

App. 1

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

Feb 23, 2018
Molly C. Dwyer, Clerk
U.S. Court of Appeals

YAN SUI; PEI-YU YANG,
Plaintiffs-Appellants

v.

RICHARD ALAN
MARSHACK, an individual;
et al.,
Defendants - Appellees.

No. 17-56323
D.C. No. 8:13-cv-01607-
JAK-AJW

U. S. District Court
Central District of
California, Santa Ana

ORDER

Before: LEAVY, FERNANDEZ, and MURGUIA
Circuit Judges

We have reviewed the record and the response to this court's September 6, 2017 order to show cause and conclude that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F. 2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, we summarily affirmed the district court's order.

AFFIRMED.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

Sept. 6, 2017
Molly C. Dwyer, Clerk
U.S. Court of Appeals

YAN SUI; PEI-YU YANG,
Plaintiffs-Appellants

v.

RICHARD ALAN
MARSHACK, an individual;
et al.,
Defendants - Appellees.

No. 17-56323
D.C. No. 8:13-cv-01607-
JAK-AJW

U. S. District Court
Central District of
California, Santa Ana

ORDER

A review of the record demonstrates that this appeal may be appropriate for summary disposition because the questions on which the decision in the appeal depends may be so insubstantial as not to justify further proceedings. *See* 9th Cir. R. 3-6.

Within 21 days after the date of this order, appellants shall show cause why the judgment in this appeal should not be summarily affirmed. Appellees may file a reply to appellants' response within ten days from service of the response. Appellants' failure to comply with this order shall result in the automatic

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dismissal of this appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

FOR THE COURT

MOLLY C. DWYER

CLERK OF COURT

By: Cyntharee K. Powells

Deputy Clerk

Ninth Circuit Rule 27-7

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

YAN SUI, PEI-YU YANG
Plaintiffs

v.

RICHARD A. MARSHACK,

et al

Defendants

Case No.

8:13-cv-01607-

JAK(AJW)

Date: Aug.1, 2018

CIVIL MINUTES -

GENERAL

Present:

The Hon. John A.

Kronstadt, U.S.

District Judge

**Proceedings: (In Chambers) Order re Plaintiffs'
Motion for Order to (1) Reopen Case after
Appeal; (2) Continuing Sanctions for Violating
the Discharge Injunction; (3) Set up a Separate
Hearing to Determine the Damages, including
Attorneys' Fees and Costs in Connection with
Litigating Discharge Injunction at Federal
Court (DKT. 194)**

Attorney Present for Plaintiff: Not Present

Attorney Present for Defendants: Not Present

Andrea Keifer - Deputy Clerk

Court Smart Recorder: Not Reported

Plaintiffs filed a Motion for an order, which seeks
to reopen the case, continue sanctions for violating
the discharge injunction, and to set a

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hearing to determine damages and fees (the "Motion"). This case was dismissed upon the entry of Judgment on April 10, 2015. Dkt. 152. On May 8, 2015, Plaintiffs filed an appeal with the Ninth Circuit Court of Appeals. Dkt.157. The Court of Appeals issued its Mandate on June 9, 2017, which affirmed this Court's findings. Dkt. 193. Accordingly, this case is closed.

Notwithstanding that this case is closed, the Court reviewed the Motion. It has determined that the issues raised have either been addressed previously in a more detailed order or have no merit. No basis has been identified for the reopening of this case. In light of the foregoing, the Court orders the Motion to be **STRICKEN**.
IT IS SO ORDERED.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

YAN SUI, PEI-YU YANG
Plaintiffs

v.

RICHARD A. MARSHACK,

et al

Defendants

Case No.

8:13-cv-01607-

JAK(AJW)

Date: June 30, 2015

CIVIL MINUTES -

GENERAL

Present:

The Hon. John A.

Kronstadt, U.S.

District Judge

Proceedings: Order to Show Cause re Contempt

Attorney Present for Plaintiff: No Appearance

Attorney Present for Defendants: Jess R. Bressi;

D. Edward Hays

Andrea Keifer - Deputy Clerk

Court Reporter/Recorder: Alex Joko

I. Introduction

The hearing is held on the Order to Show Cause Re Contempt ("OSC") issued by Magistrate Judge Wistrich on March 3, 2015. Dkt. 139. There is no appearance by or on behalf of Plaintiffs notwithstanding orders that Plaintiffs were to appear in person if they wished to address the issues raised by the Order to Show Cause. Dkt. 160, 162. Indeed, the

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purpose of the hearing was to provide Plaintiffs with the opportunity to present any evidence in response to the certified facts that formed the basis for the Order to Show Cause. The OSC certified certain facts and concluded that they warranted the issuance of an order to show cause why Plaintiffs “should not be adjudged in contempt by reason of the facts so certified,” pursuant to 28 U.S.C. § 636(e) (6) (B) (iii). The facts certified by Magistrate Judge Wistrich, which are detailed in that Order, are summarized below.

On October 15, 2013, Plaintiffs filed this action (“Marshack I”) against Richard A. Marshack, the trustee in Sui’s bankruptcy proceedings, and other defendants related to Sui’s bankruptcy proceedings (collectively, “Defendants”). Their action sought damages, injunctive relief and declaratory relief against Defendants based on alleged conduct that occurred during the bankruptcy proceedings. On November 13, 2013, Defendants filed a motion to dismiss in this action. On June 20, 2014, Magistrate Judge Wistrich issued a Report and Recommendation in which he recommended that the motion to dismiss should be granted. On July 23, 2014, this Court accepted the Report and Recommendation and granted the motion to dismiss. That motion was granted pursuant to the *Barton* doctrine.¹ That doctrine requires a party to “obtain leave of the

¹ *Barton v. Barbour*, 104 U.S. 126 (1881).

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bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity." Plaintiffs had not obtained leave from the Bankruptcy Court before filing Marshack I against Defendant, notwithstanding that the action arose from alleged actions taken by Marshack in his official capacity as Trustee. On July 28, 2014, Plaintiffs appealed that order to the Ninth Circuit. On September 25, 2014, the Ninth Circuit dismissed that appeal for lack of jurisdiction because the order was not final or appealable.

Another proceeding was then pending before the Bankruptcy Appellate Panel. On November 10, 2014, the Bankruptcy Appellate Panel filed its Memorandum in BAP Case No. CC-13-1572-TASpD in connection with a Pre-Filing/Vexatious Litigant Order entered by the Bankruptcy Court against Plaintiffs.

The Bankruptcy Appellate Panel warned Plaintiffs that if they filed another action against Defendants in the District Court without first obtaining leave from the Bankruptcy Court to do so, they could be found in contempt of the dismissal order issued by this Court on July 23, 2014. On January 14, 2015, Plaintiffs filed a new lawsuit against Defendants and others associated with the prior Bankruptcy proceedings, *Yan Sui et al v. Richard A. Marshack et al.*, No. SA CV 15-0059 JAK AJW ("Marshack II"). Magistrate Judge Wistrich

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determined that this second action also arise[s] from the conduct of the Trustee in his official capacity as the Chapter 7 trustee in Sui's bankruptcy case and from the conduct of the Trustee's professionals.

Therefore, plaintiffs were required to obtain written leave from the Bankruptcy Court before filing Marshack II against the Trustee defendants. The Court takes judicial notice of the docket in *In re Yan Sui*, which contains no indication that before filing Marshack II against the Trustee defendants in this court, plaintiffs obtained written leave to do so from the Bankruptcy Court.

II. Analysis

A. Legal Standard

1. The Contempt Authority of Magistrate Judges
Although a magistrate judge is authorized to hear pretrial matters pursuant to section 636(b)(1), his or her authority as to any contempt proceedings is limited by section 636(e) (6) (B)(i)-(iii). It provides that, after considering whether an act or conduct may constitute a civil contempt, a magistrate judge "shall forthwith certify the facts to a district judge," and "may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified." 28 U.S.C. § 636(e)(6)(B)(iii). If a magistrate judge

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certifies such facts and issues an order to show cause, “[t]he district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.” 28 U.S.C. § 636(e)(6)(B)(iii). See *Grimes v. City and Cnty. of San Francisco*, 951 F.2d 236, 240 (9th Cir. 1991) (“28 U.S.C. § 636, which governs the jurisdiction and powers of magistrates, requires a magistrate to refer contempt charges to a district court judge.”) (citing 28 U.S.C. § 636(e)); *United States v. Ritte*, 558 F.2d 926, 927 (9th Cir. 1977) (per curiam) (“[C]ontemptuous acts committed in the presence of a magistrate or related to proceedings before a magistrate must be referred to a district judge for adjudication.”) As the Fourth Circuit has explained: [T]he certificate of facts forwarded by the magistrate to the district court shall be considered the statement of a prima facie case. Thus, if there is nothing else appearing before the district court and the certified facts, if true, will support a violation, then the district court may, if it deems the burden of persuasion to have been satisfied, find a party in contempt. *Proctor v. State Gov't of N. Carolina*, 830 F.2d 514, 521 (4th Cir. 1987). Further, the district court should “allow any party the opportunity to introduce evidence upon request.” *Id.* at 522; see *In re Kirk*, 641 F.2d 684, 687 (9th Cir. 1981) (In contempt procee-

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dings under § 636(e), the alleged contemnor was allowed to testify before the district judge).

2. Civil Contempt Proceedings

“It is firmly established that ‘[t]he power to punish for contempts is inherent in all courts.’” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (quoting *Ex parte Robinson*, 86 U.S. 505, 510 (1873)). “The under-lying concern that gave rise to the contempt power was ... disobedience to the orders of the Judiciary.” *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987) (citations omitted); *See also* 18 U.S.C. § 401 (“A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority ... as... [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command”). Courts may address the alleged disobedience of their orders by civil or criminal contempt proceedings.² *United States v. Rose*, 806 F.2d 931, 933 (9th Cir. 1986). Courts have the power “to adjudge in civil contempt any person who willfully disobeys a specific and definite order requiring him to do or to refrain from doing an act.” *Shuffler v. Heritage Bank*, 720 F.2d

2. “[T]he ‘distinction between the two forms of contempt lies in the intended effect of the punishment imposed. The purpose of civil contempt is coercive or compensatory, whereas the purpose of criminal contempt is punitive.’” *Koninklijke Philips Electronics N.V. v. KXD Tech., Inc.*, 539 F.3d 1039, 1042 (9th Cir. 2008) (citation omitted).

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1141, 1146 (9th Cir. 1983) (citations omitted).

Further, “[a] person fails to act as ordered by the court when he fails to take ‘all the reasonable steps within [his] power to insure compliance with the [court's] order [].’” *Id.* at 1146-47 (quoting *Sekaqua-ptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976)).

“The contempt ‘need not be willful,’ and there is no good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). “But a person should not be held in contempt if his action ‘appears to be based on a good faith and reasonable interpretation of the [court's order].’” *Id.* (quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)). “Substantial compliance’ with the court order is a defense to civil contempt, and is not vitiated by ‘a few technical violations’ where every reasonable effort has been made to comply.” *Id.* (quoting *Vertex*, 689 F.2d at 889). Courts have “broad equitable power to order appropriate relief in civil contempt proceedings,” *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003). When considering a sanction to make a party comply with a court order, the court should consider “the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” *United States v. United Mine*

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Workers, 330 U.S. 258, 304 (1947).

