

DEC 27 2013

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-12-1501-KuBaPa
)		
WILLIAM CHIONIS and)	Bk. No.	SA 09-18254-ES
HELEN CHIONIS,)		
)	Adv. No.	SA 10-01591-ES
Debtors.)		
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WILLIAM CHIONIS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
JAMES R. STARKUS,)		
)		
Appellee.)		
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Argued and Submitted on November 21, 2013
at Pasadena, California

Filed - December 27, 2013

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Appearances: Anerio Ventura Altman of Lake Forest Bankruptcy
argued for appellant William Chionis; appellee
James R. Starkus argued pro se.

Before: KURTZ, BALLINGER** and PAPPAS, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

**Hon. Eddward P. Ballinger, Jr., United States Bankruptcy
Judge for the District of Arizona, sitting by designation.

1 otherwise affect the Debt. The guaranties also contained a
2 provision stating that the guarantor's liability would not be
3 discharged except by full satisfaction of the Debt. According to
4 Starkus, he bargained for this language to be included in the
5 guaranties in part to protect himself from any bankruptcy filing
6 by Chionis and from the effect of any bankruptcy discharge
7 Chionis might receive. In Starkus' own words, he was concerned
8 at the time of the 2006 Loan transaction that "you could just
9 discharge somebody through bankruptcy and all their money would
10 be lost." Hr'g Tr. (May 21, 2012) at 30:8-9.

11 In August 2009, Chionis and his wife (collectively,
12 "Debtors") commenced their bankruptcy case by filing a chapter 7
13 petition.² Starkus was duly scheduled on the Debtors' bankruptcy
14 schedules, and Starkus received the standard form notice from the
15 bankruptcy court regarding the filing of the Debtors' chapter 7
16 bankruptcy case. That form notice was substantially the same as
17 Official Form 9A³ and advised Starkus of the date of the Debtors'
18 meeting of creditors pursuant to § 341(a) ("§ 341(a) Hearing").
19 The form notice further advised Starkus of the deadline for
20 filing complaints regarding the Debtors' right to a discharge.
21

22 ²Some of the background facts we refer to herein are drawn
23 from the Trial Declaration of William Chionis filed in the
24 underlying adversary proceeding on April 20, 2012 (Adv. Dkt.
25 No. SA 10-01591-ES, Doc. No. 8). This declaration was not
26 included in the parties' excerpts of record, but we can and do
27 take judicial notice of this document and others included in the
28 bankruptcy court's case and adversary dockets. See Ellsworth v.
Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 909
n.4 (9th Cir. BAP 2011).

³Use of the Official Forms is mandated by Rule 9009.

1 Starkus attended the Debtors' § 341(a) Hearing, but he did not
2 otherwise actively participate in the bankruptcy case.
3 Specifically, he never attempted to challenge in the bankruptcy
4 court the Debtors' right to discharge the Debt.

5 On February 8, 2010, the bankruptcy court entered a standard
6 form chapter 7 discharge order granting the Debtors a discharge
7 pursuant to § 727. The bankruptcy court sent Starkus a copy of
8 the discharge order, and Starkus has not disputed that he
9 received a copy of the order. The form order was substantially
10 the same as Official Form 18 and, on the reverse side, described
11 in lay terms the effect of the discharge as follows:

12 The discharge prohibits any attempt to collect
13 from the debtor a debt that has been discharged. For
14 example, a creditor is not permitted to contact a
15 debtor by mail, phone, or otherwise, to file or
16 continue a lawsuit, to attach wages or other property,
or to take any other action to collect a discharged
debt from the debtor. . . . A creditor who violates
this order can be required to pay damages and
attorney's fees to the debtor.

