No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, *as executor of the estate of Stuart Brown*; TERRY W. EMMERT; KEITH JEHNKE; *and* SHERWOOD PARK BUSINESS CENTER, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Sherwood Park Business Center, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Respondents sued petitioner in state court for breach of contract in connection with petitioner's purported sale of an interest in a mutually-owned LLC. On the eve of trial, petitioner filed for bankruptcy, and the action was stayed. When the bankruptcy proceedings concluded, the stay was lifted. Because respondents' claim for damages was discharged in the bankruptcy, respondents proceeded on their request for injunctive relief only—and they prevailed.

The agreement that petitioner had breached (the operating agreement of the LLC) included a fee-shifting provision. Thus, respondents asked the state court for a determination of whether their entitlement to attorneys' fees had been discharged in the bankruptcy. Relying on *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), they contended that petitioner's liability for post-petition attorneys' fees had *not* been discharged because petitioner had "returned to the fray" of the litigation post-petition. The state court agreed.

Petitioner reopened his bankruptcy proceedings, arguing that the bankruptcy court should impose sanctions on respondents for seeking to collect on a discharged liability. But the bankruptcy court agreed with the state court that respondents were not barred from pursuing post-petition fees. Respondents accordingly filed a supplemental judgment for attorneys' fees in the state court proceedings.

Over the complex course of subsequent litigation, the state court's and bankruptcy court's rulings were overturned, and petitioner renewed his request for sanctions against respondents. Although the bankruptcy court imposed sanctions on remand, the Bankruptcy Appellate Panel reversed. It concluded that respondents had not violated the discharge injunction

at all and "should be praised, not sanctioned, for having followed [the] correct procedure to resolve the [discharge] issue." Pet. App. 47a. The BAP held separately that, even if the discharge injunction had been violated, the bankruptcy court applied the wrong legal standard for determining respondents' liability for contempt.

The Ninth Circuit affirmed. Without reaching the question of whether respondents had violated the discharge injunction, it held that respondents could not be liable for sanctions because they had had a good faith belief that petitioner's obligation to pay attorneys' fees was not discharged.

That holding does not warrant further review.

For starters, petitioner significantly overstates any disagreement in the lower courts on the question presented. Most notably, *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996), is distinguishable on its facts and has been abrogated by the Internal Revenue Service Restructuring and Reform Act of 1998. Beyond that, the question presented in the petition arises infrequently. And because a court's decision to impose contempt sanctions is doubly discretionary (at both the liability and damages stages), context-dependent outcomes are expected. Because the BAP held that respondents did not violate the discharge injunction under the unique facts of this case, moreover, this would be a poor vehicle for reaching the issue in any event.

Finally, the Ninth Circuit's approach to the question presented is plainly correct. Indeed, the position advocated by petitioner would write language into the Bankruptcy Code that does not appear there.

For those reasons and those laid out below, the petition should be denied.

STATEMENT

A. Statutory background

1. A bankruptcy proceeding generally concludes with a discharge order. So far as relevant here, a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Section 524(a)(2) does not specify automatic monetary damages for violations of a discharge injunction. Rather, a discharge order must be enforced, if at all, under "the inherent contempt power of the court" or the court's "statutory contempt powers under [Section] 105." *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996). Accord, *e.g.*, *In re Cano*, 410 B.R. 506, 538-539 (Bankr. S.D. Tex. 2009) ("Bankruptcy Courts have both inherent contempt authority and equitable authority under [Section] 105."). Section 105, in turn, provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105(a).

Neither Section 524(a)(2) nor Section 105(a) uses the word "willful." This omission stands in contrast with other provisions of the Bankruptcy Code. For example, Bankruptcy Code Section 362(a) automatically stays creditors' collection efforts upon a debtor's filing of a bankruptcy petition. To enforce the automatic stay, Section 362(k) provides that "an individual injured by any *willful* violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(k)(1) (emphasis added).

A similar standard applies to the United States' efforts to collect unpaid tax obligations under Section 7433(e). That Code section provides that "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service *willfully* violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11 * * *, such taxpayer may petition the bankruptcy court to recover damages against the United States." 26 U.S.C. 7433(e)(1) (emphasis added).

2. Contempt orders are equitable and discretionary, regardless whether they are issued pursuant to the court's inherent authority or Section 105(a). *E.g.*, *In re Fierke*, 567 B.R. 322, 325 n.4 (Bankr. W.D. Mich. 2017) ("[A] decision on a contempt petition is within the sound discretion of the trial court.") (citing *Electrical Workers Pension Tr. Fund* v. *Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003)). Thus, even when a Section 524(a)(2) discharge injunction is violated, "[i]t is within the sound discretion of the court to refuse to hold persons in contempt." *In re Revere Copper & Brass, Inc.*, 29 B.R. 584, 588-589 (Bankr. S.D.N.Y. 1983) (citing *In re Porter*, 25 B.R. 425, 428 (Bankr. D. Vt. 1982)). That is consistent with Section 105(a)'s plain language, which permits a court to enter only those orders that are "necessary or appropriate" to effectuate the Code.

It is also within the court's discretion, once an individual has been held in contempt, to determine an appropriate sanction, if any. See *In re Hardej*, 563 B.R. 855, 866-867 (Bankr. N.D. Ill. 2017) ("In their discretion, however, courts have also declined to award damages for discharge injunction violations when such an award would be inappropriate under the circumstances.") (collecting cases). See also *In re*

Sekendur, 334 B.R. 609, 622 (Bankr. N.D. Ill. 2005) (citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991)) (recognizing generally a court's "discretion to determine the degree of punishment for contempt"). Thus, even in circumstances where good faith is not "a defense to liability" for contempt, it is typically possible for a contemnor "to raise its good faith belief * * * as a means of mitigating damages." *IRS* v. *Murphy*, 892 F.3d 29, 39 (1st Cir. 2018).

B. Factual background

Respondent Sherwood Park Business Center (SPBC), is a limited liability company that owns a mixed-use business park in Sherwood, Oregon. At all times relevant, SPBC's members included petitioner Bradley Taggart and respondents Terry Emmert and Keith Jehnke. CA9 ER 633.

Petitioner, who had principal responsibility for managing the LLC, was facing financial difficulty. CA9 ER 633. Thus, at least one company that he owned or managed stopped remitting payroll taxes to the IRS and Oregon Department of Revenue. *Ibid.* Shortly thereafter, petitioner "disappeared." *Ibid.*

Emmert and Jehnke removed petitioner as manager of SPBC, and Jehnke was elected manager in his place. See CA9 ER 634. Jehnke discovered that in late 2004, petitioner had wrongfully appropriated more than $30,000 of SPBC's funds for his own use. *Ibid.* SPBC initiated an arbitration proceeding, in which petitioner was deemed liable for converting the funds and breaching his fiduciary duty to SPBC. *Ibid*.

To raise much-needed capital (and to pay the judgment owed to SPBC, among other things), petitioner resolved to sell his interest in SPBC. Petitioner's attorney, John Berman, advised petitioner to transfer his interest in SPBC to a new LLC owned solely by

petitioner. CA9 ER 634. The plan initially was for petitioner to sell his interest in the new LLC to a third party. CA9 ER 635. Petitioner, however, was unable to find a conventional buyer. *Ibid.* He instead sold his interest to Berman. *Ibid.* Petitioner used a portion of the proceeds to pay the $30,000-plus judgment to SPBC; he used the remainder for personal purposes, but not to pay the outstanding payroll taxes that he owed. See CA9 ER 635-636.

Petitioner's sale of his interest in SPBC to Berman violated the SPBC operating agreement, which prohibited sales or transfers of a membership interest to a third party without the consent of the other members. CA9 ER 582-584. When Emmert and Jehnke learned of the purported sale to Berman, SPBC sued petitioner, petitioner's LLC, and Berman in Washington County Circuit Court. See Pet. App. 5a. In addition to damages, SPBC sought an equitable order unwinding the transfer and expelling petitioner from SPBC. CA9 ER 595-596, 599.[1]

On the eve of trial, petitioner filed a petition for bankruptcy protection under Chapter 7 of the Bankruptcy Code. Pet. App. 5a. The state court case was stayed pending resolution of the bankruptcy case. *Ibid.* Petitioner listed a "[p]otential attorney fee award" in the state case as a contingent asset in the bankruptcy. CA9 ER 768. The bankruptcy trustee did not pursue the claim on behalf of the estate.

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[1] The transfer of petitioner's interest in SPBC to Berman was especially alarming because Emmert and Berman had a long and acrimonious personal history. Most notably, Berman had represented several of Emmert's adversaries in a string of business disputes. Around the same time as the arbitration, Berman also represented one of Emmert's former employees in an employment dispute against Emmert.

At the conclusion of the bankruptcy proceedings some time later, the state court litigation resumed. Pet. App. 5a. Emmert and Jehnke sought to reopen discovery, and Berman (representing petitioner) vigorously opposed those efforts. *Ibid.*

The day before the rescheduled trial, Berman filed a motion to dismiss the state court equitable claims in light of the bankruptcy discharge. CA9 ER 610-611. The court denied the motion, holding that petitioner was a necessary party to the equitable claims. Pet. App. 6a. But the parties agreed that no monetary damages would be awarded against petitioner. *Ibid.*

Emmert, Jehnke, and SPBC prevailed in the state court litigation. The court unwound the transfer of petitioner's interest in SPBC to Berman, expelled petitioner from the LLC, and allowed Emmert and Jehnke to purchase petitioner's membership interest at a price to be determined by an appraisal. Pet. App. 6a; CA9 ER 639. Emmert and Jehnke submitted a proposed judgment, to which petitioner objected. See Pet. App. 6a. The state court entered the judgment. *Ibid.*

Emmert, Jehnke, and SPBC—through Emmert's and Jehnke's attorney Stuart Brown[2]—subsequently filed a motion for attorneys' fees (Pet. App. 6a) pursuant to the operating agreement's fee-shifting provision (CA9 ER 586). The fee motion sought only those fees incurred after the filing of petitioner's bankruptcy petition. Pet. App. 6a. The motion thus acknowledged petitioner's bankruptcy but argued that post-petition attorneys' fees were not discharged because petitioner had actively engaged in post-petition litigation. Under

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[2] Brown passed away during the pendency of this litigation. His surviving spouse, Shelley Lorenzen, is a respondent here, in her capacity as executor of Brown's estate.

the Ninth Circuit's decision in *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), respondents argued that petitioner had "returned to the fray" and that the bankruptcy discharge thus did not apply. Pet. App. 7a.

The state court held an evidentiary hearing and ultimately agreed that respondents' post-petition fees were not discharged because, under *Ybarra*, petitioner had returned to the fray. Pet. App. 7a. The court therefore granted respondents' fee request in part. *Ibid.*[3]

C. Procedural background

1. Before the state court ruled on the discharge question, petitioner reopened his bankruptcy proceedings and moved for sanctions against respondents for violating the statutory discharge injunction. Pet. App. 7a; CA9 ER 770-782.

The bankruptcy court denied the motion. BIO App. 12a-35a.[4] After reciting the facts and describing *Ybarra*'s holding, the court concluded that "a state court is not divested of jurisdiction 'to determine the applicability of a discharge order when discharge in bankruptcy is raised as a defense to a state cause of action filed in a state court.'" BIO App. 29a (quoting *In re McGhan*, 288 F.3d 1172, 1180 (9th Cir. 2012)). "Accordingly," the bankruptcy court explained, "a state court, such as the Circuit Court in this case, has concurrent jurisdiction with this court to interpret the bankruptcy court's discharge orders." *Ibid.*

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[3] The state court denied fees to Emmert and Jehnke personally on grounds not relevant here. See Pet. App. 7a.

