condition), but on other parts of his body as well. His symptoms included not only the typical lesions, but further included open wounds with bleeding. Mr. Taggart also began experiencing difficulties sleeping. He consulted a doctor on at least one occasion in April 2013, but he had no funds to pay for medical care, and the only specific cost for treatment that he could identify was $100 spent for a tube of medicating ointment. Mr. Taggart did not present any corroborating medical evidence or supporting testimony from family members, friends or co-workers as to his stress levels or medical condition.

At the outset, I found Mr. Taggart's testimony as to the stress and physical consequences that resulted to him from the Respondents' post-discharge actions credible. Accordingly, I find that it is appropriate to award Mr.

Taggart some damages for the emotional stress and psoriasis-related physical problems that he has experienced post-discharge. However, as readily admitted at the Hearing by Mr. Taggart's counsel, such damages are difficult to quantify because, frankly, there is no specific standard by which to measure such damages.

There is no question in my mind, after all of the proceedings to date related to the Contempt Motion, that Mr. Taggart's relationship with the Respondents has had a long and bitter history, and that historically poisoned relationship undoubtedly has had an impact on the stress that Mr. Taggart experienced in dealing with the Respondents and, unfortunately, will continue to have an impact with respect to the surviving Respondents after this proceeding is finally resolved. I also recognize that the entire process of going through bankruptcy is stressful. So, not all of Mr. Taggart's emotional and physical distress can be attributed to the post-discharge conduct of the Respondents.

That said, my ultimate finding and conclusion is that under the *Dawson/Feldmeier* standards, Mr. Taggart is entitled to an award of damages for substantial harm in terms of his emotional distress and its physical manifestations caused by the post-discharge conduct of the Respondents in violation of the discharge injunction in the amount of $5,000, awarded jointly and severally against the Respondents.

B. *Attorneys' Fees and Costs*

As the Ninth Circuit has stated, "We emphasize that attorneys' fees are an appropriate component of a civil contempt award." *Knupfer v. Lindblade (In re Dyer)*, 322

F.3d 1178, 1195 (9th Cir. 2003), citing *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). However, any award of attorneys' fees must be reasonable. *See, e.g.*, *In re Dawson*, 390 F.3d at 1152; *In re Dyer*, 322 F.3d at 1195.

At the Hearing, counsel for the Estate and for Mr. Emmert, Mr. Jehnke and SPBC both conceded that the hourly rates charged by Mr. Taggart's counsel were reasonable, and no issue has been raised as to the reasonableness of Mr. Taggart's counsel's expense reimbursement requests. Accordingly, any disputes among the parties focus on the reasonableness of the time expended by Mr. Taggart's counsel, as reflected in the itemizations attached to the Declarations of Mr. Berman and Mr. Petticord.

I have reviewed both itemizations in light of the Fee Objection filed by counsel for Mr. Emmert, Mr. Jehnke and SPBC and the Response filed by Mr. Taggart's counsel. At the outset, I note that this matter has been protracted and professionally handled. My findings and conclusions as to each of the categories of objections to Mr. Taggart's attorneys' fees claim raised in the Fee Objection follow:

1. *Vagueness, Block Billing, Lumping.* While Mr. Berman sometimes includes several tasks in his individual time itemizations and describes tasks performed in general terms, I do not find that his time entries were too vague to allow for reasonableness review, and I find that his time entries appear reasonable for the work performed, even where tasks are grouped together within a single time entry. I do not find it appropriate to reduce his fees with respect to this objection.

2. *Administrative/Secretarial Functions.* Ordinarily, in a typical law firm setting, attorneys should not be billing their time for performing secretarial or administrative services. So, in typical circumstances, an objection on this basis would be well taken. However, as Mr. Berman points out in his Response, he is a solo practitioner, who does not employ a secretary or paralegal to assist him in performing his legal work. In reviewing his itemization, I do not find that the time expended on what might ordinarily be characterized as secretarial or administrative services unreasonable or excessive, particularly since any such time that I noted usually was combined with performing legal work. Again, I do not find it appropriate to reduce his fees on this basis.

3. *Billing in Quarter Hour Minimums.* As counsel for Mr. Emmert, Mr. Jehnke and SPBC notes, Mr. Berman bills in quarter hour minimum increments, but the total of quarter hour entries is only $1,575, and many of such entries that I reviewed reasonably would have required at least one quarter hour or more to perform the services described. I find no basis to reduce Mr. Berman's allowed fees on this ground.

4. *Representation of Mr. Taggart in the State Court Litigation.* Mr. Berman includes in his itemization, 2.25 hours with respect to representing Mr. Taggart in the state court litigation. In light of the District Court's determination that Mr. Taggart did not reengage in the state court litigation, I find that the objection on this point is well taken and will reduce the fee award by 2.25 hours ($787.50).