17 Reverse Side of Discharge Order (February 8, 2010).

18 The reverse side of the discharge order further explained
19 that "[m]ost, but not all, types of debts are discharged if the
20 debt existed on the date the bankruptcy case was filed." The
21 reverse side also provided a list of common types of
22 nondischargeable debts. The concluding paragraph on the reverse
23 side cautioned that its explanation of the effect of the
24 discharge was a general summary of the law and encouraged
25 interested parties to consult an attorney if they needed to
26 ascertain the precise effect of the discharge to their specific
27 situation.

28 In July 2010, notwithstanding his prior receipt of the

1 discharge order, Starkus filed a complaint against Chionis in the
2 Small Claims Court for the City of Temecula, California (Case No.
3 TES10001805). Starkus sought to recover \$7,500, the maximum
4 jurisdictional amount covered by the Temecula Small Claims Court,
5 on account of the Debt. In his small claims complaint, Starkus
6 acknowledged Chionis' bankruptcy and that Chionis had told him
7 that he no longer could collect on the Debt. But he attempted to
8 counter this acknowledgment by referencing the "no discharge"
9 provisions in the Loan documents.

10 The small claims complaint contained a notice that the
11 matter was set for trial on November 5, 2010. In response,
12 Chionis filed in the small claims court a request that the case
13 not proceed to trial. In his request, Chionis explained that the
14 Debt had been discharged in bankruptcy. Nonetheless, the small
15 claims court issued an order on September 27, 2010, setting a
16 hearing on Chionis' request for November 5, 2010, at the same
17 time as trial was scheduled.

18 The Debtors' bankruptcy counsel sent a letter to Starkus on
19 August 27, 2010, stating that the Debt had been discharged in the
20 Debtors' bankruptcy case and that the no discharge language in
21 the Loan documents was void and unenforceable as a matter of law.
22 The letter further warned Starkus that he was subject to being
23 sanctioned for filing the small claims complaint and would be
24 subject to further sanctions if he did not dismiss the small
25 claims case within ten days. Thereafter, the Debtors retained
26 new counsel who sought and obtained from the bankruptcy court, on
27 November 4, 2010, the day before the trial in the small claims
28 case, an order enjoining Starkus from proceeding with the small

1 claims case.

2 Starkus was given advance written and telephonic notice of
3 the bankruptcy court hearing on the Debtors' motion for an
4 injunction, but Starkus apparently did not attend the bankruptcy
5 court hearing and did not attempt to respond in writing to the
6 injunction motion. This seems odd, given that Starkus later
7 testified in the bankruptcy court that he filed the small claims
8 case primarily because he was seeking a simple way, without an
9 attorney, to obtain a judge's opinion on the validity of the no
10 discharge language in the Loan documents. As he later explained
11 in his appeal brief, he sought an "unbiased third party legal
12 opinion." Aple. Br. (May 21, 2013) at 6:54. The bankruptcy
13 court's tentative ruling, which is incorporated into the court's
14 order granting the injunction, addressed this very issue. It
15 stated that the no discharge language was unenforceable, citing
16 Bank of China v. Huang (In re Huang), 275 F.3d 1173, 1177 (9th
17 Cir. 2002).

18 The next day, November 5, 2010, Starkus and the Debtors'
19 counsel both traveled to the small claims court with the intent
20 to appear at the small claims hearing and trial. However, before
21 the hearing and trial occurred, the Debtors' counsel approached
22 Starkus and informed him of the new injunction. While Starkus
23 initially responded by disputing the bankruptcy court's authority
24 to determine the dischargeability of the Debt, he ultimately left
25 the small claims court before his case was called, so neither the
26 trial nor the hearing took place.

27 On December 10, 2010, the Debtors filed a complaint seeking
28 contempt sanctions against Starkus. In the complaint's prayer

1 for relief, the Debtors requested compensatory damages, punitive
2 damages and attorney's fees and costs. However, the joint
3 pretrial order entered on May 10, 2012, which by its explicit
4 terms superseded the parties' pleadings, did not reference
5 punitive damages as a legal or factual issue. Nor did the
6 pretrial order mention punitive damages in any other way.⁴

7 The bankruptcy court held trial in the adversary proceeding
8 on May 21, 2012.⁵ After the parties presented their evidence,
9 the court announced its ruling from the bench, including its
10 findings of fact and its conclusions of law.