B. Application

Plaintiffs failed to appear at the hearing. As a result, they waived their respective rights to offer any evidence to dispute the facts certified in the Order to Show Cause Re Contempt. Because there has been no rebuttal to the prima facie showing, and because the pleadings filed in the relevant proceedings support the facts proffered in the Order to Show Cause Re Contempt, those certified facts are found to be correct, and are adopted. Therefore, Plaintiffs are in violation of the prior order that precluded the filing of this action without the prior consent of the Bankruptcy Court. Consequently, a finding of contempt is warranted, and the following order is appropriate: Plaintiffs are ordered to dismiss Marshack II within three days of the contempt proceedings, i.e., on or before July 2, 2015. Should Plaintiffs fail to do so, the Court will determine an appropriate remedy to enforce this Order.

Reasonable attorney's fees are also awarded to the moving parties in connection with these proceedings on the Order to Show Cause Re Contempt. However, sufficient evidence has not been presented to determine an appropriate amount of such fees. Pursuant to this Court's Standing Orders 10(e), and Ex. H., the moving parties are ordered to file any application(s) for attorney's fees on or before July 6, 2015: A summary, in table form, of the hours worked and rate

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charged by each attorney or legal assistant. The hours worked by each attorney shall be categorized by task. If the hourly rate charged by any individual attorney changed while the case was ongoing, the party shall provide separate calculations for the total number of hours that the attorney spent in connection with each task at each hourly rate. *See* Ex. H of this Court's Standing Orders. The courtesy copy shall be e-mailed in an editable, electronic copy of the table described above, formatted for use with Micro-soft Excel. Plaintiffs shall file any response to any such submission on or before July 20, 2015. Defendants may file a reply on or before July 27, 2015. The application(s) will be taken under submission on July 27, 2015, and an order will be issued.

IT IS SO ORDERED.

cc: Magistrate Judge Wistrich

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

YAN SUI, PEI-YU YANG

Plaintiffs

v.

RICHARD A. MARSHACK,

et al

Defendants

Case No.

8:13-cv-01607-

JAK(AJW)

Date: March 3, 2016

CIVIL MINUTES -

GENERAL

Present:

The Hon. John A.

Kronstadt, U.S.

District Judge

**Proceedings: (In Chambers) Order re:
Defendant's Request for Attorneys' Fees (Dkt.
169)**

Attorney Present for Plaintiff: No Present

Attorney Present for Defendants: Not Present

Andrea Keifer - Deputy Clerk

Court Reporter/Recorder: Not Reported

On October 14, 2013, Yan Sui and Pei-Yu Yang ("Plaintiffs") filed an action against Richard A. Marshack ("Marshack"), his law firm of Marshack Hays, LLP ("Marshack Hays"), Clarence Yoshikane ("Yoshikane"), Pickford Real Estate, Inc. ("Pickford") (erroneously sued as Prudential Real Estate Corporation), Wells Fargo Bank ("Wells Fargo"), Office of the United States Trustee ("U.S. Trustee's Office"), and 2176 Pacific Homeowners Association ("Pacific HOA"). Dkt. 1. The Complaint advanced 13 causes of

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action against all Defendants. They include negligence, common law fraud, breach of contract, intentional infliction of emotional distress, abuse of process, legal malpractice, breach of fiduciary duty and attempted violations of the Fifth Amendment and 42 U.S.C § 1983. *Id.*

On November 13, 2013, Marshack, Marshack Hays, Yoshikane and Pickford filed a motion to dismiss the Complaint. Dkt. 18. On June 20, 2014, Magistrate Judge Wistrich issued a Report and Recommendation; it proposed granting the motion. Dkt. 96. On July 23, 2014, this Court accepted the Report and Recommendation and granted the motion to dismiss. Dkt. 99. On July 28, 2014, Plaintiffs appealed that order to the Ninth Circuit. Dkt. 101. The Ninth Circuit dismissed the appeal for lack of jurisdiction because the order was not final. Dkt. 108.

At that time, a separate, related proceeding was pending before the Bankruptcy Appellate Panel ("BAP"). On November 10, 2014, the BAP filed its Memorandum in BAP Case No. 13-1572. It cautioned Plaintiffs that if they filed another action against Defendants in the District Court without first obtaining leave from Bankruptcy Court, they could be found in contempt of the dismissal order issued by this Court on July 23, 2014. Case No. 8:11-bk-0448, Dkt. 321 at 8.

On January 14, 2015, Plaintiffs filed a new action against Defendants and others associated with the

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prior Bankruptcy proceedings. *Sui v. Marshack*, Case No. 15-0059. They did so without first obtaining leave from the Bankruptcy Court. Magistrate Judge Wistrich determined that this second action also arise[s] from the conduct of the Trustee in his official capacity as the Chapter 7 trustee in Sui's bankruptcy case and from the conduct of the Trustee's professionals. Therefore, plaintiffs were required to obtain written leave from the Bankruptcy Court before filing Marshack II against the Trustee defendants. The Court takes judicial notice of the docket in *In re Yan Sui*, which contains no indication that before filing Marshack II against the Trustee defendants in this court, plaintiffs obtained written leave to do so from the Bankruptcy Court. Dkt. 139 at 7.

On February 2, 2015, Defendants filed a motion for the issuance of an Order to Show Cause Re Contempt ("OSC") against Plaintiffs as well as a request for an award of attorney's fees. Dkt. 121. On March 3, 2015, Magistrate Judge Wistrich granted the request as to the issuance of an OSC. Dkt. 139. On June 30, 2015, a hearing was held on the OSC. Dkt. 166. At that hearing, Plaintiffs were found in civil contempt and were ordered to dismiss the newly-filed action on or before July 2, 2015. An order was issued with respect to these determinations. *Id.* That order stated, "[r]easonable attorney's fees are also awarded to the moving parties in connection with these proceedings on the Order to Show Cause Re Contempt.

However, sufficient evidence has not been presented to determine an appropriate amount of such fees." *Id.* at 4.

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On July 6, 2015, Defendants filed additional information in support of the request for attorney's fees. Dkt.169. On July 22, 2015, Plaintiffs filed an objection to the OSC as well as to an award of attorney's fees. Dkt. 170. They argue that "a procedural contempt proceeding should not supersede the substantive federal laws on awarding defense attorney's fees in a civil rights action." *Id.* at 26.

Plaintiffs also presented several arguments as to why the OSC and subsequent finding of contempt were improper. Because these issues had already been decided following the hearing at which Plaintiffs failed to appear, these arguments are deemed a motion for reconsideration. The Local Rules provide the limited grounds for such a motion: (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Local Rule 7-18.

Plaintiff's filing does not meet any of these standards. Moreover, Plaintiffs were directed in two

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separate orders to appear in person at the hearing on the OSC. Dkt. 160, 162. In the later of these orders, the Court rejected Plaintiffs' request to be permitted to respond in writing to written questions posed by the Court in advance of the hearing. That order also provided that the purpose of the hearing includes permitting Plaintiffs to address the factual matters certified by Magistrate Judge Wistrich in the Order to Show Cause Re Contempt issued. Dkt. 139; see 28 U.S.C. § 636(e)(6)(B)(iii). The written process proposed by Plaintiffs is not provided for by the applicable statute and would be both inefficient and inappropriate. Among other things, it would not permit the normal back-and-forth discussion clarifying, as necessary, both the questions asked and answers presented. Nor would it permit, as necessary, to confirm that the responses, if any, by either or both Plaintiffs are ones that each has made. If either or both Plaintiffs fail to appear at the June 29 Hearing, such a non-appearance will effect a waiver of the rights of the non-appearing part(ies) to contest any of the factual matters certified by Magistrate Judge Wistrich, to present evidence as to these or related matters, and to present any legal arguments as to the Order to Show Cause. Dkt. 162.

On July 27, 2015, Defendants filed a reply to Plaintiffs' objection. Dkt. 172. On August 14, 2015,

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Defendants were ordered to file a summary, in table form, of hours worked and the rate charged by each attorney in connection with the prior request for an award of attorney's fees. Dkt. 173, 174. On August 19, 2015, Defendants made their responsive filing. Dkt. 175. There, Defendants requested the award of \$36,777 in attorney's fees in connection with the OSC. *Id.* at 6. The materials submitted in support of this request show that Jess R. Bressi ("Bressi") performed all of the work for which an award was sought. 17

Bressi is a partner at Dentons US LLP, which serves as special litigation counsel for Marshack. Bressi's hourly rate is \$615. The evidence submitted shows that she billed approximately 60 hours in connection with the OSC. *Id.* at 8-11. That work was performed between January 15 and June 29, 2015. *Id.*

On October 16, 2015, Plaintiffs filed a "Request for Judicial Notice" (Dkt. 176) as to an order entered on September 30, 2015, in the Bankruptcy Proceedings, No. 8:11-bk-20448-CB, in which Bankruptcy Judge Bauer denied a motion brought by Plaintiffs. In that same filing Plaintiff also included another order from the same Bankruptcy Proceedings in which Plaintiffs were found to be in civil contempt and ordered to pay \$50,313.50 to the Trustee "to compensate the bankruptcy estate for the attorneys' fees and expenses incurred by Marshack Hays LLP in enforcing the Default Order and the Sale Order...." Dkt. 176 at 7. The same order required Plaintiffs to pay \$43,519.22 to the Trustee "to compensate the bankruptcy estate for 17

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the attorneys' fees and expenses incurred by Dentons US LLP in enforcing the Default Order and the Sale Order....” *Id.* Plaintiffs contend, in a conclusory statement, that an award of fees in this proceeding would constitute the imposition of “duplicative charges.” *Id.* at 1.

Defendants responded to this argument through a declaration by Bressi, in which she states:

6. At present, no court order has been entered either in this District Court action or the Adversary in Sui Bankruptcy Case awarding Dentons fees and costs regarding the OSC Motion in this Court or the contempt motion in the Adversary in Sui Bankruptcy Case.

7. As indicated in the Marshack Supp. Decl., if and when Dentons is awarded fees and costs regarding the OSC Motion in this Court or the contempt motion in the Adversary in Sui Bankruptcy Case, Dentons will adjust its fee request accordingly. Therefore and as noted above, there will be no duplicative requests for fees and costs by Dentons. Dkt. 177 ¶¶ 6, 7. Marshack is the Chapter 7 Trustee in the Bankruptcy Proceedings. His Supplemental Declaration, which is referred to above, was filed in those proceedings. Dkt. 177 at 7-9. It is consistent with the statements quoted

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above from the Bressi Declaration.

Based on this evidence, there is no merit to Plaintiffs' claim as to an award of duplicative relief; no amount has been paid as of this time, and the Trustee is estopped from seeking the same recovery in the separate proceedings.