5. *Duplicative Time.* Counsel for Mr. Emmert, Mr. Jehnke and SPBC objects to Mr. Petticord's time entries

as vague and duplicative of services performed by Mr. Berman. I note that it is not unreasonable for a solo practitioner to seek counsel and assistance in developing legal strategies and performing legal work, particularly with respect to a matter that presented the complications of this one. Mr. Petticord's conferences with Mr. Berman and substantive legal work total only 6.0 hours, and I do not find that time unreasonable. However, Mr. Petticord also bills 10.25 hours for attending the depositions of Mr. Brown, Mr. Emmert and Mr. Jehnke, and for attending two hearings, without any detail as to services he was performing through just "being there." It is reasonable to assume that Mr. Petticord was helping Mr. Berman through his attendance by observing what went on outside the storm center of acting, but gauging the reasonableness of such passive attendance is difficult. Ultimately, I conclude that it is appropriate to deduct half the time Mr. Petticord spent merely attending depositions and court hearings or 5.125 hours ($1,025).

6. *Miscellaneous Substantive Time.* Counsel for Mr. Emmert, Mr. Jehnke and SPBC also objects to the 2.0 hours that Mr. Berman itemizes for preparation for examination/cross-examination of Mr. Emmert and Mr. Jehnke for the Hearing when neither Mr. Taggart nor any of the Respondents designated either Mr. Emmert or Mr. Jehnke as a witness for the Hearing. Excerpts from the deposition testimony of both Mr. Emmert and Mr. Jehnke were admitted as exhibits (Exhibits 29 and 30) without objection at the Hearing. Under the circumstances, I find that the subject time was not necessarily spent for Hearing preparation, and I will sustain the ob-

jection. In addition, in light of what was required after remand from the District Court in this matter and what was discussed at the scheduling conference with the court on September 16, 2014, I do not find that the 5.0 hours Mr. Berman spent on the Motion to Clarify and supporting memorandum and the related hearing, itemized for 9/23/2014, 9/24/2014 and 10/1/2014, was either necessary or reasonable. Accordingly, I will deduct those 5.0 hours as well. On the other hand, appreciate that Mr. Berman did not bill any time for preparation of his thorough Response to the Fee Objection in order to avoid another potential round of objections and responses to the additional fees requested, but I expect that he put in reasonable time to prepare the Response of at least 3.0 hours, and I will allow that additional time at his $350 hourly rate. Accordingly, I will deduct a net 4.0 hours ($1,400) for this miscellaneous substantive time category.

7. *Ninth Circuit Appeal.* Since Mr. Brown was not employed by the other Respondents to pursue the Ninth Circuit appeal after the District Court ruling and did not participate in the Ninth Circuit appeal, I conclude that it would not be appropriate to award fees in relation to the Ninth Circuit appeal (38.5 Hours = $13,475) against the Estate that I will award against the other Respondents.

8. *Totals of Attorneys' Fees and Costs Awarded.* Based on the foregoing findings and conclusions, I will award attorneys' fees of $101,450 and costs of $4,143.71, a total of $105,593.71, jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC, and I will award attorneys' fees and costs totaling $92,118.71 against the Estate, payable jointly and severally as part of the total attorneys' fees and costs award against the Respondents.

C. *Punitive Damages.* As I stated at the Hearing, under current Ninth Circuit authority, I can award mildly coercive punitive damages in the context of a contempt proceeding for violation of the discharge injunction under § 105(a). *See, e.g.*, *Espinosa v. United Student Aid Funds*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) ("If the bankruptcy court finds that the creditor here willfully violated the injunction, it shall, at the very least, impose sanctions to the extent necessary to make [debtor] whole. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ('In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney's fees.')."); *In re Dyer*, 322 F.3d at 1193 ("Although 'relatively mild' non-compensatory fines may be necessary under some circumstances, *Zambrano v. Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989); [*F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*], 244 F.3d at 1140 n.10, the language of § 105(a) simply does not allow for the serious punitive penalties here assessed (a minimum of $50,000 and, under the trustee's theory, over $200,000).").

In the Contempt Motion, Mr. Taggart requested punitive damages of $100,000. In his Hearing memorandum, Mr. Taggart reduced that request to $20,000.

I note first that since Mr. Brown is deceased, coercive sanctions serve no purpose with respect to the Estate, and accordingly, I decline to award punitive damages against the Estate. As to Mr. Emmert, Mr. Jehnke and SPBC, if all we were concerned with here was their actions while Mr. Brown represented them, I find that they acted consistent with the advice of their counsel, and punitive damages might not be appropriate. However, after

the District Court decision and subsequent rulings of this court and the Oregon state courts that the supplemental state court judgment for attorneys' fees against Mr. Taggart was improper, it ultimately required an order of this court, entered on March 4, 2015 (Docket No. 179), to get the supplemental attorneys' fees judgment vacated. In these circumstances, I find an award of $2,000 punitive damages (40% of the actual damages award) against Mr. Emmert, Mr. Jehnke and SPBC is appropriate as a sanction to insure that Mr. Taggart's discharge order is observed in future.

Conclusion

Based on the foregoing findings and conclusions, I award Mr. Taggart actual damages of $5,000, jointly and severally against the Respondents; attorneys' fees and costs of $105,593.71, awarded jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC, of which $92,118.71 further is awarded jointly and severally against the Estate; and punitive damages of $2,000, awarded jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC. No punitive damages are awarded against the Estate. Mr. Berman should prepare and submit an order and judgment consistent with this Memorandum Opinion, approved as to form by counsel for the Respondents, within ten days following entry of this Memorandum Opinion.