11 The court found that Starkus knew about the Debtors'
12 bankruptcy case, knew about the discharge order and intended the
13 conduct - the filing of the small claims complaint - which
14 violated the discharge order. But the court also found that
15 Starkus subjectively believed (albeit incorrectly) that, as a
16 result of the no discharge language in the Loan documents, the
17 discharge order did not preclude him from collecting the Debt.
18 Because of this subjective belief, the court inferred that
19 Starkus did not actually know that the discharge injunction
20 applied to the Debt.

21 According to the bankruptcy court, the Ninth Circuit Court
22

23 ⁴As a result, the Debtors abandoned their request for
24 punitive damages. In any event, citing Knupfer v. Lindblade
25 (In re Dyer), 322 F.3d 1178, 1195 (9th Cir. 2003), the bankruptcy
26 court ruled at the conclusion of trial that punitive damages can
27 not be awarded as part of the bankruptcy court's imposition of
28 civil contempt sanctions. Chionis has not challenged this ruling
on appeal.

⁵Chionis' wife Helen passed away in March 2012, so Chionis
proceeded to trial as the sole surviving plaintiff.

1 of Appeals decision in ZiLOG, Inc. v. Corning (In re ZiLOG,
2 Inc.), 450 F.3d 996, 1007 (9th Cir. 2006) required Chionis, as
3 the party seeking to demonstrate contempt, to prove by clear and
4 convincing evidence that Starkus: "(1) knew the discharge
5 injunction was applicable and (2) intended the actions which
6 violated the injunction." Id. Specifically with respect to the
7 first ZiLOG prong, the bankruptcy court explained, Chionis needed
8 to establish that Starkus subjectively knew that the discharge
9 applied to the Debt. The bankruptcy court ultimately held that
10 Chionis had not met his burden as to the first ZiLOG prong.

11 Based on its findings of fact and conclusions of law, the
12 bankruptcy court concluded that no civil contempt sanctions would
13 be imposed against Starkus for his violation of the discharge
14 order. On September 14, 2012, the bankruptcy court entered its
15 judgment in favor of Starkus, and on September 30, 2012, Chionis
16 timely appealed.⁶

17 JURISDICTION

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
20 § 158.

21 ISSUES

22 Did the bankruptcy court commit reversible error by
23 addressing the contempt proceedings in an adversary proceeding
24 instead of a contested matter?

25
26 ⁶Chionis sought and obtained leave from the bankruptcy court
27 for an extension of time to file his notice of appeal. That time
28 extension rendered Chionis' notice of appeal timely. See Rule
8002(c)(2).

1 Did the bankruptcy court abuse its discretion by not
2 imposing any sanctions against Starkus for his violation of the
3 discharge injunction?

4 **STANDARDS OF REVIEW**

5 The bankruptcy court's decision as to whether sanctions
6 should be imposed for a violation of the discharge injunction is
7 reviewed for an abuse of discretion. Nash v. Clark Cnty. Dist.
8 Atty's. Office (In re Nash), 464 B.R. 874, 878 (9th Cir. BAP
9 2012).

10 A bankruptcy court abuses its discretion if its decision is
11 based on an incorrect legal rule, or if its findings of fact were
12 illogical, implausible, or without support in the record. Id.
13 (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.
14 2009) (en banc)).

15 **DISCUSSION**

16 **A. Procedural Issue - Adversary Proceeding vs. Contested Matter**

17 Generally speaking, civil contempt sanctions for the
18 violation of the discharge injunction must be sought by contested
19 matter rather than an adversary proceeding. See Barrientos v.
20 Wells Fargo Bank, N.A., 633 F.3d 1186, 1190-91 (9th Cir. 2011).