[4] The petition appendix omits the initial opinion of the bankruptcy court denying sanctions and of the district court reversing that decision. The missing opinions are reproduced in an appendix to this brief.

After concluding that the state court's decision concerning the applicability of the discharge injunction did not preclude the bankruptcy court from addressing the same issue anew, the bankruptcy court upheld the state court's ruling. BIO App. 30a-35a. Indeed, it concluded that the state court's decision concerning the scope of the bankruptcy discharge should be upheld regardless whether it was reviewed de novo or for clear error. *Ibid.*

2. Petitioner appealed to the U.S. District Court for the District of Oregon, which reversed. BIO App. 1a-11a. Notwithstanding petitioner's failure to dismiss his counterclaim for attorneys' fees and his repeated objections to discovery rulings, dispositive issues, and fees, the district court concluded that petitioner's "actions were not sufficiently affirmative and voluntary to be considered returning to the fray." BIO App. 11a. The court thus remanded to the bankruptcy court "for consideration of whether [petitioner] has proven whether [respondents] knowingly violated the discharge injunction in seeking attorney fees." *Ibid.*[5]

3. On remand, the bankruptcy court found respondents liable for contempt (Pet. App. 52a-64a) and assessed damages (Pet App. 65a-75a).

Relying on *In re Zilog, Inc.*, 450 F.3d 996, (9th Cir. 2006), the court explained that a violation of a discharge injunction is sanctionable when "the alleged contemnor knew that the discharge injunction applied" and "the alleged contemnor intended the actions that violated the discharge injunction." Pet App.

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[5] Respondents SPBC, Emmert, and Jehnke appealed the district court's order to the Ninth Circuit, which dismissed for lack of jurisdiction under Section 158(d). *Taggart* v. *Brown*, 575 F. App'x 719 (9th Cir. 2014).

58a. The court rejected the notion that "a good faith belief that the discharge injunction does not apply to proceedings vitiates the Respondents' knowledge that the discharge injunction was in existence." *Ibid.* Under the bankruptcy court's understanding of the law, the inquiry "does not allow for the subjective belief, good faith or otherwise, regarding whether, as a legal matter, the discharge applied." Pet. App. 59a.

Taking the view that the standard is "strict liability," the bankruptcy court concluded that it was "[not] helpful" to respondents that both the state court and the bankruptcy court had held that the discharge injunction did not apply, because those decisions were "reversed on appeal." Pet. App. 60a-61a. Because "[r]espondents had actual knowledge that [petitioner's] bankruptcy discharge had been entered," and because they "intended" to "pursu[e] proceedings to obtain" an award of attorneys' fees, the bankruptcy court held respondents liable for contempt. Pet. App. 61a-63a. It subsequently assessed more than $105,000 in attorneys' fees and costs, plus $2,000 in punitive damages, as a sanction. Pet. App. 65a-75a.

4. The Bankruptcy Appellate Panel unanimously reversed. Pet. App. 21a-51a. As an initial matter, the BAP explained that "Section 524(a)(2) clearly was not designed to prohibit actions that seek" a determination of whether the debtor returned to the fray under *Ybarra*. Pet. App. 46a. Indeed,

> [d]ue to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs. Whether a debtor voluntarily returns to the fray under the *Ybarra* rule is a factual question subject to dispute as demonstrated by the state and bankruptcy courts' ruling on the one hand, and the district court's ruling the other

> hand. A creditor seeking to invoke the *Ybarra* rule would necessarily need to seek such a determination from a court.

Ibid. Although the BAP acknowledged that it had "previously said that a party seeking a bankruptcy court determination regarding the scope of the discharge should file an adversary complaint seeking declaratory relief" in the bankruptcy court, it held that respondents' "request for a[n] *Ybarra* ruling in the state court was essentially the same." *Ibid.* The BAP thus held that "following this procedure [does not] equate[] to a violation of [Section] 524(a)(2)" at all. *Ibid.* Rejecting petitioner's contrary position, the BAP concluded that respondents "should be praised, not sanctioned, for having followed a correct procedure to resolve the *Ybarra* issue." Pet. App. 47a.

Were it otherwise, the BAP explained, no creditor would ever be willing to "fil[e] an adversary proceeding to seek a court's ruling on the issue" of the scope of a discharge, for fear of contempt sanctions if the debt were held discharged. Pet. App. 46a-47a.

What is more, "once the state court decided that the discharge did not bar [respondents'] claim for attorneys' fees, [they] were entitled to rely on that decision." Pet. App. 47a. After all, "[a] party who acts in reliance on a facially valid determination that the discharge does not apply cannot be guilty of 'willfully' violating the discharge injunction." *Ibid.*

The BAP alternatively held that the test for willfulness applied by the bankruptcy court was erroneous. Pet. App. 48a. "Rather than conducting any inquiry into whether [respondents] were aware that the discharge injunction applied to their fee request as instructed in *Zilog*," the BAP explained, "the [bankruptcy] court imputed such awareness by strict

liability." *Ibid*. "[T]he bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test" on this point. *Ibid*. In light of the state court's and bankruptcy court's rulings in respondents' favor, the BAP concluded, respondents "held an objectively reasonable belief that, for reasons specific to [petitioner's] conduct in the state court, the discharge injunction did not apply to their post-discharge attorneys' fee request under the *Ybarra* rule." Pet. App. 48a-49a. "Due to the application of an improper legal standard, the bankruptcy court's factual findings regarding [respondents'] actual knowledge are clearly erroneous" and were grounds for reversal. Pet. App. 50a.

5. The Ninth Circuit unanimously affirmed the BAP. Pet. App. 1a-15a. The court of appeals began by explaining that "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." Pet. App. 12a (citing *Zilog*, 450 F.3d at 1009 n.14). "In this case," the court continued, "the bankruptcy court abused its discretion by concluding that [respondents] knowingly violated the discharge injunction" because it "appl[ied] an incorrect rule of law." *Ibid*. In particular, "[t]he bankruptcy court held that a good faith belief that the discharge injunction was inapplicable to the [respondents'] claims was irrelevant." *Ibid*. Holding that the BAP correctly reversed that holding, the Ninth Circuit affirmed.

Having affirmed on that basis, the court "express-[ed] no opinion as to whether" respondents "violate[d] the discharge injunction." Pet App. 14a.

6. The Ninth Circuit denied rehearing en banc. Pet. App. 16a-20a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit affirmed the BAP's denial of equitable sanctions in this case. Further review of that fact-bound decision is not warranted.

To begin with, petitioner significantly oversells the supposed disagreement among the lower courts concerning the state of mind necessary to impose contempt sanctions under Section 105(a) for a violation of Section 524(a)(2). Many of the cases he cites are not precedential, and others construe different Code provisions containing materially different statutory language. In other cases, including the Eleventh Circuit's 22-year-old decision in *Hardy*, the differences in outcomes are attributable not to conflicting legal approaches but to differences in the facts.

The question presented is also unimportant. It arises infrequently—and, when it does arise, it implicates questions of equitable discretion, as to which context-dependent outcomes are expected.

This case would be a poor vehicle for addressing the issue in any event. The BAP held that respondents did not violate petitioner's discharge injunction in the first place, making sanctions statutorily unavailable regardless of the standard applied.

Finally, the decision below is correct. Petitioner's view is that a court must impose sanctions any time a creditor "willfully" violates a discharge injunction. But that position conflates Section 524(a)(2), which concerns discharge injunctions, with Section 362(k), which concerns automatic stays. Whereas Section 362(k) mandates damages for any "willful" violation, Section 524(a)(2) does not. Rather, Section 105(a) permits entry of a contempt order for a violation of Section 524(a)(2) only when "necessary or approp-

riate" to effectuate the purposes of the Code. According to that standard, parties who seek and follow court guidance (like respondents in this case) are not subject to sanctions—as the BAP held in this case, consistent with the holdings of other courts.

A. There is no conflict among the circuits warranting the Court's attention

Petitioner asserts (Pet. 22) that the lower courts are in an "indisputable and entrenched" conflict over the question presented. That is wrong.

1.a. To support his claim of a conflict, petitioner relies principally on the Eleventh Circuit's dated holding in *Hardy*. See Pet. 11-13. But that case is readily distinguishable on its facts.

In *Hardy*, the IRS unilaterally concluded that the debtor's bankruptcy discharge did not apply to certain unpaid tax obligations. 97 F.3d at 1387. Unlike respondents in this case, the IRS did not first obtain a court order resolving the discharge question in its favor. Thus, it took action to collect the unpaid taxes unilaterally, without the imprimatur of a court order declaring that the taxes had not been discharged.

That makes a difference because the Eleventh Circuit has held—in a case cited favorably in *Hardy* itself—that "[c]onduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance." *Howard Johnson Co.* v. *Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

That is an exact description of this case. See Pet. App. 46a-47a. As petitioner acknowledges, creditors comply with a discharge injunction if they first obtain a court order declaring the discharge injunction inapplicable. See Pet. 30 (creditors comply with a discharge injunction when they "seek declaratory relief

before acting") (emphasis omitted). Respondents did just that: They sought and received not one, but two court orders resolving the question of the injunction's applicability in their favor. The fact that the orders were later reversed on appeal is beside the point; at the time they acted, respondents had substantially complied with their obligations under the Bankruptcy Code, as the BAP expressly held. Pet. App. 46a-47a.

Because the court in *Hardy* was not similarly confronted with a creditor who undertook "a good faith effort at compliance" (*Howard Johnson*, 892 F.2d at 1516), it is hard to see how *Hardy* could be in conflict with the outcome in this case.

Petitioner nonetheless seizes on language from *Hardy* suggesting that the focus in a contempt proceeding "is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." 97 F.3d at 1390. It is unclear whether *Hardy*'s statement on that score has any continuing vitality. That is because *Hardy* involved a motion for sanctions against the IRS, which today would be brought under Section 7433(e). See Internal Revenue Service Restructuring and Reform Act, Pub L. 105-206, § 3102, 112 Stat. 685, 730-731 (1998).

Section 7433(e) provides for damages against the government when the IRS "willfully violates" a taxpayer's discharge injunction. 26 U.S.C. 7433(e)(1). By contrast, the Code provisions at issue in *this* case lack the same "willful violation" language. It is therefore unlikely that *Hardy* has any continuing relevance.

b. Taking liberty with both description and attribution, petitioner points to stray remarks from the proceedings below, which he says acknowledge a conflict with *Hardy*. Not so.

Petitioner first asserts (at 10 & n.4, 13) that "[t]he decision below expressly acknowledged the 'tension' between its holding and *Hardy*." That is wrong. The court below adverted to apparent "tension" between *Zilog*, on the one hand, and *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003), and *In re Bennett*, 298 F.3d 1059 (9th Cir. 2002), on the other hand. See Pet. App. 13a. In the course of its discussion, the lower court did drop a footnote (Pet. App. 13a n.5) to language from *Dyer* that quoted from *Hardy*. But the court went on to explain that the two lines of cases are consistent, not in conflict. Pet. App. 13a.

Petitioner also repeatedly asserts (Pet. 3, 10 n.4, 11, 13, 22) that the "the panel" and "the Ninth Circuit" conclusively "recognized" and "admitt[ed]" at the oral argument below that affirming the BAP "would 'ineluctably cause there to be a split between the Ninth Circuit and the Eleventh Circuit[].'" That is a striking misrepresentation. In fact, a single judge (Judge Bea—not "the panel," not "the Ninth Circuit") merely *asked* whether affirming the BAP would create a circuit conflict, and his question was premised on the misimpression that the Eleventh Circuit imposes "strict liability" for violations of discharge injunctions, which it does not.[6] A single judge asking a question predicated on a misunderstanding of out-of-circuit case law is not same thing as the "the Ninth Circuit" "admitt[ing]" to a circuit split.