The next issue is a consideration of the reasonableness of the fees requested in this action. Based on the review of the submissions, the Court has evaluated the fee request in light of its substantial experience with matters adjudicated in this District, including the amount of time that is reasonably required to complete certain tasks, as well as the hourly rates that are appropriate given the nature of the issues that are presented. In light of the professional experience of Bressi, the nature of the matters presented, and the efficiency that is achieved by having a single lawyer handle all aspects of a matter, the requested hourly rate of \$615 is reasonable, and is approved. The Court is also familiar with the proceedings that have occurred in this action, including those that led to the issuance of the OSC as well as those that occurred thereafter. A consideration of all of these factors shows that a reasonable award in this matter is \$30,319.50. This is \$645.50 less than the \$36,777 that has been requested.

The reasons for this reduction of approximately 18% are that more hours were spent than were reasonably necessary. The reductions,

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which total 10.5 hours, are as to the following matters that are identified in the billing records:

- “Draft Motion for OSC re Contempt and accompanying voluminous pleadings and legal research re same; draft request for judicial notice, assemble evidence and exhibits; edit same” (Dkt. 175 at 6): reduced by 1.10 hours from 12.1 to 11 hours;
- “Review Plaintiffs’ Opposition to OSC and other submittals by Plaintiffs and prepare Reply papers including request for judicial notice and legal research re same; edit papers” (*id.*): reduced by 4 hours from 8 to 4 hours;
- “Review Plaintiffs’ Motion for Reconsideration of OSC; research grounds for opposition and draft Opposition to same” (*id.*): reduced by 1.4 hours from 3.4 to 2 hours;
- “Review Plaintiffs’ Submission of Argument on OSC and prepare written Opposition to same and perform brief legal research re same” (*id.*): reduced by 1 hour from 7 to 6 hours;
- “Prepare for and attend OSC; review and analysis of all pleadings filed in support and opposition to OSC; prepare outline of argument if called up by Court” (*id.*): reduced by 1 hour from 5.2 to 4.2 hours; and
- “Review various Court orders pertaining to OSC re Contempt and Plaintiffs’ various submissions and strategize with clients re

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same" (*id.*): reduced by 2 hours from 4 to 2 hours.

For the foregoing reasons, what has been deemed Plaintiffs' request for reconsideration is **DENIED**, and the request for attorney's fees is **GRANTED IN PART**. Fees in the amount of \$30,319.50 are awarded with Plaintiffs jointly and severally liable for their payment.

Defendants shall lodge a proposed judgment within 10 days of the issuance of this Order. Any objections by Plaintiffs to the proposed judgment shall be filed within 7 days. Any objections to the proposed judgment must be limited to discussing inconsistencies between the proposed judgment and this Order. After final judgment is entered, Plaintiffs shall make payment of the total amount within 30 days. Any payment that is made is to be applied as a credit to what is determined in the Bankruptcy Proceedings to have been a parallel fee award made in those Proceedings.

IT IS SO ORDERED.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

May 18, 2017
Molly C. Dwyer, Clerk
U.S. Court of Appeals

YAN SUI; PEI-YU YANG
Appellants

v.

RICHARD A. MARSHACK
Chapter 7 Trustee; et al
Appellees.

No. 15-55708
D.C. No. 8:13-cv-01607-
JAK-AJW

MEMORANDUM

Appeal from the United States District Court
for the Central District of California

John A. Kronstadt, District Judge, Presiding

Submitted May 8, 2017**

Before: REINHARDT, LEAVY and NGUYEN
Circuit Judges

*This disposition is not appropriate for publication
and is not precedent except as provided by Ninth
Circuit Rule 36-3

**The panel unanimously concludes this case is

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Yan Sui and Pei-yu Yang appeal pro se from the district court's judgment dismissing their 42 U.S.C. § 1983 action alleging federal and state laws claims in connection with Sui's bankruptcy proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *Serra v. Lappin*, 600 F.3d 1191, 1195 (9th Cir. 2010). We affirm. The district court properly dismissed plaintiffs' claims against the chapter 7 trustee because plaintiffs neither sought leave to sue the trustee from the bankruptcy court nor alleged facts sufficient to show that the trustee acted outside the scope of this official capacity. *See Beck v. Fort James Corp. (In re Crown Vantage, Inc)*, 421 F.3d 963, 970 (9th Cir. 2005) ("[A] party must first obtain leave of the bankruptcy court before it initiates an action in another forum against a bankruptcy trustee or other officer appointed by the bankruptcy court for acts done in the officer's official capacity.").

Because plaintiffs do not raise any arguments regarding the basis for the district court's dismissal of the federal claims against defendant Wells Fargo, they have waived any challenge to the dismissal of their claims against Wells Fargo. *See Greenwood v.*

suitable for decision without oral argument. *See* Fed. R. App. P. 34(a) (2)

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FAA, 28 F. 3d 971, 977 (9th Cir. 1994) (“We review only issues which are argued specifically and distinctly in the party’s opening brief.”).

The district court did not abuse its discretion by declining to exercise supplemental jurisdiction over plaintiffs’ state law claims after dismissing all federal claims. *See* 28 U.S.C. § 1367(c)(3) (permitting district court to decline supplemental jurisdiction if it has “dismissed all claims over which it has original Jurisdiction”); *Costanich v. Dep’t of Soc. Health Servs.*, 627 F. 3d 1101, 1107 (9th Cir. 2010) (standard of review).

The district court did not abuse its discretion by denying plaintiffs’ request for default judgment against defendant United States Trustee because plaintiffs had not demonstrated that they served the Trustee with the summons and complaint. *See Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986) (setting forth standard of review and factors for determining whether to enter default judgment).

The district court did not abuse its discretion by denying plaintiffs’ motion for leave to amend after concluding that amendment would be futile. *See Chappel v. Lab. Corp. of Am.*, 232 F. 3d 719, 725-26 (9th Cir. 2000) (“A district court acts within its discretion to deny leave to amend when amendment would be futile....”).

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We do not consider arguments raised for the first time on appeal or matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F. 3d 983, 985 n.2 (9th Cir. 2009).

Appellee 2176 Pacific Homeowners Association's request for judicial notice (Docket Entry No. 18) is denied. Plaintiffs' request for oral argument (Docket Entry No. 41) is denied.

AFFIRMED.

App.29

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

May 18, 2017
Molly C. Dwyer, Clerk
U.S. Court of Appeals

YAN SUI; PEI-YU YANG
Appellants

v.

RICHARD A. MARSHACK
Chapter 7 Trustee; et al
Appellees.

No. 15-56130
D.C. No. 8:13-cv-00059-
JAK-AJW

MEMORANDUM

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding
Submitted May 8, 2017**

Before: REINHARDT, LEAVY and NGUYEN
Circuit Judges

*This disposition is not appropriate for publication
and is not precedent except as provided by Ninth
Circuit Rule 36-3

**The panel unanimously concludes this case is

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Yan Sui and Pei-yu Yang appeal pro se from the district court's order dismissing their 42 U.S.C. §1983 action alleging federal and state laws claims against, among others a bankruptcy judge and the chapter 7 trustee representing Sui's bankruptcy estate. We have jurisdiction under 28 U.S.C. §1291. We review for abuse of discretion a court's imposition of sanctions under its inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32.55 (1991). We affirm.

The district court did not abuse its discretion by imposing terminating sanctions under its "inherent equitable powers to dismiss action for ...abusive litigation practice." *Televideo Sys. Inc., v. Heidenthal*, 826 F. 2d 915, 916 (9th Cir. 1987).

We reject as without merit plaintiffs' contention that the district court demonstrate bias.

Appellants' request for judicial notice (Docket Entry No. 12) is denied.

AFFIRMED.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

Aug.17, 2016
Molly C. Dwyer, Clerk
U.S. Court of Appeals

In re: YAN SUI,
Debtor.

No. 16-60038
BAP No. 15-1262

YAN SUI,
Appellant,
v.
RICHARD A. MARSHACK
Chapter 7 Trustee; et al
Appellees.

ORDER

A review of the record suggests that this court may lack jurisdiction over the appeal because an order denying a motion for sanctions brought by a party to ongoing litigation is not immediately appealable. *See McCright v. Santoki*, 976 F. 2d 568, 569 - 70 (9th Cir. 1992) (per curiam); *see also In re Rains*, 428 F. 3d 893, 900-01 (9th Cir. 2005) (court of appeals lacks jurisdiction to hear interlocutory appeals in bankruptcy cases); *In Re Lievsay*, 118 F. 3d 661, 662 (9th Cir. 1997) (per curiam) (“[i]f the the underlying bankruptcy court decision is interlocutory, the BAP

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order affirming or reversing it is also interlocutory”).

Within 21 days after the date of the order, appellant shall move for voluntary dismissal of this appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to show cause, a response may be filed within 10 days after service of the memorandum.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order of the Court.

FOR THE COURT:
MOLLY C. DWYER
CLERK OF COURT

By: Seung Lee
Deputy Clerk

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

Dec.15, 2016
Molly C. Dwyer, Clerk
U.S. Court of Appeals

In re: YAN SUI,
Debtor.

No. 16-60038
BAP No. 15-1262

YAN SUI,
Appellant,
v.
RICHARD A. MARSHACK
Chapter 7 Trustee; et al
Appellees.

ORDER

Before: THOMAS, Chief Judge, LEAVY and
SILVERMAN, Circuit Judges.

A review of the record and appellants' response to this court's August 17, 2016 order to show cause demonstrates that this courts lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. *See McCright v. Santoki*, 976 F. 2d 268, 569-70 (9th Cir. 1992) (per curiam); *see also In re Rains*, 428 F. 3d 893, 900-01 (9th Cir. 2005) (court of appeals lacks jurisdiction to hear interlocutory appeals in bankruptcy cases); *In*

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Re Lievsay, 118 F. 3d 661, 662 (9th Cir. 1997) (per curiam) (“[i]f the underlying bankruptcy court decision is interlocutory, the BAP order affirming or reversing it is also interlocutory”). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

DISMISSED.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

YAN SUI et al

Plaintiffs

v.

RICHARD A. MARSHACK,

et al

Defendants

Case No.

8:13-cv-01607-JAK
(AJW)

Date: Jan. 27, 2015

**ORDER DENYING
PLAINTIFFS' EX
PARTE
APPLICATION**

Plaintiffs Yan Sui and Pei-yu Yang ("plaintiffs") filed an ex parte application ("Application") for an order staying "the eviction in lieu of the writ of possession." Plaintiffs seek to prevent defendant Richard A. Marshack ("Marshack" or "Trustee"), the Chapter 7 bankruptcy trustee of Yan Sui's bankruptcy estate, from causing plaintiffs to be evicted from their residence at 2176 Pacific Avenue, #C, Costa Mesa, California (the "Property"). Exhibits attached to plaintiffs' ex parte application establish that on December 29, 2014, the United States Bankruptcy Court for the Central District of California ("Bankruptcy Court") granted Marshack's motion for entry of an order authorizing issuance of a writ of assistance. The Bankruptcy Court issued an order

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(the "Order") finding that the Trustee was entitled to immediate turnover of the Property from Yan Sui, Pei-yu Yang, and all other occupants of the property and authorizing the Trustee to direct the United States Marshals Service to forcibly evict and lockout all occupants from the Property. The Bankruptcy Court also authorized the Clerk of the Court to issue a writ of assistance consistent with the Bankruptcy Court's order. [Application, Exhibit ("Ex.") 1, pp. 4-6]. The Clerk of the Court issued a "Writ of Assistance to Compel Occupants to Vacate and Surrender Possession" (the "Writ of Assistance") of the Property on January 2, 2015. The United States Marshals Service issued a "Notice to Vacate" on January 13, 2015 directing "Yan Sui and any and all occupants residing at" the Property to vacate the Property no later than January 21, 2015, or be subject to eviction by force. [Application, Ex. 1, unnumbered pages]. Plaintiffs' contention that "the upcoming eviction is unnecessary" and will cause "needless harm" to plaintiffs are properly raised in the Bankruptcy Court or on appeal from that court's orders, not in this civil rights action. Additionally, this Court cannot grant the ex parte relief requested because plaintiff's claims against Marshack, Marshack Hays, LLP, Clarence Yoshikane, and Prudential Realty have been dismissed for lack of subject matter jurisdiction, and plaintiffs' claims against the Office of the United States Trustee have been dismissed with

B

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prejudice. Accordingly, plaintiffs' ex parte application
is **denied**.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

Jan.22, 2015
Molly C. Dwyer, Clerk
U.S. Court of Appeals

In re: YAN SUI and
PEI-YU YANG

YAN SUI and
PEI-YU YANG
Petitioners

v.