21 In fact, a bankruptcy court may dismiss a complaint seeking
22 contempt sanctions for violation of the discharge injunction and
23 thereby require the party seeking sanctions to proceed by motion
24 instead. Id. at 1188.

25 Chionis, the appellant herein, initiated the adversary
26 proceeding and never challenged in either the bankruptcy court or
27 on appeal the utilization of an adversary proceeding to seek
28 civil contempt sanctions for Starkus' noncompliant conduct. We

1 have declined to remand solely on the ground that the bankruptcy
2 court determined the debtor's discharge violation claim in an
3 adversary proceeding rather than a contested matter, when the
4 appellant did not object to the bankruptcy court's use of the
5 adversary proceeding to dispose of the matter. See In re Nash,
6 464 B.R. at 879 (declining in the "interests of justice" to
7 remand simply because bankruptcy court heard and determined
8 discharge violation claim in an adversary proceeding rather than
9 in a contested matter).

10 Nonetheless, because we are vacating and remanding on other
11 grounds as discussed below, the bankruptcy court on remand should
12 issue an order converting the adversary proceeding to a contested
13 matter and should determine the unresolved damages issue in that
14 contested matter.

15 **B. Substantive Issue - Knowledge of Discharge Injunction**

16 Pursuant to § 524(a)(2), the discharge of a debtor in
17 bankruptcy prohibits creditors from making any attempt to collect
18 on prepetition debts, unless those debts have been excepted from
19 the discharge. In re ZiLOG, Inc., 450 F.3d at 1007; Renwick v.
20 Bennett (In re Bennett), 298 F.3d 1059, 1067 (9th Cir. 2002).

21 However, there is no private right of action for violation
22 of the discharge injunction; a party seeking to enforce the
23 discharge injunction must seek civil contempt sanctions.
24 Barrientos, 633 F.3d at 1188-89; Walls v. Wells Fargo Bank, N.A.,
25 276 F.3d 502, 506-07 (9th Cir. 2002). Civil contempt sanctions
26 may be imposed for violation of the discharge injunction when the
27 creditor willfully or knowingly violates a definite and specific
28 court order. In re ZiLOG, Inc., 450 F.3d at 1007; In re Bennett,

1 298 F.3d at 1069. In this context "willful" essentially means
2 that the alleged contemnor "knew of the injunction."

3 In re ZiLOG, Inc., 450 F.3d at 1008.

4 The discharge injunction constitutes a definite and specific
5 court order for purposes of contempt proceedings. See Knupfer v.
6 Lindblade (In re Dyer), 322 F.3d 1178, 1190-91 (9th Cir. 2003)
7 ("Because the 'metes and bounds of the automatic stay are
8 provided by statute and systematically applied to all cases,'
9 . . . there can be no doubt that the automatic stay qualifies as
10 a specific and definite court order."); In re ZiLOG, Inc.,
11 450 F.3d at 1008, n.12 (for purposes of determining whether a
12 violation of a court order constitutes civil contempt, there is
13 "no material difference between the discharge injunction and the
14 automatic stay.").

15 As the bankruptcy court correctly explained, the Ninth
16 Circuit Court of Appeals in In re ZiLOG held that the party
17 seeking to demonstrate contempt in the discharge injunction
18 context must prove by clear and convincing evidence that the
19 alleged contemnor: "(1) knew the discharge injunction was
20 applicable and (2) intended the actions which violated the
21 injunction." In re ZiLOG, Inc., 450 F.3d at 1007. In turn, the
22 first prong of the ZiLOG test requires the moving party to show
23 that the alleged contemnor actually knew that he or she was
24 subject to the terms of the discharge order. Id. at 1008.