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[6] The BAP likewise thought the Eleventh Circuit's standard is strict liability. See Pet. App. 36a. But strict liability is "[l]iability that does not depend on proof of negligence or intent." *Liability*, Black's Law Dictionary (10th ed. 2014). The Eleventh Circuit's rule, by contrast, requires both knowledge and general intent. See *Hardy*, 97 F.3d at 1390.

2. Petitioner next says (Pet. 14-16) that the First Circuit's decision in *In re Pratt*, 462 F.3d 14 (1st Cir. 2006), conflicts with the decision below. That is a puzzling assertion.

Pratt involved a creditor's refusal to release, post-bankruptcy, a lien on the debtors' car. The debtors argued that the creditor had "violated the chapter 7 discharge injunction because its refusal either to repossess the vehicle or to release its lien effectively coerced them to repay the discharged personal liability on their car loan." *Pratt*, 462 F.3d at 16-17.

The First Circuit noted that "the core issue [was] whether the creditor acted in such a way as to 'coerce' or 'harass' the debtor improperly" into repaying the debt. *Pratt*, 462 F.3d at 19. Emphasizing that "each case must be assessed on its particular facts" (*id.* at 20), the court there held that the "the particular confluence of * * * circumstances" indicated that the creditor's "refusal to release its lien" was "objectively coercive." *Id.* at 19.

Petitioner asserts (Pet. 14) that, from there, the First Circuit "confront[ed] the question presented [in the petition]." It did nothing of the sort. The court merely flagged the issue of whether a debtor must prove a violation of Section 524(a)(2) "by a preponderance of the evidence" or instead "by clear and convincing evidence." *Pratt*, 462 F.3d at 20. The court declined to resolve the question because it found that the debtors had satisfied their burden either way. *Id.* at 21. Although the court—citing an automatic stay case governed by Section 362—noted in passing (*ibid.*) that the debtor had offered sufficient evidence to prove a "willful" violation of the discharge injunction, the court did not purport to adopt an extra-textual willful-

ness standard in contempt cases under Section 105(a). Indeed, it gave no thought to the issue at all.[7]

Petitioner's citation to *IRS* v. *Murphy*, 892 F.3d 29 (1st Cir. 2018), is equally bewildering. That case concerned Section 7433(e)—the provision that governs discharge violations against the IRS, including cases with facts like those in *Hardy*. The court was thus called upon to construe the words "'willfully violates' as used in [Section] 7433(e)." *Id.* at 34. And the court there held only that Section 7433(e)'s willfulness standard should be read consistently with Section 362(k)'s willfulness standard. *Id.* at 40-41. The question of what standard applies in cases like this one—proceeding under Section 105(a), which lacks the same language—was not presented in *Murphy*.

True, the First Circuit noted in passing that "in *In re Pratt*, we used the same standard to evaluate whether a violation of a discharge order was willful." *Murphy*, 892 F.3d at 40. But that superficial observation was not a "reaffirm[ation]" of any legal holding (Pet. 15); rather, it was an unthinking observation that the violation in *Pratt* was found to be willful. No more, no less.

There is no indication in either *Pratt* or *Murphy* that the First Circuit would hold that respondents had willfully violated petitioner's discharge injunction, or even that willfulness is the appropriate standard for alleged Section 524(a)(2) violations enforced under Section 105(a). There is accordingly no conflict with the First Circuit.

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[7] It is thus ironic that petitioner dismisses *In re Ben Franklin Hotel Associates*, 186 F.3d 301 (3d Cir. 1999), on the ground that its "so-called 'holding' came in a single paragraph at the tail end of the court's opinion" and "did not include any supporting rational or citations." Pet. 21-22. The same is true of *Pratt*.

3. Apart from *Hardy*, *Pratt*, and *Murphy*, petitioner cites a handful of unpublished, non-binding cases, including *In re Fina*, 550 F. App'x 150 (4th Cir. 2014) (unpublished), *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012) (unpublished), *In re Culley*, 347 B.R. 115 (B.A.P. 10th Cir. 2006) (unpublished), and several bankruptcy court cases. See Pet. 17-21. Because none of those decisions is precedential, there is no reason to think that this case would have been resolved differently in the Fourth, Sixth, or Tenth Circuits.

Citing just two cases decided over the past 27 years, petitioner nevertheless asserts (Pet. 18 n.10) that this Court "routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review." But the two cases that petitioner cites each involved an independent split among the courts of appeals themselves, which is absent here. What is more, the Court in those cases cited *published* BAP decisions, which bind other BAP panels. *E.g.*, CA6 BAP Rule 8024-1(b); CA9 BAP Rule 8024-1(c). The BAP decisions that petitioner cites here, by contrast, are unpublished and therefore nonbinding. There is accordingly no split worthy of this Court's attention.

B. The question presented is unimportant

Review is also unwarranted because the issue presented is unimportant, for two reasons.

First, the purported conflict is stale, and the issue arises infrequently. *Hardy* was decided more than 22 years ago, and *Zilog*—which the panel below applied without modification—was decided more than 12 years ago. In all that time, the issue over which those cases supposedly conflict has not arisen frequently, either before the bankruptcy courts or before Article III judges.

In fact, petitioner cites just 11 cases—far fewer than the "dozens" promised (Pet. 3, 19, 22)—that he says turned on the question presented. See Pet. 18-21. But several of the cited cases did not in fact "confront[] the identical question as the Ninth Circuit" in this case, as petitioner asserts. Pet. 19.

For example, *In re Witt*, 2018 WL 3966692 (Bankr. N.D. Ohio 2018), held that the debt at issue was *not* discharged, for fact-specific reasons. Nothing in that case turned on the court's supposed answer to the question presented here. The same is true of *In re Renfrow*, 2017 WL 6541136 (Bankr. N.D. Okla.), and *In re Slater*, 573 B.R. 247 (Bankr. D. Utah 2017). Of course, even taking petitioner's assertion at face value, an issue that comes up just 11 times in 12 years is not one that arises sufficiently often to warrant this Court's attention.

Second, in the circumstances of this case, petitioner is wrong that "[t]here is an overriding (even *constitutional*) importance of achieving national 'uniform[ity]' in the bankruptcy context." Pet. 25.

The question whether or not to impose sanctions is a discretionary one that turns on the unique equities of each case. See, *e.g.*, *In re Fierke*, 567 B.R. 322, 325 n.4 (Bankr. W.D. Mich. 2017) (citing *Electric Workers Pension Tr. Fund* v. *Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003)) ("[A] decision on a contempt petition is within the sound discretion of the trial court."). Although courts sitting in equity "exercise judgment in light of prior precedent," they do so first and foremost with an eye to the "specific circumstances" of the case and whether those circumstances warrant "special treatment." *Holland* v. *Florida*, 560 U.S. 631, 650 (2010). In this way, a court's exercise of its equitable power requires "delicate judgment calls" based on an "interplay of

factors" that are unique in each case. *In re Rental Sys., LLC*, 511 B.R. 882, 894 (Bankr. N.D. Ill. 2014). The upshot is clear: Even when a Section 524(a)(2) discharge injunction is violated, "[i]t is within the sound discretion of the court to refuse to hold persons in contempt." *In re Revere Copper & Brass, Inc.*, 29 B.R. 584, 588-589 (Bankr. S.D.N.Y. 1983) (citing *In re Porter*, 25 B.R. 425, 428 (Bankr. D. Vt. 1982)) (violation of automatic stay).

Moreover, as noted earlier, even after holding an individual liable for contempt, courts have "declined to award damages for discharge injunction violations when such an award would be inappropriate under the circumstances." *In re Hardej*, 563 B.R. 855, 866 (Bankr. N.D. Ill. 2017) (collecting cases). Thus, even if good faith were not "a defense to liability" for contempt, it would still be possible for a contemnor "to raise its good faith belief * * * as a means of mitigating damages." *Murphy*, 892 F.3d at 39.

Against this backdrop, context-dependent outcomes are both predictable and understandable. It is therefore wrong to say that "petitioner would have prevailed had these proceedings occurred in Florida, Ohio, Massachusetts, or Virginia, but he lost due to the happenstance that his bankruptcy case arose in Oregon." Pet. 25. While judges in any of those jurisdictions *might* have imposed sanctions upon respondents, they also *might* have declined to do so in their equitable discretion.

For example, in *In re Ben Franklin Hotel Associates*, 186 F.3d 301 (3d Cir. 1999), the Third Circuit agreed that the debtor's state court suit for money damages was a discharge violation, but held that it was not "contemptuous because, *inter alia*, considering the unusual facts of this case, there was at least a colorable argument that [the creditors'] claims for

monetary damages had been preserved." *Id*. at 309. That was just what the court in this case held.[8]

As Judge Paez stressed at the October 3, 2017 hearing below, moreover, "the BAP's opinion is limited to these circumstances, where the party went back and sought a determination," and "that's a unique circumstance," and "it's not often you see that." CA9 Oral Arg. Video 28:21-28:43, goo.gl/VL3gfS. Given

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[8] Other courts routinely hold that a good faith belief that a debt was not discharged is a defense to imposition of sanctions in circumstances like these. See, *e.g.*, *Romanucci & Blandin, LLC* v. *Lempesis*, 2017 WL 4401643, at *4 (N.D. Ill. 2017) (agreeing that reasonable belief that debt is not discharged is a defense to sanctions but affirming award because "appellants offer no explanation * * * as to why [they] believed that the discharge did not apply"); *In re Hardej*, 563 B.R. 855, 866-867 (Bankr. N.D. Ill. 2017) (declining to impose damages in nearly identical circumstances as these); *In re Moore*, 2017 WL 934641, at *6 n.41 (Bankr. N.D. Okla. 2017) (holding that sanctions would not be warranted if the creditor "had a good faith basis to believe the penalties were not discharged"); *In re Wilson*, 527 B.R. 635, 638 (Bankr. N.D. Cal. 2015) (sanction against the IRS was limited to returning funds because its position that the penalty had not been discharged was not without merit); *In re Barr*, 457 B.R. 733, 738 (Bankr. N.D. Ill. 2011) (declining to impose sanctions because creditor "believed in good faith that its debt was not discharged by the discharge order"); *In re Everly*, 346 B.R. 791, 797-798 (B.A.P. 8th Cir. 2006) (where creditor has a "good faith basis for believing that its debt was excepted from discharge * * *, the creditor is not subject to sanctions for violating the discharge injunction"); *In re Kuhl*, 2005 WL 8146346, at *3 (E.D.N.Y. 2005) (declining to impose damages where the creditor "lacked the knowledge, and the willfulness, that its actions were in violation of" the discharge injunction), vacated on other grounds, *Kuhl* v. *United States*, 467 F.3d 145 (2d Cir. 2006) (per curiam) (failure to exhaust administrative remedies); *In re Kewanee Boiler Corp*., 297 B.R. 720, 736-737 (Bankr. N.D. Ill. 2003) (denying debtor's claim for contempt sanctions when creditor "had a good faith and colorable basis for asserting that there had been no discharge").

these "unique circumstance[s]," it is impossible to say that the outcome would have been different in the Eleventh Circuit or anywhere else.

C. This case is a poor vehicle for reaching the question presented

1. Even assuming petitioner were correct that there is some disagreement among the lower courts and that the question presented is important, this case would be a poor vehicle for addressing it. That is because the BAP held that respondents did not violate the discharge injunction at all (Pet. App. 46a-47a), meaning that respondents could not be sanctioned regardless of the answer to the question presented.