UNITED STATES
DISTRICT COURT
FOR THE CENTRAL
DISTRICT OF
CALIFORNIA, SANTA
ANA

Respondent
RICHARD A. MARSHACK
Chapter 7 trustee,
Real Party in Interest

No. 15-70189
D.C. No. 8:13-cv-00519
MWF
Court for the Central
District of California
Santa Ana

ORDER

Before: GRABER, CALLAHAN, and CHRISTEN,
Circuit Judges.

Petitioner's request for judicial notice is granted.
The "emergency petition for writ of prohibition" is
construed as a petition for writ of mandamus. So

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construed, petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No further filings will be entertained in this closed case.

DENIED.

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Fax: (949)-333-7778 Attorneys for Plaintiff and
Chapter 7 Trustee, RICHARD A. MARSHACK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIV.**

Filed & Entered

Dec. 29, 2014

In re:	Case No. 8:11-bk-
YAN SUI	20448-CB
Debtor	Chapter 7
	Ad. No. 8:13-ap-
RICHARD A. MARSHACK,	01246-CB
Chapter 7 Trustee	ORDER GRANTING
Plaintiff,	PLAINTIFF'S MO-
vs.	TION FOR ENTRY OF
PEI-YU YANG	ORDER AUTHORI-
	ZING ISSUANCE OF
Defendant,	WRIT OF ASSIS-
	TANCE [MOTION
	DKT. NO. 125]
	Date: Dec. 16, 2014
	Time: 10:00 a.m.
	Court: 5D

The Motion for Entry of Order Authorizing

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Issuance of Writ of Assistance ("Motion"), filed by Richard A. Marshack in his capacity as Chapter 7 Trustee of the Bankruptcy Estate of Yan Sui ("Trustee" or "Plaintiff" on December 1, 2014 as Docket No. 125, came on for hearing on shortened time on December 16, 2014 at 10:00 a.m., before the Honorable Catherine E. Bauer, United States Bankruptcy Judge, Plaintiff appeared by and through his attorneys Marshack Hays LLP by Chad V. Haes. No other appearances were made.///

The Court considered the Motion, memorandum of points and authorities, declaration of Chad V. Haes, the amended notice of hearing, Debtor Yan Sui and Defendant Pei-yu Yang's Opposition, the reply in support of Motion, and all related pleadings filed in this adversary case, and the oral argument and comments of counsel during the hearing. For the reasons set forth on the record, the Court finds good cause to grant the Motion.

IT IS ORDERED that:

1. The Motion is granted in its entirety;
2. Plaintiff is entitled to immediate turnover of the real property commonly known as 2176 Pacific Avenue #C, Costa Mesa, California 92627-4891 ("Property") and legally described as follows:
"All that certain land situated in the State of California, County of Orange, City of Costa Mesa, described as follows:
Parcel A: Lot 3 of Tract No. 14470, in the City of Costa Mesa, County of Orange, State of California, as shown on a Map Recorded in Book 693, Pages 34 and 35 of Miscellaneous Maps, Records of Orange County, California.

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Reserving therefrom non-exclusive easements for ingress, egress, encroachments, maintenance, repair, drainage, support, use and enjoyment, all as described in the declaration of covenants, conditions and restrictions Recorded January 5, 1996 as Instrument No. 19960008704 of Official Records of Orange County, California.

Parcel B: Appurtenant non-exclusive easement for ingress, egress, pedestrian walkways, general recreation purposes, use and enjoyment of the association common area property described as Parcel 3, as shown on Exhibit "B" to Lot Line Adjustment No. LL 95-02 Recorded May 16, 1995 as Instrument No. 95-0210116 of Official Records of Orange County, California, as said Easements are set forth in the Declaration of Covenants, Conditions, and Restrictions Recorded January 5, 1996 as Instrument No. 19960008704 of said Official Records."

3. Yan Sui, Pei-yu Yang, and all other occupants of the Property must immediately vacate and turn-over possession of the Property to the Trustee pursuant to §§ 542(a) and 704(1).
 4. Plaintiff may direct the United States Marshals Service to: (a) forcibly evict and lockout all occupants of the Property; and (b) surrender possession of the Property to the Trustee's designated custodian.
 5. The Clerk of the Court may issue a Writ of Assistance consistent with this Order ###
- Date: Dec. 29, 2014 / s / Catherine E. Bauer

CATHERINE E. BAUER
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIV.

Filed & Entered

Dec. 29, 2014

In re:

YAN SUI

Debtor

RICHARD A. MARSHACK,

Chapter 7 Trustee

Plaintiff,

vs.

PEI-YU YANG

Defendant,

Case No. 8:11-bk-

20448-CB

Chapter 7

Ad. No. 8:13-ap-

01246-CB

WRIT OF ASSIS-
TANCE TO COMPEL
OCCUPANTS TO
VACATE AND
SURRENDER POSSE-
SSION OF REAL
PROPERTY
COMMONLY KNOWN
AS 2176 PACIFIC
AVENUE #C, COSTA
MESA, CA92627-4891

WHEREAS, on December 29, 2014, the Court entered an Order granting the motion for entry of order authorizing issuance of writ of assistance filed by Richard A. Marshack, in his capacity as Plaintiff and Chapter 7 Trustee ("Order"). A true and correct copy of the Order is attached as Exhibit "1."

WHEREAS the Order directs Yan Sui, Pei-yu Yang, and all other occupants to immediately vacate

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and turn over to Plaintiff possession of the real property commonly known as 2176 Pacific Ave., #C, Costa Mesa, CA929627-4891 ("Property") and legally described as follows:

"All that certain land situated in the State of California, County of Orange, City of Costa Mesa, described as follows:

Parcel A: Lot 3 of Tract No. 14470, in the City of Costa Mesa, County of Orange, State of California, as shown on a Map Recorded in Book 693, Pages 34 and 35 of Miscellaneous Maps, Records of Orange County, California.

Reserving therefrom non-exclusive easements for ingress, egress, encroachments, maintenance, repair, drainage, support, use and enjoyment, all as described in the declaration of covenants, conditions and restrictions Recorded January 5, 1996 as Instrument No. 19960008704 of Official Records of Orange County, California.

Parcel B: Appurtenant non-exclusive easement for ingress, egress, pedestrian walkways, general recreation purposes, use and enjoyment of the association common area property described as Parcel 3, as shown on Exhibit "B" to Lot Line Adjustment No. LL 95-02 Recorded May 16, 1995 as Instrument No. 95-0210116 of Official Records of Orange County, California, as said Easements are set forth in the Declaration of Covenants, Conditions, and Restrictions Recorded January 5, 1996 as Instrument No. 19960008704 of said Official Records." WHEREAS AS the Order authorizes the Clerk of the Court to issue this Writ of Assistance.

THEREFORE, pursuant to Rule 70(d) of the

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Federal Rules of Bankruptcy Procedure applicable to this proceeding pursuant to Rule 7070 of the Federal Rules of Bankruptcy Procedure, the United States Marshal is authorized and directed to take any and all necessary actions, including but not limited to, the use of reasonable force, to enter and remain on the Property for the purpose of enforcing the Order. The United States Marshal is further authorized and directed to evict and/or arrest any and all persons who, in any way, obstruct, attempt to obstruct, interfere, or attempt to interfere, with the enforcement of the Order. ///

Once all occupants of the Property have voluntarily vacated or have been forcibly removed, and the Property has been secured, the United States Marshal shall turnover possession of the Property to Plaintiff's court-approved agent and real estate broker, Clarence Yoshikane.

DATED: 1.2.2015 (SEAL) of Kathleen J. Campbell

KATHLEEN J. CAMPBELL
Clerk of the Court
By: Jewel Roque

JEWEL ROQUE, Deputy

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Chapter 7 Trustee, RICHARD A. MARSHACK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIV.**

Filed & Entered

July 28, 2015

In re:
YAN SUI

Debtor

RICHARD A. MARSHACK,
Chapter 7 Trustee

Plaintiff,

vs.

PEI-YU YANG

Defendant,

Case No. 8:11-bk-
20448-CB

Chapter 7

Ad. No. 8:13-ap-

01246-CB

ORDER DENYING
YAN SUI'S MOTION
FOR ISSUANCE OF
AN ORDER TO SHOW
CAUSE WHY CHAP-
TER 7 TRUSTEE; HIS
ATTORNEYS; WELLS
FARGO BANK; 2176
HOA; SCOTTSDALE
INS. CO., MCKENNA;
CLARENCE YOSHI-

KANE; TOYAMA; JOHN CHACE; ERIC F. KING

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**SHOULD NOT BE HELD IN CONTEMPT OF
DISCHARGE INJUNCTION; COMBINED WITH A
HEARING TO DECIDE DAMAGES**

Date: July 7, 2015; Time: 2:30 p.m. Ctrm: 5D

**A motion was held on July 7, 2015 at 2:30 p.m.,
before the Honorable Catherine E. Bauer, United
States Bankruptcy Court Judge for the Central
District of California, in Courtroom 5D located at 411
W. Fourth St., Santa Ana, CA, on debtor Yan Sui's
Notice of Motion and Motion for an Order to Show
Cause why Chapter 7 Trustee; his Attorneys; Wells
Fargo Bank; 2176 Pacific HOA; Scottsdale Ins. Co.,
McKenna; Yoshikane; Toyama; John Chace; Eric F.
King Should not be Held in contempt of Discharge
Injunction; Combined with a Hearing to Decide the
Damages filed on May 26, 2016 as Docket #148
("Motion"). Chapter 7 Trustee, Richard A. Marshack
("Trustee"), appeared by and through his attorneys of
record, D. Edward Hays of Marshack Hays LLP. Non-
party McKenna Long & Aldridge LLP, Special
Litigation Counsel for Chapter 7 Trustee Richard A.
Marshack, et al., specially appeared by and through
its counsel of record, Jess R. Bressi of Dentons US
LLP (formerly known as McKenna Long & Aldridge
LLP), Chapter 7 Creditor Scottsdale Ins. Co.,
specially appeared by and through their attorneys of
record, Meka Moore of Selman Breitment LLP, 2176
Pacific Homeowners Association, appeared by and
through their attorneys of record, Allyson Ascher of**

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Bonne, Bridges, Mueller, O'Keefe & Nichols. Debtor Yan Sui appeared on his own behalf.