25 The evident concern underlying ZiLOG's first prong is that
26 creditors should not be held in contempt for violation of an
27 order unless they actually are aware that the subject order
28 applied to them. Id.; see also In re 1601 W. Sunnyside Dr. #106,

1 LLC, 2010 WL 5481080, at *4 (Bankr. D. Idaho 2010) (citing
2 In re ZiLOG and noting that Ninth Circuit has been "reluctant to
3 hold an unwitting creditor in contempt."). Because the discharge
4 injunction is imposed by statute and also because discharge
5 orders typically do not identify the specific creditors or claims
6 subject to the discharge injunction, In re ZiLOG apparently
7 reasoned that receipt of a discharge order sometimes may not, by
8 itself, be sufficient to prove that a particular creditor was
9 subjectively aware of the discharge injunction's applicability to
10 its claim:

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

16 In re ZiLOG, Inc., 450 F.3d at 1009, n.14 (emphasis added).

17 The bankruptcy court here applied the correct legal standard
18 in determining whether it could impose sanctions against Starkus.
19 The court explicitly cited to In re ZiLOG, Inc., and it recited
20 the legal standard set forth in ZiLOG for the imposition of
21 discharge violation contempt sanctions.

22 But we must overturn the bankruptcy court's finding
23 regarding Starkus' actual knowledge of the discharge order and
24 its application to the Debt. It is undisputed that Starkus
25 received the form notice regarding the Debtors' bankruptcy filing
26 and later received a copy of the bankruptcy court's form
27 discharge order. In addition, Starkus admitted at trial, while
28 under oath, that he knew and understood at the time the general

1 effect of the discharge on claims like his: that the discharge
2 rendered such claims uncollectible. Starkus admitted that, prior
3 to the Debtors' bankruptcy filing, he sought to implement a
4 contractual workaround to avoid the specific legal effect of any
5 potential future discharge Chionis might obtain. Thus, he
6 clearly knew and understood the legal effect of the discharge:
7 "you could just discharge somebody through bankruptcy and all
8 their money would be lost." Hr'g Tr. (May 21, 2012) at 30:8-9.

9 The bankruptcy court in essence found that Starkus'
10 (incorrect) belief regarding the impact of the no discharge
11 language in the Loan documents negated any knowledge he otherwise
12 had regarding the applicability of the discharge order to the
13 Debt. We disagree. It is undisputed that the Debtors through
14 their counsel warned Starkus, both orally and in writing, and on
15 more than one occasion, that the no discharge language in the
16 Loan documents was invalid. It also is undisputed that Starkus
17 received notice of the Debtors' motion for an order enjoining the
18 small claims lawsuit from going forward. Yet Starkus chose to
19 ignore these warnings, as well as the proceedings seeking to
20 enforce the discharge order, and instead chose to press forward
21 with his small claims lawsuit up until moments before the trial.

22 Starkus never attempted to appear before the bankruptcy
23 court to assert his legal theory regarding the no discharge
24 language, even though the form notice of the Debtors' bankruptcy
25 filing advised him of the deadline for filing complaints
26 regarding the Debtors' right to a discharge and even though the
27 notice of the Debtors' injunction motion invited a response from
28 Starkus.

1 The only evidence in the record indicating that Starkus
2 believed he could enforce the Debt without violating the
3 discharge order was his own self-serving testimony. But given
4 the undisputed facts regarding all that Starkus knew and the
5 undisputed facts regarding Starkus' conduct, we hold that the
6 overwhelming weight of the evidence in the record is contrary to
7 the bankruptcy court's finding that Starkus did not know that the
8 discharge order precluded him from attempting to collect the
9 Debt. Thus, we conclude that the bankruptcy court's finding on
10 this point was illogical, implausible and without support in
11 inferences that reasonably could be drawn from the facts in the
12 record. See Hinkson, 585 F.3d at 1262.

13 Indeed, Starkus' knowledge and conduct in this case is
14 similar to the knowledge and conduct of the contemnors in McComb
15 v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). McComb in
16 relevant part held that a court may impose civil contempt
17 sanctions without finding that the contemnor specifically
18 intended to violate the court's order. In McComb, certain
19 employers were accused of violating a court order entered to
20 enforce a floor on employee wages and a ceiling on non-overtime
21 work hours imposed by the Fair Labor Standards Act ("Act"). The
22 order specifically enjoined the employers from violating the wage
23 floor and hours ceiling in the Act.