As the BAP explained, "[d]ue to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs." Pet. App. 46a. Any creditor "seeking to invoke the *Ybarra* rule" in circumstances like these "would necessarily need to seek * * * a determination from a court" whether the fee award was discharged. *Ibid.* Again, respondents did that, raising the *Ybarra* issue in the state court proceedings. Because "Section 524(a)(2) clearly was not designed to prohibit actions that seek an *Ybarra* determination," the BAP held that "following this procedure [did not] equate[] to a violation of [Section] 524(a)(2)." *Ibid.*

The Ninth Circuit did not disturb that inherently fact-dependent holding. See Pet. App. 14a ("express-[ing] no opinion as to whether" respondents "violate[d] the discharge injunction"). Thus, it makes no difference in this case whether respondents' reasonable, good faith reliance on the state court's *Ybarra* ruling is a defense to contempt. Either way, respondents did not violate petitioner's discharge injunction and cannot be held liable for contempt.

2. Petitioner says (Pet. 27) that respondent Lorenzen "has since conceded *that the discharge was violated*, leaving the good-faith defense as the sole remaining issue in dispute." That is mistaken.

At the same time that petitioner appealed the BAP's reversal of sanctions, respondents cross-appealed the district court's reversal of the bankruptcy judge's original *Ybarra* holding. During the pendency of the combined appeal, however, the Ninth Circuit decided *In re Castellino Villas*, 836 F.3d 1028 (9th Cir. 2016), which limited *Ybarra*'s "return to the fray" framework to those cases where liability for post-petition fees was not within the "fair contemplation" of the claimant. *Id.* at 1034-1037. Concluding that respondents' entitlement to fees in the state court litigation was within her contemplation during the bankruptcy, respondent Lorenzen took the view that *Castellino Villas* controlled and required affirming the district court's *Ybarra* ruling. Pet. App. 14a n.6. She thus withdrew her cross-appeal. *Ibid.*

Petitioner characterizes this as a concession that the discharge injunction was violated. It is not. All Lorenzen acknowledged was that, in light of *Castellino Villas*, she was not entitled to obtain an award of attorneys' fees in the state court litigation.

That is not the same thing as Lorenzen admitting that her conduct violated the discharge injunction. On the contrary, the BAP held in favor of respondents on the discharge issue, not because respondents necessarily had the better of the *Ybarra* argument, but because the scope of the discharge was ambiguous in light of *Ybarra* and thus required resolution by a court. See Pet. App. 46a. Respondents' conduct in seeking a court order therefore did not violate Section 524(a)(2), regardless of *Castellino Villas*.

Setting that aside, the remaining respondents did not withdraw their cross-appeal or concede *Castellino Villas*'s applicability. The question whether they violated the discharge injunction thus remains a live issue regardless. Petitioner is entirely wrong to say that the outcome of this case turns on solely on resolution of the question presented.

D. Petitioner's attempt to conflate a violation of the automatic stay with a violation of the discharge injunction is unpersuasive

There is no conflict, the issue is unimportant, and the BAP issued an alternative holding. These are reasons enough to deny the petition. On top of that, the lower court is correct.

1. In *Zilog*, the Ninth Circuit held that "[a] contempt order entered for violation of [a discharge injunction] is governed by the same standards * * * applicable to all civil contempt proceedings." 450 F.3d at 1008 n.12 (citing *Dyer*, 322 F.3d at 1191-1192). According to those standards, it is a "well-established proposition that only actual knowledge of the discharge injunction suffices for a finding of contempt," requiring knowledge of both "the discharge injunction *and* its applicability to [the] claims [in question]." *Id.* at 1008-1009 (emphasis added). That is because, as a general matter, "invocation of the [district court's] inherent power" to sanction a contemnor for violating a court order "would require a finding of bad faith." *Chambers*, 501 U.S. at 49 (citing *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980)). See also *id.* at 50 (a court imposing sanctions under its inherent

power for violating a discovery order must make "the requisite bad faith" finding).[9]

In *Hardy*, the Eleventh Circuit held that bad faith is not a prerequisite to a sanctions award entered pursuant to Section 105(a). See 97 F.3d at 1390. In the Eleventh Circuit's (since-abrogated) view, a debtor must show only that the alleged contemnor was "aware of the discharge injunction" and "intended the actions which violated the [injunction]." *Ibid*.

But in making that statement, the Eleventh Circuit undertook no actual analysis of the issue. Instead, it merely cited an automatic-stay case—*Jove Engineering, Inc.* v. *IRS*, 92 F.3d 1539 (11th Cir. 1996)—and unthoughtfully asserted that the framework for deciding violations of Section 362's automatic stay "is likewise applicable to determining willfulness for violations of the discharge injunction of [Section] 524." *Hardy*, 97 F.3d at 1390.

That is plainly wrong. Section 362 uses language materially different from the language in Sections 524(a)(2) and 105(a). It states in relevant part that the filing of an initial bankruptcy petition "operates as a stay" against collection efforts and that "an individual injured by any *willful* violation" of the automatic stay "*shall* recover actual damages, including costs and attorneys' fees." 11 U.S.C. 362(a), (k)(1) (emphasis added). That language is notable because it requires an assessment of damages (the debtor "shall" recover)

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[9] Although *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), suggests that any willful violation of a court order is sanctionable in contempt and that "the state of mind of respondents" is irrelevant (*id.* at 191), the accepted rule in the bankruptcy context is that good faith is a defense to contempt sanctions imposed under the court's inherent authority. See *Hardy*, 97 F.3d at 1390 ("[A] defendant may be cited for contempt under the court's inherent powers only upon a showing of 'bad faith.'").

for any and all violations that are "willful" (not merely those that are in bad faith).

Section 524(a)(2) is quite different. It provides that a bankruptcy discharge "operates as an injunction" against collection efforts but does not include an enforcement provision. Instead, Section 105(a) provides separately that "[t]he court *may* issue any order, process, or judgment that is *necessary or appropriate* to carry out the provisions of this title." 11 U.S.C. 105(a) (emphasis added). Thus, a court's award of damages for a violation of Section 524(a)(2) is only permissive, and even then damages are allowed only when *necessary or appropriate*. In other words, Section 105(a) allows far broader discretion to enforce (or not enforce) violations of Section 524(a)(2).

It is therefore wrong to say, as did the Eleventh Circuit, that the test for a violation of the automatic stay under Section 362 is "likewise applicable" (*Hardy*, 97 F.3d at 1390) to alleged violations of the discharge injunction under Section 524. Congress demonstrated in Section 362 that it knows how to impose mandatory damages for willful violations when it wishes to. Indeed, it did so in Section 7433(e) as well. Yet Congress omitted the same language from Sections 524(a)(2) and 105(a).

That observation is dispositive here. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Put another way, "[i]f Congress had wanted" to impose a mandatory damages for any willful violation of a discharge injunction, it "would have said so" because "other statutes, in other contexts, speak in

just that way." *Descamps* v. *United States*, 570 U.S. 254, 267-268 (2013).

2. There is good reason, moreover, for treating a violation of an automatic stay differently from a violation of a statutory discharge injunction. The automatic stay under Section 362 is temporary and demands strict enforcement at the outset of the bankruptcy, when the estate is at risk of being destroyed altogether. By contrast, the discharge (which is permanent) comes at the conclusion of the bankruptcy proceedings, when the debtor is on surer footing.

While of course creditors should not be permitted to violate a duly entered discharge order, it is not clear that such a violation should be treated differently from a creditor's mistaken effort to collect a debt that has already been satisfied or for which the statute of limitations has expired. Creditors are not liable at common law for incidental damages or attorneys' fees in such cases—the debtor simply receives back what was wrongly collected. See generally W. E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2d 1070 (1953, with supplements); Joel E. Smith, *Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R. 3d 201 (1978, with supplements).

That matters because Congress presumptively incorporates common law standards into the Bankruptcy Code. *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 537 (1999) (enactments presumptively consistent with common law); *Field* v. *Mans*, 516 U.S. 59, 73-74 (1995) (principle applied to bankruptcy).

Hardy did not consider any of these basic points, unthinkingly conflating a violation of the automatic

stay with a violation of the discharge injunction. That is indefensible.

3. Petitioner and his *amici* suggest that, under the Ninth Circuit's rule, bankruptcy discharges will be rendered useless, throwing the bankruptcy system into turmoil. See Pet. 23-24; Wedoff Amicus Br. 13-23. They are wrong.

As an initial matter, we do not disagree that the Code's discharge provision is essential to the proper functioning of the bankruptcy system. Nor do we dispute that the honest debtor should have the benefit of discharge free from harassing creditors. But that is not what this case is about.

The question here is relevant only in cases where the scope of the discharge is ambiguous and the creditor seeks a court order resolving the ambiguity. In that circumstance, a creditor ought to be able to request and obtain a court's determination of the discharge's scope without fear of sanctions if the discharge is ultimately found applicable. And when creditors obtain a court order declaring that the discharge does *not* apply, they should not be liable for contempt of court merely because the order is later reversed on appeal. To conclude otherwise would discourage creditors from lawfully pursuing *non*-discharged debts, in practical effect expanding the scope of a debtor's injunction beyond what the Code provides. There is no support for such an outcome.[10]

In any event, the Ninth Circuit's rule has already governed for longer than 12 years across nine States

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[10] Petitioner and his *amici* raise the specter of the Ninth Circuit's good faith rule being used to excuse serious creditor misconduct. *E.g.*, Wedoff Amicus Br. 13. To the extent that is a real concern (and there is no evidence that it is), the Court should await a case that presents such facts.

comprising approximately one fifth of the national population—and in all that time, it is has not led to any systematic problems. That is likely because, as Judge Paez emphasized at the oral argument below, these are "unique circumstances" that don't often arise. CA9 Oral Arg. Video 28:21-28:43.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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APPENDICES

APPENDIX A

United States District Court, D. Oregon.
Bradley Weston TAGGART, Appellant,
v.
Stuart M. BROWN, et al., Appellees.
No. 3:12–cv–00236–MO

Aug. 6, 2012

Attorneys and Law Firms

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OPINION AND ORDER

MOSMAN, District Judge.

Appellant, Bradley Taggart, appeals a United States Bankruptcy Court decision denying his motion for contempt against appellees, Terry Emmert, Keith Jehnke, Stuart Brown, and Sherwood Park Business Center LLC ("SPBC"), in which he alleges that appellees violated his 11 U.S.C. § 524 ("§ 524") discharge injunction. For the following reasons, I reverse and remand this case to the bankruptcy court.

BACKGROUND

This dispute stems from a Washington County Circuit Court lawsuit revolving around uncertain ownership interests in SPBC. Mr. Taggart transferred his 25% stake in SPBC to BT of Sherwood LLC ("BT"), an LLC that he formed, and then subsequently sold

his interest in BT to his attorney in this appeal, John Berman. SPBC sued Mr. Taggart, Mr. Berman, and BT over the purported conveyance, alleging that Mr. Taggart maintained the 25% interest in SPBC because he failed to provide notice or proof of transfer. Plaintiff countersued appellees SPBC, Mr. Jehnke, and Mr. Emmert for attorney fees pursuant to Section 13.6 of the SPBC Operating Agreement and Or. Rev. Stat. § 20.105. (Appellant's Brief [87–5] 3). The state court case was stayed when Mr. Taggart filed for Chapter 7 bankruptcy. As part of his discharge, which was granted on February 23, 2010, the bankruptcy trustee discharged the counterclaim for attorney fees back to Mr. Taggart. When the state court case reconvened, Mr. Berman filed a motion to dismiss Mr. Taggart from the case. The judge denied the motion, finding that Mr. Taggart was a non-dispensable party, but ruled that no money judgment would be entered against him. (*Id.* [87–6] 23). After a trial, the court ruled that Mr. Taggart still owned a 25% interest in SBPC and that Mr. Emmert and Mr. Jehnke were entitled to purchase Mr. Taggart's interest in accordance with the terms of the SPBC Operating Agreement. (*Id.* at 31). The judge also dismissed Mr. Taggart's counterclaims with prejudice. (*Id.* at 32).