The Court having read and considered the Motion; McKenna Long & Aldridge LLP's *Special Appearance* and Opposition and Request for Judicial Notice filed on June 23, 2015, as Docket Nos. 152 and 153; Scottsdale Ins. Co.'s Opposition filed on June 23, 2015, as Docket Nos. 156; Trustee's Opposition filed on June 23, 2015, as Docket No. 157; 2176 Pacific HOA's Opposition filed on June 24, 2015, as 159; Debtor's Reply to Opposition of Trustee filed on June 29, 2015 as Docket No. 160, Debtor's Reply to McKenna Long & Aldridge LLP's *Special Appearance* and Opposition filed on June 30, 2015, as Docket No. 161; Debtor's Reply to Opposition of Scottsdale Ins. Co., filed June 30, 2015, as Docket No. 162, McKenna Long & Aldridge LLP's Supplemental Request for Judicial Notice filed on July 6, 2015, as Docket No. 163; the oral argument of movant and counsel during the hearing, and with good cause shown,
IT IS ORDERED;

1.) The Motion is **DENIED ###**

Date: July 28, 2015 / s / Catherine E. Bauer

CATHERINE BAUER
United States Bankruptcy
Judge

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SANTA ANA DIV.

In re:
YAN SUI

Debtor

RICHARD A. MARSHACK,
Chapter 7 Trustee

Plaintiff,

vs.

YANG

Defendant,

Case No. 8:11-bk-
20448-CB

Chapter 7

Ad. No. 8:13-ap-
01246-CB

MOTION FOR AN
ORDER TO SHOW
CAUSE WHY CHAP-
TER 7 TRUSTEE; HIS
ATTORNEYS; WELLS
FARGO BANK AND
2176 PACIFIC HOA;
SCOTTSDALE INS.
CO.; MCKENNA;
YOSHIKANE;
TOYAMA; JOHN

CHACE; ERIC F. KING SHOULD NOT BE HELD
IN CONTEMPT OF DISCHARGE INJUNCTION;
COMBINED WITH A HEARING TO DECIDE THE
DAMAGES

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE CATHERINE BAUER
UNITED STATES BANKRUPTCY JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service

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APPEARANCES:

For the Debtor:

YAN SUI, IN PRO PER

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For the Trustee:

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For the Homeowners Association:

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Bonne, Bridges, Mueller, O'Keefe & Nichols

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For Scottsdale Ins. Co.:

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Court Recorder: James Le
United States Bankruptcy Court
411 West Fourth Street
Suite 2030
Santa Ana, California 92701
Transcriber: Briggs Reporting Company, Inc.
4455 Morena Boulevard, Suite 104
San Diego, California 92117
(310) 410-4151

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SANTA ANA, CALIFORNIA TUESDAY, JULY 7,
2015 2:30 PM

(Call to order of the Court.)

THE COURT: 2:30 calendar, number 22, Yan Sui, Marshack versus Yang.

MR. HAYS: Good afternoon, your Honor. For the Trustee, Ed Hays of Marshack Hays.

THE COURT: Thank you.

MS. ASCHER: Good afternoon, your Honor. Allyson Ascher, specially appearing on behalf of the Homeowners Association.

THE COURT: Thank you.

MR. SUI: Good afternoon, your Honor, Yan Sui. Long time no see. Three years.

THE COURT: Yeah, I thought you weren't coming.

MR. SUI: Yeah, sometimes I come. Sometimes we rely on the sufficiency of our pleadings, so we do not come. We are busy at home. Sorry.

THE COURT: Oh, okay. All right. Well, I'm glad you're here.

MR. SUI: Good seeing you, your Honor.

THE COURT: Thank you.

MS. MOORE: Good afternoon, your Honor. Meka Moore, specially appearing on behalf of Scottsdale Insurance Company.

THE COURT: Thank you.

MR. BRESSI (Telephonic): Good afternoon, your Honor. Jess Bressi of Dentons U.S., LLP, successor by merger of McKenna Long, specially appearing on

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behalf of McKenna Long.

THE COURT: Thank you. And I guess that's it. Well, Mr. Sui, did you want to say anything?

MR. SUI: Yes, your Honor. First of all, I noticed that Wells Fargo did not -- Wells Fargo did not oppose the motion. So as to Wells Fargo, Sui would request that the order, the Court enter a finding in favor of Sui and against Wells Fargo.

And certainly this matter, I filed the show cause, why these parties are not in contempt of the discharge injunction. And we need to divide these two things. We cannot lump them -- we should not lump them together. Two things. One is the pre-petition claim, the other is the post-petition claims.

In terms of the pre-petition claims, your Honor, as you know, Debtor was discharged on March 29th, 2013, and the Scottsdale Insurance Company and Homeowners Association, they filed their pre-petition claims against me on the register, and over which I have objected already. And since those are the pre-petition claims, and with the discharge, they should be gone, liquidated. So they should not be brought up again.

However, Trustee Marshack, they keep demanding the payment of those two objected pre-petition claims. And if we do not pay, he evict us. And as a matter of fact, he did evict us at all. So that's the undisputed fact, that he violated the discharge injunctions. Because with discharge, those pre-petition claims should be gone, liquidated.

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Dissolved. Nothing.

THE COURT: Well, I think we talked about this before. The discharge means that, as to pre-petition debts that can be discharged, they can't sue you personally. Okay, so I just wanted to clarify that.

MR. SUI: I know. What I'm talking about, I'm not talking about the creditors that sued me. It was the Trustee, he picked up those pre-petition discharge debts, picked up again, and demanding payment. If we do not pay, we were kicked out of the house. And we refused to pay, so he kicked us out of the house. So we are talking about his position based on the pre-petition debts of Homeowners Association and the Scottsdale Insurance Company. So those are two specific things. Those facts are on the record. No change. And nobody can dispute against this evidence. They are there.

And I will submit to your Honor's attention, that Marshack's email of December the 4th, 2014, your Honor, actually it was number 7, he's like you need to pay this, otherwise you are out, you are going to lose the house. So in this regard, he did violate the discharge injunction, because the trustee has no position to put himself in the shoes of a creditor to collect those discharge debts. He is wrong in doing that, your Honor.

And secondly, and the second part is, the post discharge debts, we understand that your Honor, you granted them some administrative claims for

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coverage law firm, that's 14,650, and that's post petition. But those are not dischargeable, I understand. However, I appealed to BAP. And BAP has tossed out his 14,650 in the memorandum under the number CC-12-1266, yeah, on April 4th, 2014. So both of his 14,650 claims has been tossed out through my appeal.

However, Marshack picked that up again, and he stated in the email of December 4th, 2014 and says you need to pay this, if you don't pay, you lose your house. So, of course I refused to pay, so we lost the house.

So, also, your Honor, you granted Marshack's attorney fees of 297,400 something under the interim application of fees. You granted and I appealed. But the appeal was dismissed because it was unappealable.

And in the same matter, your Honor, you granted defense attorney fees of McKenna, Long and Eldridge for defense attorneys work incurred in the United States District Court for \$51,700. I appealed that charges as well. However, because McKenna labeled that as interim fees, so my appeal was dismissed. So at least these two claims, they were not legally obtainable, because under the bankruptcy law, administrative fees, they must be beneficial and necessary in administering the estate. However, after the discharge, no such is necessary.

And on top of that, the defense attorney fees

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incurred in the United States District Court is a sacred (sic "separate") matter. And as a matter of fact, McKenna's application to the District Court to award him those 51,000 fees has been denied as moot, because he requested under special strike clause. And I suggested to McKenna, I said why don't we stipulate to request the District Court to make a ruling on the merits, if they're going to grant your fees or deny the fees. So he declined to do so. And I said why don't you appeal to the Appellate Court from denial of your attorney fees. Still, he declined to do so. So those two fees are unlawful under the governing bankruptcy law. }

THE COURT: Can I just say one thing?

MR. SUI: Yes, your Honor.

THE COURT: Just because sometimes these terms get confused. Getting a bankruptcy discharged does not mean that things don't still happen in a bankruptcy case. The trustee can have years of work. The debtor can -- and you got your discharge, which is great. That's what we can give, is the ability for you not to be sued personally.

But a bankruptcy trustee can spend years selling assets and recouping assets, and the discharge doesn't end the bankruptcy. Sometimes it's close to the end, but really it's dismissal or the closure of a case that's the end of the case, not the discharge. The discharge is just as to your personal liability. A lot of other things can happen, and do happen all the time }

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in bankruptcy cases after a discharge. I just think the language sometimes gets very confusing.

MR. SUI: I understand and appreciate for your instructions. However, in this particular case, there are no Chapter 7 debts at all. By the date of March the 28th, 2012, I paid off all those Chapter 7 debts without involving the Trustee, without even involving the Court. So I think I have fulfilled the congressional intent, to make the debtor pay when the debtor is able to pay. I paid.

So in that separate appeal from that administrative fees, that kept the Chapter 7 open only for the purpose for Marshack and his professionals to file for their fees. And I would reasonably assume that discharge in 2014, and he should have examined if there are any attainable valid claims pending there against me. If there's no, the trustee should close the estate pursuant to 11 U.S. Code 704, to serve the best interest of all parties.

However, it looks like the trustee did not want to do that. He just wants to keep the case as relatively long as possible. It's not necessary. Because after the orders are paid, what you're administering, to whose benefits are you administering? This is an open question. And Marshack has not answered that. And through all his pleadings, he has asserted the claims and also make unfounded arguments. And some of those arguments, the falseness cannot be verified. For example, he says you did not show any proof

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that any creditor consent to the dismissal. What kind of an argument is that? You should prove to the Court that a creditor opposed a motion to dismiss. That's a proof. But he just made those misleading arguments to keep this Chapter 7 open for no reason. And as a matter of fact, under bankruptcy law, this estate has been a negative estate. And I did not file the motion to deny them to abandon the estate yet. But, actually, it's not doing anybody any good. So the only thing it's causing any -- causing those unnecessary lawsuits and appeals, everything. So, really, it's, Marshack's handling of this case is really, really unlawful. He is not fulfilling the Court. He is not fulfilling any meaningful purpose of the bankruptcy law.

THE COURT: But let me ask you, Mr. Sui.

MR. SUI: Yes.

THE COURT: How many lawsuits or appeals do you have going right now, you and your wife? How many lawsuits?

MR. SUI: I mean, your Honor, she is my ex --

THE COURT: Okay. How many?

MR. SUI: And, your Honor, I don't even remember. Right now pending at the back, we have -- we have a few from this Court's order granting the sale of the house. That's one pending.

THE COURT: Okay.

MR. SUI: And that's only one. And there are supposed to be yeah, one pending at District Court

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from dismissal of the civil rights lawsuits at Ninth Circuit. Also there's one --

THE COURT: Wait. Okay, so one at the back, one at the District Court, one at the Ninth Circuit?