24 Instead of complying with the court order, the employers
25 attempted to evade the legal effect of the order by drafting and
26 implementing new employee compensation plans containing terms
27 that, while not specifically enjoined, effectively enabled the
28 employers to pay their employees less than the amount required by

1 the Act's wage floor and to force their employees to work more
2 non-overtime hours than permitted under the Act's hours ceiling.

3 The employers argued that the provisions in their new
4 employee compensation plans were not specifically enjoined, so
5 they could not be held in contempt. But the McComb court
6 disagreed and ruled that the district court should have held the
7 employers in contempt:

8 We need not impeach the findings of the lower courts
9 that respondents had no purpose to evade the decree, in
10 order to hold that their violations of it warrant the
11 imposition of sanctions. They took a calculated risk
12 when under the threat of contempt they adopted measures
13 designed to avoid the legal consequences of the Act.
14 Respondents are not unwitting victims of the law.
15 Having been caught in its toils, they were endeavoring
16 to extricate themselves. They knew full well the risk
17 of crossing the forbidden line. Accordingly where as
18 here the aim is remedial and not punitive, there can be
19 no complaint that the burden of any uncertainty in the
20 decree is on respondent's shoulders.

21 Id. at 193; see also Donovan v. Sureway Cleaners, 656 F.2d 1368,
22 1372-73 (9th Cir. 1981) (analogous facts and holding).

23 Similar to the contemnors in McComb, Starkus knew and
24 understood the legal effect of the order he is charged with
25 violating. But instead of complying with the discharge order, he
26 opted to rely upon the untested contractual no discharge language
27 he had implemented in an attempt to work around the unequivocal
28 legal impact of the discharge. As McComb aptly explained:

29 It does not lie in [the contemnors'] mouths to say that
30 they have an immunity from civil contempt because the
31 plan or scheme which they adopted was not specifically
32 enjoined. Such a rule would give tremendous impetus to
33 the program of experimentation with disobedience of the
34 law

35 McComb, 336 U.S. at 192; see also Espinosa v. United Student Aid
36 Funds, Inc., 553 F.3d 1193, 1205 & n.7 (9th Cir. 2008), aff'd,

1 559 U.S. 260 (2010) ("A creditor is not free to violate the
2 discharge injunction because it has doubts as to the validity of
3 the discharge.").

4 In re ZiLOG, Inc. is distinguishable. There, the chapter 11
5 debtor ZiLOG and the bankruptcy court had sent the creditors
6 charged with violating the discharge injunction misleading
7 notices indicating that their employment-related claims would not
8 be affected by ZiLOG's bankruptcy. In re ZiLOG, Inc., 450 F.3d
9 at 998, 1003, 1005. When the creditor-employees later attempted
10 to sue ZiLOG in state court, ZiLOG filed an action against the
11 creditor-employees in the bankruptcy court seeking to enforce the
12 discharge injunction contained in ZiLOG's confirmed chapter 11
13 plan of reorganization. Id. at 998-1000. The bankruptcy court
14 decided the action in ZiLOG's favor and imposed sanctions against
15 the creditor-employees for violating the discharge injunction.
16 Id. at 999-1000.

17 The Ninth Circuit Court of Appeals vacated the sanctions
18 award and remanded for further proceedings. According to the
19 Court of Appeals, the bankruptcy court on remand needed to
20 determine whether the creditor-employees actually were aware of
21 the discharge injunction and its applicability to their claims.
22 Id. at 1009. In a related footnote, the Court of Appeals pointed
23 out that the notices sent to the creditor-employees clouded the
24 willfulness issue and opined that "[t]o the extent that the
25 deficient notices led the [creditor-employees] to believe, even
26 unreasonably, that the discharge injunction did not apply to
27 their claims because they were not affected by the bankruptcy,
28 this would preclude a finding of willfulness." Id. at 1009 n.14.