All appellees subsequently sought attorney fees from Mr. Taggart, and SPBC alone was awarded approximately $45,000. The state court judge, citing *In re Ybarra*, 424 F.3d 1018, 1021 (9th Cir.2005), reasoned that attorney fees could be assessed against Mr. Taggart despite his bankruptcy discharge, because he never abandoned his counterclaim for attorney fees and because he continued to seek dismissal from the lawsuit post-petition, which if successful, would have given him a contractual right to attorney fees. Thereafter, Mr. Taggart re-opened his bankruptcy case and

filed a Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction Under 11 U.S.C. § 524. (*See* Appellant's Brief [87–2] 1). In denying the contempt motion, the bankruptcy court reiterated that the § 524 discharge injunction was inapplicable because Mr. Taggart reentered the fray of the state court lawsuit.

STANDARD OF REVIEW

A bankruptcy court's "conclusions of law [are reviewed] de novo and its factual findings for clear error." *In re Su*, 290 F.3d 1140, 1142 (9th Cir.2002). The Ninth Circuit applies "de novo review to 'mixed questions' of law and fact," because such cases "require consideration of legal concepts and the exercise of judgment about the values that animate the legal principles." *In re Beverly*, 374 B.R. 221, 230 (B.A.P. 9th Cir.2007); *see also In re Brawders*, 503 F.3d 856, 866 (9th Cir.2007). This case involves largely undisputed facts and a mixed question of law and fact, and therefore, I review de novo the Bankruptcy Court's decision.

DISCUSSION

"A Chapter 7 bankruptcy discharge releases the debtor from personal liability" for pre-bankruptcy debts. *In re Ybarra*, 424 F.3d at 1022. A Chapter 7 bankruptcy discharge also "operates as an injunction against the commencement or continuation of an action, [or] the employment of … an act, to … offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Mr. Taggart alleges that appellees violated his § 524 injunction by seeking attorney fees in connection with their continuation of the aforementioned pre-petition state court lawsuit. A debtor alleging a violation of § 524 must bring a motion for contempt under 11 U.S.C. § 105(a) (" § 105(a)") of the

bankruptcy code. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509–10 (9th Cir. 2002).

A party must "knowingly" violate the discharge injunction in order to be held in contempt under § 105(a). *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006) (citing *Walls*, 276 F.3d at 507). In order to demonstrate a knowing violation, Mr. Taggart must prove by clear and convincing evidence that appellees: "(1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.*

The threshold issue, however, is whether appellees' request for attorney fees in connection with the pre-petition state court lawsuit that was recommenced subsequent to Mr. Taggart's discharge implicates the § 524 injunction. If the claim for attorney fees was not discharged, there inevitably can be no knowing violation of the injunction. The Ninth Circuit holds that "claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.' " *In re Ybarra*, 424 F.3d at 1026 (quoting *Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525, 533–34 (9th Cir. 1998)). "Whether attorney fees and costs incurred through the continued prosecution of litigation initiated prepetition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses." *Id.* Since *Ybarra*, the Ninth Circuit has not had occasion to expound on the requisite level of affirmative and voluntary action necessary to constitute returning to the fray.

In *Ybarra*, the debtor filed a state court employment discrimination lawsuit against her former employer, and then three years later filed for Chapter 11 bankruptcy. *Id.* at 1020. She did not list the lawsuit on her bankruptcy schedule. *Id.* The employer subsequently learned of the bankruptcy proceedings and moved to convert the case to Chapter 7, which the bankruptcy court did, leading to the debtor's bankruptcy estate trustee settling the case with the former employer for $17,500. *Id.* The bankruptcy court approved the settlement over the debtor's objections and the state court dismissed the lawsuit. *Id.* The debtor petitioned the bankruptcy court to exempt the state suit, which led to an appeal to the Ninth Circuit, and ultimately a remand back to the bankruptcy court, with the latter court holding that the case was exempt and that the debtor could either accept the settlement offer or take ownership of the lawsuit. *Id.* Opting for the latter, the debtor persuaded the state court to set aside the dismissal but ultimately lost at summary judgment. *Id.* The former employer then moved for an award of attorney fees and costs and was awarded $456,884.03. *Id.* at 1021. The Ninth Circuit affirmed the bankruptcy court's decision allowing the former employer to collect approximately $150,000 in attorney fees that were incurred after the filing of the debtor's bankruptcy petition. *Id.* at 1027. The Court elaborated that the debtor's actions in reviving the state court action were "sufficiently voluntary and affirmative to be considered 'returning to the fray.' " *Id.*

The parties both cite *In re Kozak*, 03–20278–MT, 2007 Bankr. LEXIS 4548 (Bankr. C. D. Cal. Sept. 10, 2007), an unpublished case from the United States Bankruptcy Court for the Central District of California. In *Kozak*, the debtors entered into a settlement agreement with Packing Crate Classics, Inc. ("PCC")

regarding a dispute over a residential property ("the property"). *Id.* at *3. The debtors were leasing the property from PCC at the time of settlement, and it was subsequently the subject of two lawsuits. *Id.* First, the debtors sued PCC alleging that it breached the settlement agreement by not allowing them to purchase the property. *Id.* The state court ruled for PCC and the debtors appealed. *Id.* The second lawsuit arose while the appeal was pending when a third party sued both PCC and the debtors over the property; the debtors filed a cross-complaint against PCC, which essentially alleged the same claims as the first lawsuit. *Id.* In the meantime, the debtors filed for bankruptcy and were granted a discharge. *Id.* at *4. The debtors' Chapter 7 trustee filed an application to employ outside legal counsel, employed on behalf of the estate, for the purpose of pursuing both lawsuits for the debtors. The state court of appeals rejected the appeal in the first lawsuit and PCC filed a motion for attorney fees. *Id.* at *4–5. Because the ruling in the first lawsuit essentially covered the same claims that the debtors brought in the second lawsuit, PCC requested that the trustee's attorney drop the counter-complaint. *Id.* at *5. The trustee's attorney then filed a motion to be dismissed as debtors' counsel, which was granted. *Id.* at *7. Thereafter, the state court granted PCC summary judgment on the debtors' counter-complaint in the second lawsuit, and PCC filed a second motion for attorney fees. *Id.* at *8. Debtors, now pro se, filed an appeal of the summary judgment ruling, as well as an objection to PCC's proposed order awarding attorney fees. *Id.* at *9.

The *Kozak* court held that PCC was entitled to fees from the second lawsuit only, finding: (1) the debtors did not return to the fray in the first lawsuit because the trustee pursued the litigation; and (2) the

debtors' failure to seek dismissal of the cross-complaint in the second lawsuit constituted returning to the fray, because the debtor's failure to respond to PCC's request to dismiss their counter-complaint forced PCC "to take action in response to the pending [crosscomplaint] or possibly face judgment themselves," and because the debtors' actions "demonstrated more than a passive lack of response." *Id.* at *20; *0–21. The court noted that the following post-discharge actions on behalf of the debtors gave PCC "every indication that they were pursuing their cross-complaint": they appeared at the summary judgment hearing and indicated to court they were still pursuing their complaint, they attended numerous status conferences, they filed an opposition on the merits to the summary judgment motion in which they argued their cross-complaint should not be dismissed, and they requested an extension of time to exchange expert witness information. *Id.* at 21.

This case is unlike *Ybarra* in the sense that Mr. Taggart did not commence the litigation at issue here, nor can the state court case be considered the commencement of a new suit. He did bring a counterclaim for attorney fees prepetition, which was eventually discharged back to him upon resolution of his Chapter 7 case, and which he never affirmatively moved to dismiss postpetition. Mr. Taggart's remaining involvement in the lawsuit post-discharge is described as follows. Prior to trial, Mr. Berman filed a motion for a protective order on behalf of Mr. Taggart in which he requested that a subpoena for Mr. Taggart's second deposition be quashed, as well as for attorney fees in connection with the motion. (Appellant's Brief [87–5] 35–37). Mr. Berman also filed a pretrial motion to dismiss in which he sought to dismiss

the claims against Mr. Taggart pursuant to his Chapter 7 discharge. (*Id.* [87–6] 14–15). Mr. Berman renewed the motion orally at the close of evidence. After the trial, and after appellees in this case submitted a proposed form of judgment that included their request for attorney fees from Mr. Taggart, Mr. Berman filed an objection on behalf of himself and BT, in which he also argued that no attorney fees or costs, pre or post-bankruptcy, could be assessed against Mr. Taggart pursuant to *In re Ybarra*. (*Id.* [87–10] 41). Mr. Taggart testified at the bankruptcy court oral argument that Mr. Berman prepared the motion for him in part. At the hearing with regard to Mr. Berman's objection, Mr. Taggart, who the state court had previously ruled maintained a 25% interest in SPBS, appeared on his own behalf and argued in entirety that plaintiffs should have to pay interest on the purchase price of his interest in SPBC for the three years that had passed and that any proceeds from the subsequent transaction should go into an escrow account. (*Id.* [87–11] 49). Following the state court judgment, Mr. Taggart personally filed "Objections to Attorney Fees and Costs," (*Id.* [87–9] 14), and a Notice of Appeal (*Id.* [87–12] 10). In the former, he argued that any claim for fees or costs violated his Chapter 7 discharge.

The issue here is whether Mr. Taggart's aforementioned post-discharge actions were sufficiently affirmative and voluntary to constitute returning to the fray of appellees' state court lawsuit. *In re Ybarra*, 424 F.3d at 1026. I first note that Mr. Taggart's objection to a second deposition does not suggest that he voluntarily or affirmatively agreed to return to the fray. Mr. Taggart reacted to what he viewed as an oppressive litigation strategy as opposed to affirmatively committing an act that forced appellees to incur post-petition legal fees. Nor do Mr. Taggart's actions after the state

court dismissed Mr. Taggart's counterclaims constitute returning to the fray. Mr. Taggart did not object to or seek reversal of the state court's decision on the merits. He solely argued that he should not be subjected to attorney fees for the same reason that he asked to be dismissed from the suit at the outset. A consequence of finding that Mr. Taggart's bankruptcy injunction blocked appellees' attorney fee request would not have been reversal of the state court's dismissal of plaintiff's counterclaims. Therefore, on these facts, Mr. Taggart's actions were reactionary and solely in response to a potential judgment against him for attorney fees, as opposed to affirmative and voluntary actions for the purpose of seeking attorney fees himself.