MR. SUI: Yeah, one is Ninth Circuit.

THE COURT: One at Ninth Circuit?

MR. SUI: Yeah.

THE COURT: So that's three, okay.

MR. SUI: And also there's one pending lawsuit at the District Court after we were evicted. So we filed the other case.

THE COURT: So is that Federal District Court or --

MR. SUI: Yeah, Federal District Court.

THE COURT: So is that two at the Federal District?

MR. SUI: That's right, your Honor, yeah.

THE COURT: Okay, okay.

MR. SUI: And one appeal at Ninth Circuit.

THE COURT: Right.

MR. SUI: And also, in relationship to Marshack's dismissal solely from the State Court, and there are one petition at the U.S. Supreme Court. But it has not been decided or granted or denied yet, and regarding some fees. But it's irrelevant to this case.

THE COURT: Okay. And how many State Court actions/appeals are there?

MR. SUI: No, State Court is not related to Marshack, actually. Yeah, no State Court actions

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against Marshack.

THE COURT: But related to creditors?

MR. SUI: Oh, yes. Oh, no. Actually, your Honor, I would like to say I have no creditors. Because only -- only the so-called creditor is the Homeowners Association. We still have lawsuits against the Homeowners Association in the State Court. There are three cases pending there.

THE COURT: Okay, three cases in the State Court.

MR. SUI: Yeah, your Honor, actually, what I believe is keeping this Chapter 7 open is really doing nobody no good at all. So it should be closed as soon as possible to satisfy the congressional intent, because --

THE COURT: But --

MR. SUI: Yes.

THE COURT: -- isn't the Trustee defending in some of these actions?

MR. SUI: Yes. Your Honor, yes, including the law firm of McKenna, who just appearing through the phone, they are defending Marshack in this District Court, correct. And the second District Court case has been stayed pending contempt proceedings from the first case.

THE COURT: Okay. But see, one of the problems here, and maybe you don't realize this, the reason the case can't be closed is because the lawsuits against the Trustee, we have to keep -- the case stays

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open while those lawsuits -- the appeals are pending.

MR. SUI: Well, your Honor, I would ask you a question. What's the relationship between the discharged Chapter 7 to this pending District Court? Is the Trustee have some kind of entitlement of attorney fees against the Debtor?

THE COURT: Well, the Trustee has a fiduciary duty and has to -- the Trustee has to defend. The bankruptcy case is going to stay open while they defend these appeals. So by you filing all these appeals over the years and the Trustee having to defend, that keeps the bankruptcy case open.

MR. SUI: Your Honor, I understand that.

THE COURT: Okay.

MR. SUI: We only appealed on the firm belief that we have a good reason to appeal.

THE COURT: Okay.

MR. SUI: Otherwise, our appeal has been frivolous.

THE COURT: Well, the Trustee has a duty to defend, and that keeps the bankruptcy case open.

MR. SUI: I see.

THE COURT: And without the appeals, it may be that the case would close, I don't know. But with appeals pending, we can't close the case.

MR. SUI: Your Honor, I see. But my contention is, all that's been at stake is my surplus estate, because it was surplus. So it should be returned back to, released back to estate. It's not the bankrupt

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estate at all. Because all those Chapter 7 Creditors, they were paid. They left. Where do you come up with all those Chapter 7 Creditors? They were simply paid and they were gone. No more. So can Trustee and his professionals term themselves as Chapter 7 Creditors? Does any bankruptcy law says that? Probably no, right? They can only recover based -- they can only request for fees based on the recovery in Chapter 7.

THE COURT: Well, I got to tell you, unfortunately, our Chapter 7 Trustees a lot of times are working for free because they have a duty to defend, they have a duty to do things. And if in the end there isn't money to pay their fees, they don't get paid. It happens, unfortunately, all the to the trustees, but they have a duty to do certain things. And regardless of whether they're going to get paid, they have to do those things. They are appointed by the Court to do those things. Actually, by the U.S. Trustees. Well, no, they're appointed by the Court. But, unfortunately, there's a lot of times they're working for free because they have a duty to do certain things. So, I want to clarify a few issues, because I think there's some confusion. I do want to let the other folks speak too, Mr. Sui.

MR. SUI: Okay.

THE COURT: Thank you.

MR. HAYS: Your Honor, Ed Hays for the Trustee. There is, I think, a bit of a housekeeping question I'd

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like to ask the Court, whether this is a hearing on whether or not to issue the order to show cause re contempt, because the Debtor initiated this proceeding by filing a motion, and the Court set this hearing today, but never actually entered an OSC re contempt.

THE COURT: Well, it's a motion for the OSC.

MR. HAYS: Correct. So if this --

THE COURT: And I've not issued the OSC.

MR. HAYS: Correct. So, to the extent this is on whether or not -- today's hearing is whether or not to issue the OSC.

THE COURT: To issue an OSC.

MR. HAYS: And that would be my position, so thank you for that clarification.

THE COURT: Yeah. Oh, yeah.

MR. HAYS: The other point is -- I've got several I guess -- the first would be, the Debtor has no standing. This motion was filed in an adversary to which he is not a party. This adversary was the Trustee's action against the Debtor's spouse, or the co-owner of the property for an order to sell the property free and clear, including the co owner's interest in the property. So Mr. Sui is not a party. The motion that was filed that initiated today's hearing was not signed by Ms. Yang, and therefore the Debtor is a stranger to these proceedings. I think a lot of this comes about, and the reason the Debtor filed this motion, and, you know, we've

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actually had some email exchanges on this, I think he's fundamentally confused about the process. The Debtor files bankruptcy. The Debtor sees he gets a discharge. The Debtor thinks, oh, I don't have to pay those claims anymore. But that doesn't mean that the Trustee doesn't have a duty to administer assets of the estate and property of the estate to go pay those pre-petition claims.

The discharge, as we all know, because we're lawyers and we're familiar with the bankruptcy system, protects the debtor from any unpaid balance of credit or claims after bankruptcy. It doesn't mean he gets to keep property of the estate and not pay the creditor claims. }

Section 726 of the Bankruptcy Code lists out a, you know, list of who gets paid from property of the estate. The number one priority are administrative creditors, and then the general unsecured creditors, and then interest, and then a surplus back to the debtor.

So in this case, the Debtor did pay some claims post petition, but there remain claims against the estate, and there remain significant administrative claims against this estate.

As the Court has already noted, the Debtor has taken dozens of appeals. The Debtor has sued both your Honor twice in the Federal District Court, has sued the Trustee twice in the Federal District Court, has acted in contempt of court both in the Federal }

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District Court, which was actually entered by Judge Kronstadt last week that he was in contempt by filing the second lawsuit against both your Honor and the Trustee and everybody else.

The bottom line is, the Debtor continues to pursue things. And I think at a certain level, it's based upon the confusion that once his discharge was entered, he gets all of his property back. And that's just not the way the system works. And because of all of the frivolous appeals and all of the frivolous lawsuits, the Trustee's administrative expenses are significant. And the Trustee has to defend against lawsuits that have no merit. And the same issues get raised over and over and over again after he's already had these issues resolved against him.

So at the end of the day, what the discharge does for you, according to Section 524, is it protects you in personam, you know, you as an individual. It doesn't protect the property which is an asset of the bankruptcy estate. And it doesn't mean assets of the bankruptcy estate are no longer assets of the bankruptcy estate.

So based on this record, there's no evidence before your Honor. And to issue contempt proceedings, there should be clear and convincing evidence. There's no evidence whatsoever that the Trustee or any of the respondents on this motion have done anything that was in violation of the Debtor's discharge.

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Everything that is being done by the Trustee is to void and recover the Debtor's fraudulent transfer of the property to Ms. Yang, get a sale of that property, both the 363 complaints, and then the subsequent sale to the purchaser, and it's to administer property of the estate, and it's the Trustee doing his job in this case.

And the sad, and I think tragic part about all of this, is Mr. Sui's continual appeals and lawsuits and everything else have driven the amount of the Trustee's administrative costs up to the point at which the Debtor probably has prevented himself from receiving a surplus of assets out of this case. So, one way or another, we are where we are, and there is no evidence in front of the Court by any party withstanding that there has been any contempt of the Debtor's discharge by the Trustee or any of the respondents. And we would ask that the Court enter an order denying the motion for issuance of an OSC. And hopefully there will be no appeal of that, and the Trustee can finish with the administration of this estate.

THE COURT: Thank you. Anybody else want to add anything?

MS. MOORE: Your Honor, Meka Moore.

THE COURT: Yeah, we have to record. State your name please.

MS. MOORE: Meka Moore, specially appearing for Scottsdale. We don't have anything to add to the

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comments of Mr. Hays. We join in those comments and ask that the Court deny the request for the order setting the OSC.

THE COURT: All right.

MS. MOORE: I would also add that Scottsdale has not been properly served with this motion. I understand that the Debtor is pro se, but there are procedural rules that need to be followed. And I just wanted to point that out.

THE COURT: Thank you. Ms. Ascher? Hold on Mr. Bressi, one second.

MS. ASCHER: Your Honor, Allyson Ascher on behalf of the Homeowners Association. As Mr. Hays has made exceedingly clear, there's no evidence that the Homeowners Association has done anything in violation of this Court's order, or of the discharge injunction. And we would join in the Trustee's arguments and ask that the Court deny Plaintiff's motion.

THE COURT: All right, thank you. Mr. Bressi?

MR. BRESSI: Yes, your Honor, thank you. Just for clarification of the record, specially appearing for McKenna Long. The two District Court cases that Mr. Sui referred to, the first one, SACV-13-01607, that case has gone to judgment as to all parties and is on appeal. The second case, SACV-15-00059, that case was dismissed by the District Court last Thursday, with prejudice. There is no appeal pending at this

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point, but, you know, we can surmise what will happen there.

The District Court electronically served its documents on Thursday. And yesterday, I did file a supplemental request for judicial notice so the District Court orders will be part of this record, because the Court goes to some length explaining why Mr. Sui and Ms. Yang are in contempt, and were ordered to purge the contempt by dismissing the recent case, CV-15-00059, which has now been done. But, you know, I think what Mr. Hays point, I think there's another way to describe it. The fees incurred are largely self-inflicted wounds. If Mr. Sui and Ms. Yang were not filing these contemptuous and frivolous actions as adjudicated by the District Court, the fees would not have been incurred. Not one dollar of my fees would have been incurred if the actions had not been filed. And it is difficult, and at some point, even a pro per has to adhere to the rules of law and procedure.

And, you know, we can be very civil and very nice, but suing opposing, suing the judge in your case, suing the U.S. Marshals, suing the Office of the United States Trustee, all of which have been now dismissed with prejudice, is not a way to preserve the surplus in your estate. And, you know, it is what it is. We hope that we're done with new lawsuits from Ms. Yang and Mr. Sui. But I think that anyone who

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is reading the record of these proceedings and the transcript from today's hearing, you know, needs to also focus on the effect on the non-Debtor. As a result of the actions of Mr. Sui and Ms. Yang, the other half of the estate is also -- or the other half that's not part of the estate, is also being invaded. The District Court has approved legal fees with the amount to be set for the contemptuous actions of the Debtor and Ms. Yang.