There is still the matter of whether Mr. Taggart, in seeking to be dismissed from the lawsuit pursuant to the § 524 discharge injunction, and in failing to dismiss his counterclaim for attorney fees, voluntarily took affirmative post-petition action to litigate his prepetition counterclaim for attorney fees under Or. Rev. Stat. § 20.105 and Section 13.6 of the SPBC Operating Agreement. In order to prevail on either of these claims, Mr. Taggart would have had to have been adjudicated the "prevailing party" by the state court judge.[1] Because Mr. Taggart did not move to dismiss the claims against him on the merits and did not

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[1] In order to obtain attorney fees under Or. Rev. Stat. § 20.105, Mr. Taggart would have had to have proven that: (1) he "was the prevailing party"; (2) "the opposing party's claim was meritless"; and (3) "the meritless claim was advanced for an improper purpose." *Scott v. Harold Barclay Logging Co., Inc.*, 987 P.2d 17, 18 (Or.Ct.App.1999) (citing *Mattiza v. Foster*, 803 P.2d 723, 729 (Or.1990)). Section 13.6 of the SPBC Operating Agreement states in relevant part that "the prevailing party shall be entitled to recovery, in addition to other costs, reasonable attorney fees in

otherwise appear or defend in the trial after he was ordered to remain a party, it is unclear whether Oregon law[2] would permit this designation on these facts. If he could not have prevailed on his counterclaim by seeking dismissal from the suit in the fashion he did, it cannot be said that Mr. Taggart took affirmative post-petition action to recommence his pursuit of attorney fees. Neither the SPBC Operating Agreement nor Or. Rev. Stat. § 20.105 defines "prevailing party." *See Mantia v. Hanson*, 77 P.3d 1143, 1148 (Or. Ct. App. 2003) (explaining that Or. Rev. Stat. § 20.105 "includes no definition of 'prevailing party' "); (Appellant's Brief [87–4] 19–37). The issue is irrelevant as to Or. Rev. Stat. § 20.105, as it would have been impossible for Mr. Taggart, who did not defend on the merits in the lawsuit, to then prove that appellees' claims themselves were meritless, and that they were advanced for an improper purpose. With regard to the SPBC Operating Agreement, Or. Rev. Stat. § 20.077, which governs attorney fees in civil proceedings, states that "the prevailing party is the party who receives a favorable judgment … on the claim." Mr. Taggart's judgment of dismissal pursuant to the § 524 discharge injunction would not have been a favorable judgment on the claims, and therefore, he would not

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connection with [any suit … to enforce or interpret any provision of this Agreement.]" (Appellant's Brief [87–4] 35).

[2] Section 13.6 of the SPBC Operating Agreement states that "the court" shall decide "the prevailing party and the amount of reasonable attorney fees." (Appellant's Brief [87–4] 35). Section 13.1 states that the Agreement "shall be governed by and interpreted in accordance with the laws of the State of Oregon. (*Id*.). Therefore, the analysis as to whether Mr. Taggart would have been a "prevailing party" if he was dismissed pursuant to the bankruptcy injunction would have been conducted by the Washington County Circuit Court judge pursuant to Oregon law.

have been entitled to attorney fees under the SPBC Operating Agreement either.

Regardless, however, Mr. Taggart's actions do not suggest that his requests for dismissal under the § 524 injunction were for the purpose of continuing his counterclaim for attorney fees, but rather to extricate himself from the lawsuit altogether. Unlike in *Kozak*, the fact that Mr. Taggart failed to affirmatively dismiss his counterclaim does not change the conclusion either, because the appellees here never requested that Mr. Taggart dismiss his counterclaim after arguing that he should remain in the case, nor did Mr. Taggart's failure to seek dismissal of the counterclaim cause appellees to take action themselves lest they face judgment. Lastly, Mr. Taggart's actions in requesting to be dismissed pursuant to his bankruptcy injunction, opposing the second deposition, and failing to dismiss his counterclaim should not have indicated to the appellees that he affirmatively intended to seek attorney fees.

For all of these reasons, Mr. Taggart's actions were not sufficiently affirmative and voluntary to be considered returning to the fray. The bankruptcy court's decision on this issue is reversed and this case should be remanded for consideration of whether Mr. Taggart has proven whether appellees knowingly violated the discharge injunction in seeking attorney fees.

CONCLUSION

The Bankruptcy Court's decision is REVERSED AND REMANDED for further proceedings consistent with my ruling.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON

In Re: BRADLEY WESTON TAGGART,

Debtor.

Bankruptcy Case No. 09-39216-rld7

MEMORANDUM OPINION

On November 14, 2011, I received evidence and heard testimony and argument at the hearing ("Hearing") on debtor Bradley Weston Taggart's ("Mr. Taggart") Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction under 11 USC § 524 ("Contempt Motion").[3] Hereafter, Messrs. Brown, Emmert and Jehnke will be referred to collectively as the "Respondents" and individually as "Mr. Brown," "Mr. Emmert" and "Mr. Jehnke," as appropriate. The Hearing was limited to issues as to liability. If I decide the Contempt Motion in favor of Mr. Taggart, a further evidentiary hearing will be scheduled to receive evidence and hear testimony as to Mr. Taggart's damages. At the conclusion of the Hearing, I took the matter under advisement.

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[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

In deciding this matter, I have considered carefully the testimony presented and the exhibits admitted at the Hearing, as well as arguments presented, both in legal memoranda and orally. I further have taken judicial notice of the docket and documents filed in Mr. Taggart's main chapter 7 case, Case No. 09-39216-rld7 ("Main Case"), for the purpose of confirming and ascertaining facts not reasonably in dispute. Federal Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E. D. Pa. 2006). In addition, I have reviewed relevant legal authorities, both as cited to me by the parties and as located through my own research.

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

Factual Background

Unfortunately, the proceedings in this court culminating in the Hearing represent no more than one pitched battle in the longstanding disputes among the parties and their counsel. It is neither the beginning, nor I fear, the end. I will refer to the underlying grievances among them only as necessary to set the stage for the filing of the Contempt Motion and its aftermath.

Mr. Taggart was a general contractor, who operated through a corporation, Builders, Inc. Mr. Taggart developed several business parks, anchored by tenants who also were owners. Sherwood Park Business Center, LLC ("SPBC") was formed to build and operate a two-building business park in Sherwood, Oregon. Its Operating Agreement reflects that it was organized on or about October 12, 1999. See Exhibit 1,

at p. 18. Initially, SPBC was owned by four members, each with a 25% member interest: Mr. Taggart, Mr. Jehnke, Mr. John Hoffard and Mr. Anthony Benthin. See id. at p. 19. Mr. Taggart was designated as the Manager. See id. at p. 3. Apparently, at some point, Mr. Emmert succeeded to the member interest of Mr. Benthin in SPBC.

In 2004, Mr. Enunert acquired a 50% ownership interest in Builders, Inc. Thereafter, relations between Mr. Taggart and Mr. Emmert became contentious, and Mr. Taggart ultimately encouraged three creditors to file an involuntary bankruptcy petition against Builders, Inc., which had become insolvent while the SPBC buildings were being constructed. "When SPBC paid approximately $33,000 to Builders, Inc. to be used as a deposit for a steel building, Builders, Inc. used the funds for payroll instead." Taggart Trial Brief ("Taggart Trial Brief"), Main Case Docket No. 50, at p. 2. That conduct ultimately resulted in Mr. Taggart being replaced as the SPBC Manager by Mr. Jehnke. Id.

Mr. Taggart's financial condition subsequently deteriorated further. On July 23, 2007, Mr. Taggart formed BT of Sherwood, LLC ("BT") and transferred his 25% member interest in SPBC to BT. Mr. Taggart was represented by attorney John M. Berman ("Mr. Berman") with respect to the formation of BT and the transfer of Mr. Taggart's member interest in SPBC to BT. Mr. Berman informed counsel for SPBC that the transfer had been made. See Exhibit 2. SPBC's counsel responded that Mr. Taggart had no right to make such a transfer. See Exhibit 3. Mr. Taggart later transferred his entire member interest in BT to Mr. Berman in exchange for payments totaling $200,000. See Taggart Trial Brief, at pp.3-4; and Exhibit 5.

On or about September 24, 2008, SPBC filed a complaint ("Complaint") against Mr. Taggart, BT and Mr. Berman in the Washington County, Oregon Circuit Court ("Circuit Court"), asserting claims for breach of fiduciary duty, expulsion, breach of contract, attorney's fees and declaratory relief (the "Circuit Court Lawsuit"). See Exhibit A. On or about February 24, 2009, SPBC filed a First Amended Complaint ("Amended Complaint") in the Circuit Court Lawsuit, asserting essentially the same claims with elaborating allegations. See Exhibit B.

On October 28, 2009, Mr. Taggart filed an answer ("Answer") to the Amended Complaint, asserting affirmative defenses of failure to state a claim upon which relief could be granted and claim preclusion and stating a counterclaim for attorney's fees against SPBC, Mr. Jehnke and Mr. Emmert. See Exhibit C.

In the meantime, Mr. Taggart's financial condition was not improving. He wanted to be done with SPBC, he wanted to be free of his connections with Mr. Jehnke and Mr. Emmert, and he had no money to fund participation in the Circuit Court Lawsuit. On November 4, 2009, the day that the trial in the Circuit Court Lawsuit was to begin, Mr. Taggart filed for protection under chapter 7 of the Bankruptcy Code. See Main Case Docket No. 1. In his Schedule B list of personal property assets, Mr. Taggart did not include any interest in either SPBC or BT, but he did include a potential attorney fee award on his counterclaim in the Circuit Court Lawsuit. See Exhibit D, at p. 2; Main Case Docket No. 1, Schedule B. The trustee in Mr. Taggart' s chapter 7 case filed a report of no assets available for distribution, and Mr. Taggart received his discharge by order entered on February 23, 2010. See Main Case Docket Nos. 14 and 15. Apparently, all

action in the Circuit Court Lawsuit was stayed while Mr. Taggart's bankruptcy case was pending.

After Mr. Taggart received his discharge, the Circuit Court Lawsuit was revived. In behalf of Mr. Jehnke and Mr. Emmert, Mr. Brown subpoenaed Mr. Taggart for a deposition on April 9, 2010. See Exhibit 10. Mr. Berman, in behalf of Mr. Taggart, filed a motion for a protective order requesting that the subpoena be quashed, supported by the declaration of Mr. Taggart. See Exhibit E. Mr. Taggart argued that he already had been subjected to in 8-hour videotaped deposition in the Circuit Court Lawsuit, and requiring him to submit to a further deposition in the same case was "harassing, annoying and oppressive." Id. at p. 2. In the motion for protective order, Mr. Berman requested attorney's fees in behalf of BT and Mr. Taggart. Id. at p. 3. The Hearing record is unclear as to the ultimate disposition of the motion for a protective order: Mr. Taggart testified that the Circuit Court never ruled on the motion. Mr. Brown testified that it was his understanding that the Circuit Court denied the motion. In any event, Mr. Taggart appeared at the deposition and was deposed by an attorney for Mr. Emmert other than Mr. Brown.

The rescheduled trial ("Trial") in the Circuit Court Lawsuit was set to begin on May 18, 2010. On May 17, 2010, Mr. Berman filed a Motion to Dismiss and corresponding order to dismiss Mr. Taggart from the Circuit Court Lawsuit in behalf of Mr. Taggart. See Exhibit 12. Neither the Motion to Dismiss nor the accompanying order referenced Mr. Taggart's counterclaim for attorney's fees and costs.

The Motion to Dismiss was argued on the first day of the Trial. While counsel for Mr. Jehnke and Mr.

Enunert agreed that they would not be seeking monetary relief against Mr. Taggart, Mr. Brown argued that Mr. Taggart was a necessary party with respect to the expulsion claim. The Circuit Court ruled that no money judgment would be entered against Mr. Taggart but otherwise denied the Motion to Dismiss. See Exhibit 13, which includes the portion of the Trial transcript relating to the Motion to Dismiss. No other portion of the Trial transcript was submitted in evidence at the Hearing. Mr. Brown testified that Mr. Berman orally renewed the Motion to Dismiss in behalf of Mr. Taggart at the end of the Trial, and the renewed motion was denied. Mr. Taggart apparently did not appear or testify at the Trial.

Following the Trial, the Circuit Court generally found in favor of SPBC, and Mr. Brown drafted the Findings of Fact and Conclusions of Law ("Findings and Conclusions") that the Circuit Court signed. See Exhibit H. All counterclaims of Mr. Taggart and BT in the Circuit Court Lawsuit were dismissed with prejudice. See id. at p. 9. The Findings and Conclusions were entered on July 29, 2010.

After a delay of a number of months, Mr. Brown prepared and submitted a form of judgment in the Circuit Court Lawsuit to which Mr. Berman objected. The objections to the form of judgment ("Objection to Judgment") were filed by Mr. Berman as "attorney for Defendants BT of Sherwood LLC and John Berman." See Exhibit J, particularly at p. 7. Mr. Taggart testified that Mr. Berman prepared the Objection to Judgment, in part, for him. The Objection to Judgment contains the following, that I quote at length:

> The reason that no General Judgment has been submitted is because as a matter of federal law no attorney fees or costs, pre- or post-

bankruptcy, can be assessed against Mr. Taggart. Thus, the payment to him for the 25% interest [in SPBC] must be without any such offsets, as explained infra.

Mr. Brown, who submitted this form of General Judgment, is fully aware that he is asking the Court to participate in a violation of federal law. Moreover, he has been told that any attempt to seek such fees or costs will result in a legal proceeding against the responsible parties in the Bankruptcy Court for violation of Mr. Taggart's discharge. It is up to this Court to decide how it wishes to respond when an attorney asks it to violate federal law without even advising this Court that it is being asked to do so.

DETAILS OF OBJECTIONS TO JUDGMENT

A. The proposed judgment states as follows, with the objectionable parts italicized, at page 3 lines 3-6 [:]

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

As you may recall, Mr. Taggart concluded that he had assigned his interest and received fair value. He considered himself to have no interest in this proceeding and asked at the commencement of the trial to be dismissed. He

did not appear at trial or participate in any manner.

Under these facts it is a violation of federal law for anyone to attempt to obtain any award of attorney fees against him. Mr. Taggart has received a discharge in bankruptcy, and that discharge includes any liability arising from a continuation of this proceeding.

SPBC insists that he continues to be the owner of the 25% interest, even though Mr. Taggart made no such claim and did not engage in the litigation. SPBC and Messrs. Jehnke and Emmert cannot force the continuation of this litigation on Taggart, and then assert a claim for attorney fees and costs against him.

That was the express holding in In re Ybarra, 424 F[.]3d 1018 (2005), a copy of which is attached to this brief. It held that where a litigant actively asserts claims in litigation post-petition, only then can he be assessed post-petition attorney fees, overruling In re Ybarra, 295 BR 609 (USBAP, 2002), which held that even then attorney fees could not be awarded.

As explained in the Ninth Circuit's decision, and there are numerous other cases that have so held in other jurisdictions, when one is discharged in bankruptcy from liability, including liability associated with prepetition litigation, the fact that the litigation continues without any involvement by the discharged debtor means that no attorney fees or

costs on account of those claims can be asserted against the discharged debtor. His right to a fresh start is preeminent.

The relevant fact is whether the discharged debtor asserted claims in this case post-petition. He did not. Here Taggart did not do so, but actively sought to be dismissed from the case.

In addition, the reference to deducting from the payment to be made to Taggart any fees or costs in this or the Bankruptcy Court is improper, not only for the above reasons, but also because it suggests that this court has some authority to assess attorney fees incurred in some unspecified later bankruptcy court proceeding, or some other proceeding in this court, and to deduct them from what Taggart is owed, for which there is absolutely no basis. Rather, Messrs. Jehnke and Emmert have no legal basis for their claims. They just don't want to pay for what they say they want to buy. This is not an option.

The italicized portion of the judgment quote[d] above violates federal law and must be stricken.

Id. at pp. 1-4.

The Objection to Judgment further states:

The payments must be paid to seller. There is no provision in the Operating Agreement for any escrow account. Messrs. Jehnke and Emmert want to be the owners of the 25% that Mr. Taggart had owned. They have to pay for it, and they have to pay Mr. Taggart for it. Otherwise, Mr. Taggart would be entitled to the rights of an owner, which Messrs. Emmert

> and Jehnke have said terminated on January 1, 2008.

Id. at p. 6.

On May 2, 2011, the Circuit Court held a hearing ("Judgment Hearing") on the form of judgment to be entered in the Circuit Court Lawsuit. Mr. Taggart appeared at the Judgment Hearing, purportedly representing himself. See Exhibit K, at p.1. Mr. Berman also appeared, representing himself and BT, but he stated to the Circuit Court that Mr. Taggart "consents to what I am proposing." Id. Much of the argument focused on when interest would begin to run on the value of Mr. Taggart's SPBC membership interest to be sold and how proceeds to Mr. Taggart from such sale would be distributed. See Exhibit K, at pp.2-14. When Mr. Taggart was called upon to address the Circuit Court, he stated the following:

> MR. TAGGART: Only - the only thing I'd like to say, Your Honor, is that if - if the date is in 2008, then they do - I feel they owe interest on that date. If it's not, then I -I deserved the - the tax benefit from that period of time. They can't have their cake and eat it too, in my opinion, so -
>
> THE COURT: Very well.
>
> MR. TAGGART: Fair is fair. Regarding the bankruptcy, my bankruptcy was discharged before you made your decision. There have been considerable payments made on the taxes already. We don't know what's the totals of those right now. My feeling is that any money that comes out of this should go into either an escrow account or Mr. Berman's trust account until we determine exactly what that number is. They' re hopefully not going to

> be receiving a hundred percent of the proceeds, so -

Id. at p. 16.

The General Judgment ("Judgment") in the Circuit Court Lawsuit was entered on May 26, 2011. See Exhibit L. The Judgment contained the following specific provisions with respect to Mr. Taggart:

> (1) Brad Taggart's attempted transfer of his membership interest in [SPBC] to [BT] violated the Operating Agreement and Oregon law. The transfer is hereby deemed null and void.
>
> (2) Brad Taggart engaged in wrongful conduct as a member of [SPBC]. Brad Taggart is hereby expelled from [SPBC] effective January 1, 2008.
>
> (3) Counterclaim Defendants Emmert and Jehnke have timely elected to purchase Taggart's 25% membership interest. Pursuant to Section 12.5 of the Operating Agreement, the other remaining members of [SPBC], Keith Jehnke and Terry W. Emmert, are entitled to purchase Brad Taggart's 25% membership interest in [SPBC] as follows:
>
> The purchase price shall be the fair market value of the Company as of the date of entry of Judgment multiplied by Taggart's 25% membership interest, less any unpaid post-bankruptcy petition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and any necessary proceedings in bankruptcy court or this court.

> The fair market value shall be determined by a third-party appraiser acceptable to Jehnke, Emmert and Taggart. Within 90 days of the valuation, Jehnke and Emmert shall pay twenty percent of the purchase price as a downpayment, and the balance shall be paid in 60 substantially equal, consecutive monthly payments, including principal and interest. Interest shall accrue from the date of closing at the prime rate quoted by Wells Fargo Bank at Portland, Oregon on the date that this Judgment is entered. Emmert and Jehnke may prepay some or all of the outstanding balance at any time without penalty or additional interest.

Judgment, Exhibit L, at pp. 1-2.

Both Mr. Taggart and BT appealed the Judgment. Mr. Taggart testified that he is representing himself in the appeal, but he acknowledged that Mr. Berman assisted him in preparing the Notice of Appeal. See Exhibit O.

Thereafter, Mr. Brown filed a petition for costs and attorney's fees ("Petition") in behalf of SPBC, Mr. Jehnke and Mr. Emmert in the Circuit Court Lawsuit. See Exhibit M. The Petition reflected the understanding that any liability of Mr. Taggart for fees "would be limited to fees incurred after he filed for bankruptcy on November 4, 2009 . . , " citing Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F. 3d 1018 (9th Cir. 2005). Id. at p. 4. At oral argument on the Petition, Mr. Brown clarified that fees and costs were sought from Mr. Taggart only for the period following the date of his discharge, February 23, 2010. See Exhibit R at p. 3 (p. 11 of the hearing transcript). Mr.

Taggart filed objections to the Petition pro se, supported by a Hearing Memorandum prepared by Mr. Berman as Mr. Taggart's attorney. See Exhibit 19. Mr. Brown filed a Reply Memorandum in behalf of SPBC, Mr. Jehnke and Mr. Emmert. See Exhibit P. Mr. Berman called and examined Mr. Taggart as a witness at the hearing on the Petition. See Exhibit R, at pp. 5-6 (pp. 17-21 of the hearing transcript). At the conclusion of the hearing on the Petition, the Circuit Court took the matter under advisement.

On August 11, 2011, the Circuit Court issued a letter opinion ("Letter Opinion") addressing the Petition. See Exhibit Q. The Letter Opinion states the following with respect to Mr. Taggart:

> The court notes that In re Ybarra, 424 F[.]3d 1018 (9th Cir. 2005) holds that the trial court has power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition. This is consistent with the federal case law the court reviewed.
>
> Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement. The answer also sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at the time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather he continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees.

> The court awards attorney fees in favor of BT of Sherwood [sic-actually, SPBC] in the amount sought at oral argument. My notes are difficult to decipher but I believe that amount was $44,691.50. (It may be accurately $44,611.50 as the ten column is the one I am having trouble reading.) Costs and disbursements sought as well as the standard prevailing party fee are also appropriate.
>
> [SPBC] is the prevailing party with respect to Brad Taggart (as noted above) . . . .

Exhibit Q, at pp. 1-2.

In the meantime, on July 13, 2011, Mr. Taggart had filed the Contempt Motion, as supplemented by allegations on August 15, 2011. See Main Case Docket Nos. 24 and 31-32. Following the filing of opposition papers and preliminary proceedings, as noted above, the Contempt Motion proceeded to the evidentiary Hearing on November 14, 2011. See Main Case Docket No. 63. At the Hearing, Mr. Taggart testified that his deal with Mr. Berman is if he receives anything for the value of the contested membership interest in SPBC, the proceeds will be split half to him to pay tax obligations and half to Mr. Berman.

Jurisdiction

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

Discussion

The question before me is whether the Respondents violated the discharge injunction provided for in § 524(a)(2) by continuing to prosecute the Circuit Court Lawsuit against Mr. Taggart to the point of requesting an offsetting award of attorney's fees and

costs against him after he received his discharge in his chapter 7 bankruptcy case. Section 524(a)(2) provides that, "A discharge in a case under this title - (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . . "

Procedurally, an alleged violation of the discharge injunction is pursued, as in this case, by a motion invoking the contempt remedies allowed for in § 105(a). See Walls v. Wells Fargo Bank. N.A., 276 F.3d 502, 509-10 (9th Cir. 2002). In order to be subject to sanctions for violating the discharge injunction, a party's violation must be "willful." The Ninth Circuit has adopted a two-part test to determine whether the willfulness standard has been met: 1) Did the alleged offending party know that the discharge injunction applied; and 2) did such party intend the actions that violated the discharge injunction? See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006); Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390 (9th Cir. 1996). The burden of proof for the moving party is clear and convincing evidence. See In re Zilog, Inc., 450 F.3d at 1007; Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) ("The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.").

Where litigation is commenced prepetition and is recommenced postpetition or postdischarge, the Ninth Circuit has set forth the standards to determine whether the continued prosecution of such litigation violates the discharge injunction of § 524(a)(2) in Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018 (9th Cir. 2005). The ultimate question is

whether the discharged debtor has voluntarily "returned to the fray" in the renewed litigation. Siegel v. Federal Home Loan Mortg. Corp., 143 F.3d 525, 533-34 (9th Cir. 1998).

In re Ybarra is the saga of a die-hard litigant who paid the ultimate price for her belief in her claims. Ms. Ybarra sued her former employer, Rockwell International Corporation ("Rockwell"), originally in 1988. In her Fifth Amended Complaint, filed in April 1991, Ms. Ybarra asserted two causes of action against Rockwell: 1) employment discrimination in violation of California Government Code § 12940; and 2) violation of the covenant of good faith and fair dealing. In re Ybarra, 424 F.3d at 1020. On December 10, 1991, Ms. Ybarra filed a chapter 11 bankruptcy petition, but she did not disclose her claims against Rockwell in her schedules. Id. Rockwell first learned of Ms. Ybarra' s bankruptcy case in 1993 and moved to convert the case to chapter 7. Id. Rockwell's motion was granted, and the case was converted in June 1993. Id.