Your Honor is in the process doing much the same thing. If one take-away from today's hearing might be that, you know, really it is long past time for Mr. Sui to get competent legal counsel to help him before he does anything else that will make the likelihood of even his wife, or whatever role she serves in his life, Ms. Yang, to receive any money.

So our request to Mr. Sui, since he's on the phone, is please get good counsel before you do anything else that could result in contempt or further legal fees incurred by Mr. Marshack on behalf of the bankruptcy estate as Trustee.

And, your Honor, we also note that we are not a party to this adversary. We were not named. We see there's no jurisdictional basis, even if there was an issue about contempt. We're a purely post-petition creditor who discharge injunction does not apply to. And these sentimental concepts of bankruptcy law is just lost on this Debtor.

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And we appreciate the very patient and long suffering way Your Honor has tried to explain these things to Mr. Sui, but we're at the point where enough is enough. And if, you know, further lawsuits are filed in violation of the Barton doctrine, I fully expect that the Court and the District Court will be coming down even harder.

And we would ask Mr. Sui to carefully and very deliberately research anything he does with competent counsel who knows bankruptcy law. And that I think would have avoided a lot of what has happened in this case, and will prevent future unhappiness from re-occurring. Thank you, your Honor.

THE COURT: Mr. Sui, did you want to add anything?

MR. SUI: Yes, your Honor. First of all, there were no creditors after the discharge in the estate. Your Honor, if you look --

THE COURT: Mr. Sui?

MR. SUI: Yes.

THE COURT: You have administrative expenses.

MR. SUI: I know.

THE COURT: So, and the thing is, is everybody's been trying to say, all these lawsuits that you've filed make the expenses higher and higher. And the Trustee needs to defend when you appeal everything. So while you may think that there aren't creditors, there are. There's administrative creditors, at the very least. And those keep getting -- the money, the

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amount keeps getting greater and greater with each appeal.

You've said the same thing for years, "There are no creditors." There are creditors. And you have a fundamental misunderstanding of the discharge injunction and of how the Trustee -- what the Trustee's purpose is and of the administrative claimants.

I appreciate Mr. Bressi saying you need to talk to competent bankruptcy counsel. I don't know that you're ever going to understand what we've been saying over and over again. And at some point, all these appeals that you're taking up to the District Court and the BAP and the Ninth Circuit, and even the Supreme Court, may result in absolutely no money, probably no money at this point, because now your ex-wife or your wife's share of whatever came out of the house, is being eaten into, or is completely eaten up. I don't know what the status is of those monies right now, but things are just getting worse and worse.

I am going to deny your motion. You're not a party to this action. This action was brought by the Trustee against your ex-wife or your wife, I don't know what she is at this point. So you have no standing here.

I really caution you to think long and hard about Mr. Bressi's suggestion you talk to good bankruptcy counsel, because obviously you're a very bright man.

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You are getting some of this, but you are not getting that the more you appeal, the worse you're making it for yourself.

MR. SUI: May I bring my argument further?

THE COURT: Mr. Sui?

MR. SUI: Yes.

THE COURT: I've heard the same thing --

MR. SUI: Yes.

THE COURT: -- over and over at other hearings.

MR. SUI: I'm not -- I'm not repeating the same thing.

THE COURT: Okay. All right, I'll give you a couple of minutes.

MR. SUI: Your Honor, if you look at Marshack's application to sell the house, what he based on is not any creditor, right? He used the Wells Fargo's proof of claim of \$94,874. I believe that Wells Fargo itself has admitted that its proof of claim is null and void for Chapter 7 purpose.

And secondly, Marshack based on -- based his motion on the judgment lien, which has been released through our successful appeal to the Ninth Circuit. So the defense counsel for HOA has notified Marshack that his lien of 2,975 has been released. Nothing there.

So if you look at the motion, Marshack is only trying to sell my, Yan Sui's estate. He is not selling Peiyu Yang's estate. Because he himself admitted

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that he believed half of it is to Yang. So Marshack's argument that Sui has no standing is incorrect. It's erroneous. Because, as a matter of fact, in the case of *In Re Fitzgerald*, a debtor's pecuniary interest is at stake, is at danger, that gives the debtor that standing. That was the standing I'm having right now, because what Marshack is selling is estate of me, not of Yang. So we need to have that straight on the record.

THE COURT: Okay. Well, I am going to deny your motion. You don't have standing in this case. This was a lawsuit by the Trustee, I guess against Ms. Yang, and you brought this motion for an OSC. I'm going to deny it.

And, you know, as I've said, your appeals just make this more and more of a financial disaster for you. You're entitled to appeal, but I think at some point most of the courts are going to say no more appeals. We're pretty liberal with the appeals, but all the judges now know about your appeals and how many you've already taken.

So I'm going to deny the motion. Mr. Hays, would you upload an order on that?

MR. HAYS: I will do so, your Honor.

THE COURT: All right. And, Mr. Sui, I really think Mr. Bressi's idea that you find good bankruptcy counsel to talk to --

MR. SUI: Okay.

THE COURT: -- would be the best thing you can

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do.

MR. SUI: Your Honor, I can let you know that our appeal is never frivolous because we have won (sic) three appeals. And we have won -- we have won two appeals at the Ninth Circuits.

THE COURT: Okay. But last week --

MR. SUI: So the four appeals we have won, your Honor.

THE COURT: Okay. I see a published -- no, it's not published -- an opinion of the State Court, I think this came down last week, "Sui's motion was frivolous. His appeal is equally frivolous." Now that was in State Court.

MR. SUI: That's in State Court, correct.

THE COURT: But I think the same thing can be said of your appeals in Federal Court. So if you want to get a written decision from District Court, which I haven't had a chance to look at Judge Kronstadt's opinion yet, I mean, you already have been held in contempt, you need to talk to good counsel. You really do.

MR. SUI: Your Honor?

THE COURT: Before you get in more trouble. Mr. Sui, I have a courtroom full of people here.

MR. SUI: Okay.

THE COURT: I've heard your arguments over and over. What I'm doing right now is ruling on the motion, and that is to deny. All right?

MR. SUI: Thank you, your Honor.

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THE COURT: Thank you. Thank you all.

MR. HAYS: Thank you, your Honor.

THE COURT: Thank you, Mr. Bressi.

(Proceedings concluded.)

I certify that the foregoing is a correct transcript
from the electronic sound recording of the
proceedings in the above-entitled matter.

/s/ Holly Martens _____ 9-10-15 _____

Transcriber Date

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE

PANEL OF THE NINTH CIRCUIT

In re:	BAP No. CC-15-1262
YAN SUI	BK No. 8:11-bk-20448
Debtor	Adv. No. 8:13-ap-01246
	FILED
YAN SUI	April 11, 2016
Appellant *	
vs.	MEMORANDUM **
RICHARD A. MARSHACK	
Chapter 7 Trustee	
Appellees et al	

* Pei-Yu Yang also signed the opening appellate brief. Although she is the named plaintiff in the underlying adversary proceeding, the order on appeal was not entered against Yang; thus, she is not a party to this appeal.

** This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1 (c) (2).

*** Only three appellees filed briefs on appeal:
Richard A. Marshack, Chapter 7 Trustee; 2176

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Pacific Homeowners Association; and Scottsdale Insurance Company. The remaining appellees waived their rights to appear in this case pursuant to the conditional waiver order entered by the BAP Clerk of Court.

Argued and Submitted on March 17, 2016
at Pasadena, California
Filed – April 11, 2016

Appeal from the United States Bankruptcy Court
for the Central District of California
Honorable Catherine E. Bauer,
Bankruptcy Judge, Presiding

Appearances:

Appellant Yan Sui argued pro se;
Chad V. Haes of Marshack Hayes LLP argued for
appellee Richard A. Marshack, Chapter 7 Trustee;
Allyson Suzanne Ascher of Bonne Bridges Mueller
O'Keefe & Nichols argued for appellee 2176 Pacific
Homeowners Association;
Meka Moore of Selman Breitman LLP argued for
appellee Scottsdale Insurance Company.
Before: TAYLOR, KURTZ, and DUNN, Bankruptcy
Judges.

INTRODUCTION

Chapter 7 ¹ debtor Yan Sui, pro se, appeals from a
bankruptcy court order denying his motion request-
ing an order to show cause why the chapter 7 trustee,
trustee's counsel, 2176 Pacific Homeowners

¹ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§
101-1532.

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Association, and Scottsdale Insurance Company, among others, should not be held in civil contempt under § 105(a) for violating his § 524(a) discharge injunction. The bankruptcy court denied the Debtor's motion based on a determination that the Debtor lacked standing.

We disagree with the bankruptcy court's determination regarding standing. Nonetheless, on other grounds apparent from the record, we AFFIRM.

FACTS

Shortly after the Debtor filed a chapter 7 petition, his trustee, Richard A. Marshack, learned of the Debtor's prepetition transfer of his interest in real property located in Costa Mesa, California (the "Property") to Pei-Yu Yang. Although the record is not clear, it appears that Yang is the Debtor's wife, ex-wife, or longtime domestic partner.

The Trustee commenced an adversary proceeding against Yang (the "Avoidance Proceeding") and successfully avoided the transfer as a fraudulent conveyance. The Avoidance Proceeding order, in addition to avoiding the transfer, characterized the Debtor's interest in the Property as property of the estate; provided that the estate and Yang held title to the Property as joint tenants; and authorized the Trustee to recover and administer the estate's interest in the Property for the benefit of creditors.² In the meantime, the Debtor received a chapter 7 discharge.

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The Trustee then commenced a second adversary proceeding against Yang, and sought to compel turnover of the Property, sell it pursuant to § 363, and surcharge Yang's interest in the Property (the "Turnover Proceeding"). The Trustee also prevailed in the Turnover Proceeding. A resulting order, among other things, required immediate turnover of the Property and authorized the Trustee to sell the Property, including any interest held by Yang free and clear of all interests.³

In order to effectuate the Turnover Order, the Trustee moved for a "writ of assistance," seeking authorization to evict all occupants from the Property. The bankruptcy court granted the motion, resulting in the Debtor's (and Yang's) eviction from the Property. The Trustee also successfully obtained an order approving a sale of the Property under § 363(b) and (m).⁴

The Debtor responded with a motion for an order

² Yang appealed this order to the Ninth Circuit, which affirmed. As a result, the determination that the Debtor fraudulently transferred his interest in the Property is now final.

³ Yang appealed the order to this Panel, which dismissed the appeal as moot. See BAP No. 14-1498. Yang then appealed the dismissal order to the Ninth Circuit, where it remains pending. See 9th Cir. No. 15-60066.

⁴ The Debtor appealed from the sale order. See BAP No. 15-1200. The Panel dismissed that appeal as moot. An appeal of the dismissal order is currently pending before the Ninth Circuit. See 9th Cir. No. 15-60065.