Rockwell negotiated a $17,500 settlement of Ms. Ybarra's claims with the chapter 7 trustee, to which Ms. Ybarra objected. Id. However, the bankruptcy court approved the settlement over Ms. Ybarra's objections on November 12, 1993. Id. Thereafter, the state court granted the trustee's and Rockwell's motion to dismiss Ms. Ybarra's lawsuit. Id.

In the meantime, Ms. Ybarra had amended her schedule of exempt property to add her lawsuit against Rockwell. Rockwell objected to her amended exemption claim, and the bankruptcy court sustained Rockwell's objection. Id. That decision was reversed by the Bankruptcy Appellate Panel, which was affirmed by the Ninth Circuit. On remand, the bankruptcy court upheld Ms. Ybarra's exemption claim

and gave her the option of accepting the $17,500 settlement amount from Rockwell or proceeding with her lawsuit against Rockwell in state court. Id. She chose to proceed with her lawsuit.

Thereafter, Ms. Ybarra persuaded the state court to set aside its dismissal order, and the case proceeded on Rockwell's motion for summary judgment. Id. Summary judgment ultimately was granted in Rockwell's favor. Rockwell then moved for an award of fees and costs under California law and was awarded $456,884.03 against Ms. Ybarra. Id. at 1020-21.

Ms. Ybarra previously had received her discharge in bankruptcy in May 1998. Rockwell filed a motion in the bankruptcy court for leave to enforce the state court's award of fees and costs. The bankruptcy court granted Rockwell's motion to the extent of $159,030.78, the total amount of fees and costs incurred by Rockwell after Ms. Ybarra filed her bankruptcy petition. Id. at 1021. Ms. Ybarra appealed to the Bankruptcy Appellate Panel, which reversed, "holding that the entire fee and cost award was discharged in [Ms.] Ybarra's bankruptcy." Id.

On further appeal, the Ninth Circuit reversed the Bankruptcy Appellate Panel, citing Siegel, for its holding that "post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily 'pursue[d] a whole new course of litigation,' commenced litigation, or 'return[ed] to the fray' voluntarily." Id. at 1024 (quoting Siegel, 143 F.3d at 533-34).

> Whether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a

> prepetition claim and has thereby risked the liability of these litigation expenses.

In re Ybarra, 424 F.3d at 1026.

Both Mr. Taggart and the Respondents have cited In re Ybarra to me and to the Circuit Court as setting forth the relevant legal standard to consider whether the Respondents violated the discharge injunction of § 524(a)(2) in seeking a judgment against Mr. Taggart in the Circuit Court Litigation, including an award of attorney's fees and costs. Based on the record before it, and specifically noting the application of In re Ybarra, the Circuit Court determined that an award of post-petition attorney's fees against Mr. Taggart was not barred by the discharge injunction, citing primarily Mr. Taggart' s never having abandoned his counterclaim for attorney's fees in the Circuit Court Litigation. See Letter Opinion, Exhibit Q, at pp. 1-2.

Injunctions issuing from the core jurisdictional authority of the bankruptcy court are not subject to collateral attack in other courts. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1082 (9th Cir. en Banc 2000) (citing Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995)). The discharge injunction of § 524(a)(2) is such an injunction.

However, the Ninth Circuit further has held that a state court is not divested of jurisdiction "to determine the applicability of a discharge order when discharge in bankruptcy is raised as a defense to a state cause of action filed in a state court . . . ." McGhan v. Rutz (In re McGhan), 288 F.3d 1172, 1180 (9th Cir. 2022). Accordingly, a state court, such as the Circuit Court in this case, has concurrent jurisdiction with this court to interpret the bankruptcy court's discharge orders, but it has no authority to modify them. See In re McGhan, 288 F.3d at 1179-80.

In Gruntz, where the automatic stay injunction of § 362 was considered, the Ninth Circuit stated that, "even assuming that the states had concurrent jurisdiction, their judgment would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings." In re Gruntz, 202 F.3d at 1083. The Ninth Circuit applied the same principle to alleged violations of the discharge injunction of § 524 in In re McGhan. Accordingly, neither issue preclusion nor the Supreme Court's Rooker-Feldman doctrine preclude my review of the Circuit Court's findings and conclusions with respect to the scope and application of the discharge injunction regarding the Respondents' pursuit of the Judgment and an award of attorney's fees and costs against Mr. Taggart in the continued Circuit Court Litigation. See In re McGhan. 288 F.3d at 1181; In re Gruntz, 202 F.3d at 1083-84. "In short, the state court has jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly." Pavelich v. McCormick Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich), 229 B.R. 777, 784 (9th Cir. BAP 1999). See Huse v. Huse-Sporsem, A.S. (In re Birting Fisheries. Inc.), 300 B.R. 489, 500 (9th Cir. BAP 2003).

What the foregoing authorities do not make clear is, in circumstances where the state court has applied the correct legal authority in interpreting this court's discharge order, what standard of review applies to the state court's fact findings. Ordinarily, the standard for review of a trial court's fact findings is "clear error." SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008). There are important reasons behind that standard.

> The rationale for deference to the original finder of fact is not limited to the superiority

> of the trial judge's position to make determinations of credibility [although that superiority of position is important in itself]. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. . . . As the court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" Wainwright v. Sykes, 433 U.S. 72, 90 . . . (1977). For these reasons, review of factual findings under the clearly-erroneous standard - with its deference to the trier of fact - is the rule, not the exception.

Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985) (emphasis in original).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." Anderson v. City of Bessemer City, 470 U.S. at 573.

In this case, after citing In re Ybarra, the Circuit Court found that it was appropriate to award postpetition attorney's fees against Mr. Taggart as an offset to the purchase price for his member interest in SPBC because Mr. Taggart had never abandoned his own

counterclaim for attorney's fees in the Circuit Court Litigation. See Letter Opinion, Exhibit Q, at pp. 1-2. At oral argument on the Petition, Mr. Brown reminded the Circuit Court that Mr Taggart had moved for a protective order in the Circuit Court Litigation postdischarge; that he had filed a motion to dismiss postdischarge, without moving for dismissal of his counterclaim for attorney's fees; and that he had claimed the potential award of attorney's fees in the Circuit Court Litigation as an asset in his bankruptcy. See Exhibit R, at p. 3 (pp. 9-11 of the hearing transcript). In addition, the Circuit Court presided at the Trial and thus had the opportunity first-hand to consider whether Mr. Taggart's interests were represented at the Trial. I do not have a complete transcript of the Trial to review. See Exhibit 13.

In these circumstances, I cannot conclude that the Circuit Court clearly erred in determining that the Respondents did not violate Mr. Taggart' s discharge injunction under § 524 (a)(2) in seeking a judgment and an award of offsetting, postpetition attorney's fees in the Circuit Court Litigation.

If the standard of review is de novo, my task is more complicated, but I ultimately likewise conclude that it is not appropriate to disturb the Circuit Court's findings and conclusions and further determine that Mr. Taggart's Contempt Motion should be denied for the following reasons.

Deciding the Contempt Motion presents mixed questions of law and fact. Review of "mixed questions" of law and fact requires consideration of legal principles and the exercise of judgment about the values underlying those legal principles. Consequently, review is de novo. Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230 (9th Cir. BAP 2007) (citing Murray v.

Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997). In re Beverly and In re Bammer involved determinations regarding, respectively, a debtor's entitlement to a general discharge and to the dischargeability of a particular debt. This case involves yet another determination to be made with respect to the bankruptcy discharge: the application of the injunction arising upon its entry. Accordingly, generally, a determination made pursuant to § 524(a)(2) also is a mixed question of law and fact subject to de novo review.

De novo review requires that I consider a matter anew, independent of any prior decision, as if it had not been heard before. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

Setting aside the Judgment and the Letter Opinion of the Circuit Court, the record reflects the following as to Mr. Taggart's participation in the Circuit Court Lawsuit postdischarge:

When Mr. Brown subpoenaed Mr. Taggart for a second deposition in the Circuit Court Lawsuit, Mr. Taggart had Mr. Berman file a motion for a protective order, requesting that the subpoena be quashed and further requesting attorney's fees. One day before the Trial, Mr. Berman filed a motion to dismiss Mr. Taggart from the Circuit Court Lawsuit in Mr. Taggart's behalf, without offering to dismiss Mr. Taggart's counterclaim for attorney's fees. That motion was argued on the first day of Trial, with Mr. Brown arguing that Mr. Taggart was a necessary party with regard to SPBC's expulsion claim. While recognizing that no money judgment would be entered against Mr. Taggart in light of his bankruptcy discharge, the Circuit

Court denied the motion to dismiss, and the Trial proceeded. Mr. Berman renewed his motion to dismiss in behalf of Mr. Taggart orally at the end of the Trial. Mr. Taggart did not appear or testify at the Trial.

Following the Trial, Mr. Berman filed the Objection to Judgment as "attorney for BT of Sherwood LLC and John Berman," but Mr. Taggart testified that Mr. Berman prepared the Objection to Judgment, in part, for him. A substantial portion of the Objection to Judgment, raises and argues objections in behalf of Mr. Taggart. At the Judgment Hearing, Mr. Berman told the Circuit Court that Mr. Taggart consented to what Mr. Berman was arguing, and again, much of Mr. Berman's argument focused on Mr. Taggart's issues. Mr. Taggart also appeared at the Judgment Hearing and argued before the Circuit Court. After the Judgment was entered, Mr. Taggart appealed it. He testified that he was representing himself in the appeal, but Mr. Berman had helped him in preparing his Notice of Appeal.

At the Hearing, Mr. Taggart testified that the Circuit Court Lawsuit had precipitated his personal bankruptcy filing. He also testified that when he filed for bankruptcy protection, he wanted to be finished with SPBC, he wanted to be freed from his connections with Mr. Jehnke and Mr. Emmert, and he had no money to fund further participation in the Circuit Court Lawsuit. In his bankruptcy schedules, he did not schedule any interest in SPBC or BT, but he did include a potential attorney's fee award on his counterclaim in the Circuit Court Lawsuit as an asset.

The foregoing presents a very mixed record. Individually, I am not sure that any of the actions of Mr. Taggart on his own or through Mr. Berman as outlined above would establish that Mr. Taggart renewed

active participation in the Circuit Court Lawsuit post-discharge. However, collectively, particularly from the point where the Circuit Court determined that Mr. Taggart's attempted transfer of his member interest in SPBC was ineffective and that he could be expelled from SPBC, I find on de novo review that Mr. Taggart reengaged in the Circuit Court Lawsuit, effectively "reentering the fray" for In re Ybarra purposes. As noted above, the burden of proof to prevail on a motion for contempt is clear and convincing evidence, and I further find that Mr. Taggart has not met that burden.

Conclusion

To recapitulate: 1) In light of the Circuit Court's application of the correct legal standard, citing In re Ybarra, if I review the Circuit Court's fact findings for clear error, I conclude that the Circuit Court did not clearly err in determining that it was appropriate to grant an offsetting award of postpetition attorney's fees against Mr. Taggart in the Circuit Court Lawsuit. 2) If my review is de novo, I find, based on the record before me, that at some point postdischarge, Mr. Taggart reengaged in the Circuit Court Lawsuit, and he did not meet his burden of proof to establish by clear and convincing evidence that the Respondents willfully violated the discharge injunction provided for in § 524(a)(2).

Based on the foregoing findings of fact and conclusions of law, I will deny Mr. Taggart's Contempt Motion. Mr. Smith or Mr. Streinz should prepare and submit an order denying the Contempt Motion within ten (10) days following the date of entry of this Memorandum Opinion.