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to show cause why the Trustee, his attorneys, and a number of other parties should not be held in civil contempt for violating the discharge injunction ("OSC Motion"). In the OSC Motion, the Debtor argued that the Trustee violated his discharge injunction through his actions with regard to the Avoidance Proceeding, the Turnover Proceeding, the eviction of the Debtor and Yang, and the sale of the Property. He also argued that the other parties violated his discharge injunction through their participation in the sale, through representation of the Trustee, or by failing to withdraw proofs of claim filed in the Debtor's bankruptcy case. In short, he argued exclusively that activity to collect, liquidate, and administer his bankruptcy estate and to evidence claims against his bankruptcy estate violated the discharge in his bankruptcy case.

At a hearing, the bankruptcy court denied the OSC Motion. It explained that the Debtor was not a party to the Turnover Proceeding and, thus, that he lacked standing to bring the OSC Motion. The bankruptcy court also patiently explained that a bankruptcy trustee can sometimes have "years of work" after entry of a debtor's discharge in a bankruptcy case and that the discharge related only to the Debtor's personal liability for debts.

Following the bankruptcy court's entry of the order denying his motion, the Debtor timely appealed.

JURISDICTION

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

ISSUES

Whether the Debtor had standing to file the OSC Motion; if so, whether the bankruptcy court abused its discretion in denying the motion.

STANDARDS OF REVIEW

Standing is an issue that we review *do novo*. *Paine v. Dickey* (In re *Paine*), 250 B.R. 99, 104 (9th Cir. BAP 2000). We review the bankruptcy court's decision to deny the OSC Motion for an abuse of discretion. *Hilao v. Estate of Marcos*, 103 F.3d 762, 764 (9th Cir. 1996). A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in inferences that may be drawn from the facts in the record. See *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 832 (9th Cir. 2011) (citing *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

We may affirm on any basis supported by the record. See *Johnson v. Neilson* (In re *Slatkin*), 525 F.3d 805, 810 (9th Cir. 2008).

DISCUSSION⁵

The bankruptcy court denied the OSC Motion based on a determination that the Debtor was not a party to the Turnover Proceeding and the conclusion

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that the Debtor, thus, lacked standing to bring the OSC Motion. We disagree with this conclusion. A debtor invariably has standing to assert claims based on an alleged violation of his discharge injunction.

Thus, the bankruptcy court erred. On this record, however, the error was harmless; the Debtor's allegations of discharge violative conduct are without merit.

A debtor's discharge injunction does not preclude his trustee from initiating recovery actions or from seeking to sell or obtain possession of estate assets. Once a debtor's trustee prevails in a recovery action or obtains the right to possession or sale of estate assets, a debtor's discharge does not bar the trustee from implementing the resulting orders. Similarly, a debtor's discharge does not bar his pre-petition creditors from filing and maintaining claims against

⁵ In his opening brief and reply brief on appeal, the Debtor apparently requests that we take judicial notice of the excerpts of record filed in several other appeals to this Panel (BAP Nos. CC-14-1022, CC-14-1498, CC-14-1439, and CC-15-1200), as part of the record in this appeal. We deny the Debtor's requests. In reviewing the bankruptcy court's decision here, we consider only those documents presented to it in connection with the order on appeal. See *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988). We do, however, exercise our discretion to take judicial notice of the existence of certain related appeals and documents electronically filed in the adversary proceeding, the underlying bankruptcy case, and the related appeals, to the extent pertinent. See *Atwood v. Chase Manhattan Mortg. Co.* (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

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estate assets in the case from which the discharge issues. Ultimately, the Debtor's allegations of discharge violations are meritless because the Trustee and other appellees acted consistent with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or bankruptcy court orders.

In seeking to avoid the Debtor's fraudulent transfer to Yang, to recover physical possession of the Property, and to sell the Property for the benefit of creditors, the Trustee carried out his duties as the administrator of the bankruptcy estate under § 704(a)(1). Indeed, in the absence of a sale, only the Trustee could pursue fraudulent transfer claims under the Bankruptcy Code. See, e.g., *Stoll v. Quintanar* (In re *Stoll*), 252 B.R. 492, 495 (9th Cir. BAP 2000).

Further, in connection with the eviction and sale, the Trustee acted as authorized by bankruptcy court order. These actions consistent with the obligation to "collect and reduce to money the property of the estate" did not violate the Debtor's discharge injunction - there was no collection, recovery, or offset of a debt as a personal liability against the Debtor. This reasoning applies with equal force to the Trustee's agents and to those who purchased the Property as allowed by bankruptcy court order. At oral argument, appellees 2176 Pacific Homeowners Association and Scottsdale Insurance Company made clear that neither took any collection

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action independent of the filing of a proof of claim as allowed by § 501(a). As the Debtor received a discharge only in the underlying bankruptcy case, his creditors did not violate the discharge injunction when they filed timely proofs of claim and refrained from withdrawing them after discharge issued.

In sum, none of the appellees' actions violated the § 524(a) injunction.

CONCLUSION

Based on the foregoing, we AFFIRM the bankruptcy court's denial of the OSC Motion.

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Department of Justice
Office of Public Affairs
FOR IMMEDIATE RELEASE

Thursday, November 5, 2015

U.S. TRUSTEE PROGRAM REACHES \$81.6
MILLION SETTLEMENT WITH WELLS FARGO
BANK N.A. TO PROTECT HOMEOWNERS IN
BANKRUPTCY

***Settlement Addresses the Bank's Errors
Affecting Nearly 68,000 Accounts of Homeowners
in Bankruptcy***

The Department of Justice's U.S. Trustee Program has entered into a national settlement agreement with Wells Fargo Bank N.A. (Wells Fargo) requiring Wells Fargo to pay \$81.6 million in remediation for its repeated failure to provide homeowners with legally required notices, thereby denying homeowners the opportunity to challenge the accuracy of mortgage payment increases. These failures violated federal bankruptcy rules that took effect in December 2011 and imposed more detailed disclosure requirements to ensure proper accounting of fees and charges on homeowners in bankruptcy. Bankruptcy Rule 3002.1 requires mortgage creditors to file and serve a notice 21 days before adjusting a Chapter 13 debtor's monthly mortgage payment.

Wells Fargo acknowledges that it failed to timely file more than 100,000 payment change notices (PCNs) and failed to timely perform more than 18,000 escrow analyses in cases involving nearly 68,000 accounts of homeowners

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in bankruptcy between Dec. 1, 2011, and March 31, 2015. Under the settlement, Wells Fargo also will change internal operations and submit to oversight by an independent compliance reviewer. The proposed settlement has been filed in the U.S. Bankruptcy Court for the District of Maryland, where it is subject to court approval.

"I am pleased that Wells Fargo has acted responsibly by accepting accountability for its deficient bankruptcy practices, agreed to compensate affected homeowners for those deficiencies and committed to making necessary improvements in its bankruptcy operations," said Director Cliff White of the U.S. Trustee Program. "When creditors fail to comply with the bankruptcy laws and rules, they compromise the integrity of the bankruptcy system and must be held accountable. Transparency in the process is of paramount importance. Homeowners in bankruptcy have the right to proper and timely notices, particularly when they are being asked to pay more. The U.S. Trustee Program remains diligent in its effort to hold financial institutions that disregard the law accountable for their actions."

Settlement Terms

Wells Fargo agrees to pay a total of \$81.6 million to homeowners who were in bankruptcy between Dec. 1, 2011, and March 31, 2015, and who were affected by Wells Fargo's failure to timely file PCNs and escrow statements, including:

- \$53.6 million will be paid to more than 42,000 homeowners whose payments increased as to which Wells

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- Fargo failed to timely file a PCN with the court. The payment will be in the form of a credit to the homeowner's mortgage account in a lump sum amount, which averages \$1,254 per homeowner and varies depending on the homeowner's mortgage balance. More than 70 percent of the total payments will go to homeowners who have mortgage balances under \$300,000. These payments will be made regardless of whether homeowners actually paid the increased amount.
- An estimated \$10 million will be paid by crediting homeowners' accounts at the end of their bankruptcy cases if, upon a detailed review of the accounts, it is determined the homeowners were not fully compensated through the initial crediting process described above. Wells Fargo estimates that 15 to 20 percent of homeowners who receive the initial payments will be due additional amounts at case closing.
- \$1.5 million will be refunded in cash to about 3,000 homeowners where notices of decreases in monthly payments were not timely provided and the homeowners paid more than the actual amount due.
- \$1 million will be refunded in cash to about 2,400 homeowners who satisfied escrow shortages by making a lump sum payment, but whose monthly payments did not decrease to account for the lump sum payment.

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- \$4.5 million will be paid by crediting the mortgage escrow accounts of about 6,000 homeowners who did not receive timely escrow statements. Wells Fargo will credit the amount of any increase in escrow shortage that was incurred between the time Wells Fargo should have performed the analysis and the time it actually did perform the analysis. As a result, homeowners will not be responsible for any increase in the escrow shortage stemming from Wells Fargo's failure to timely perform the escrow analysis.
- \$4 million will be paid to about 12,000 homeowners by crediting mortgage accounts in the amount of \$333, where Wells Fargo failed to timely perform an escrow analysis that would have resulted in a PCN being filed and the homeowner is not already receiving remediation for a missed or untimely PCN.
- \$4 million will be refunded in cash to about 6,000 homeowners who did not receive timely escrow statements and whose escrow accounts contained surpluses that Wells Fargo had not refunded or credited toward the next year's escrow payment.
- \$3 million in remediation to about 8,000 homeowners has already been completed by Wells Fargo for certain violations.

In addition to the monetary remediation, Wells Fargo will make

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changes to internal procedures to prevent recurrence of the violations. These changes include improvements to its computer platform, improvements to employee training and oversight and implementation of quality control processes to ensure the accuracy and timeliness of PCNs and escrow statements.

The settlement resolves any actions that could be brought by the U.S. Trustee Program for the covered conduct, but does not limit the rights of any homeowner or other third party to take action against Wells Fargo.

Wells Fargo and the U. S. Trustee Program have selected Lucy Morris of Hudson Cook LLP, to serve as an independent reviewer who will verify that Wells Fargo complies with the settlement order. The independent reviewer will file periodic public reports with the bankruptcy court. Wells Fargo will pay all costs associated with the compliance review, including the compensation of the independent reviewer.

Homeowners with questions about the settlement may contact Wells Fargo at 1-800-274-7025.

Director White commended the U.S. Trustee Program team who expertly investigated, litigated and settled this matter, including Deputy Director and General Counsel Ramona Elliott, Senior Trial Attorney Diarmuid Gorham, National Creditor Enforcement Coordinator Gail Geiger, Assistant U.S. Trustee Catherine Stavlas and Trial Attorney Kelley Callard.

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The U.S. Trustee Program is the component of the Justice Department that protects the integrity of the bankruptcy system by overseeing case administration and litigating to enforce the bankruptcy laws. The U.S. Trustee Program has 21 regions and 93 field office locations.

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED**

Jan.26, 2015

Molly C. Dwyer, Clerk
U.S. Court of Appeals

In re: YAN SUI,
Debtor

No. 15-60065
BAP No. 15-1200

YAN SUI
Appellant

ORDER

v.

RICHARD A. MARSHACK
Appellee,

Before: GOODWIN and TALLMAN, Circuit Judges.

Appellant's motion for injunctive relief is denied.

The opening brief and answering brief have been
filed. The optional reply brief remains due 14 days
after service of the answering brief.

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