1 Here, we are not dealing with a complex chapter 11
2 reorganization plan or with misleading notices from the debtor or
3 the bankruptcy court suggesting that the creditors were not
4 affected by the bankruptcy. To the contrary, the form chapter 7
5 discharge order issued by the bankruptcy court here indicated
6 that the Debt had been discharged, and Starkus admitted that he
7 knew and understood the general effect of the discharge.
8 Furthermore, the Debtors through their counsel advised Starkus
9 more than once that the no discharge language in the Loan
10 documents was invalid and unenforceable.⁷

11 We acknowledge that some of the language in In re ZiLOG,
12 Inc. is broad and arguably could be interpreted as precluding a
13 finding of willfulness and hence precluding the imposition of
14 contempt sanctions whenever the alleged contemnor testifies that,
15 for whatever reason, he or she did not subjectively believe that
16 the discharge applied to his or her claim, no matter how
17 misguided or unreasonable that belief might have been. However,
18 we do not believe that In re ZiLOG, Inc. intended such an
19 expansive reading of its comments, given that such a reading
20 seemingly would render the bankruptcy discharge all but

23 ⁷In re Nash, 464 B.R. at 880, also is distinguishable.
24 There, we affirmed the bankruptcy court's determination that the
25 Hard Rock Café and Casino had not violated the discharge
26 injunction because Hard Rock had not taken any action to collect
27 the subject debt after Nash's discharge order was entered. We
28 also affirmed on an alternate ground, holding that the evidence
in the record there established that neither of In re ZiLOG,
Inc.'s prerequisites for imposition of contempt sanctions had
been satisfied.

1 toothless.⁸

2 In any event, regardless of these competing concerns, we
3 hold that In re ZiLOG, Inc. did not preclude the bankruptcy court
4 here from finding that Starkus willfully violated the discharge
5 order, in light of the undisputed facts and circumstances
6 regarding Starkus' knowledge and conduct.

7 **C. Damages Issue**

8 Only those actual damages, including attorney's fees,
9 incurred as a result of the noncompliant conduct can be recovered
10 as part of a compensatory civil contempt sanctions award. See
11 In re Dyer, 322 F.3d at 1195. To award such sanctions, the court
12 must find that actual damages flowed from the contemnor's
13 noncompliant conduct. Id.; see also Rosales v. Wallace
14 (In re Wallace), 2012 WL 2401871, at *8 (Mem. Dec. 9th Cir. BAP
15 2012) (holding that bankruptcy court must make sufficient
16 findings to support its damages award).

17 Here, even though the bankruptcy court erred when it ruled
18 that Starkus was not liable for contempt sanctions because of his
19 _____

20 ⁸An expansive reading of In re ZiLOG, Inc. also would appear
21 to conflict with Barrientos, 633 F.3d at 1190, which held in part
22 that a chapter 7 debtor "cannot seek a second-order injunction"
23 to enforce the discharge injunction against a specific creditor.
24 According to Barrientos, permitting a debtor to seek such an
25 injunction is superfluous, repetitive and would afford no
26 additional relief given that the debtor, by operation of
27 § 524(a)(2), already has been granted a discharge injunction upon
28 entry of the discharge order. Id. But if In re ZiLOG, Inc. is
broadly interpreted, there will be cases in which the debtor will
not be able to enforce the § 524(a)(2) discharge injunction
without a "second-order" injunction, because the debtor otherwise
will not be able to establish that the noncompliant creditor knew
and subjectively believed that the § 524(a)(2) discharge
injunction applied to that creditor's claim.

1 subjective beliefs concerning the discharge order, this does not
2 mean that Starkus necessarily is liable for contempt sanctions.
3 The bankruptcy court never made definitive findings regarding
4 whether Chionis incurred compensable damages as a result of
5 Starkus' noncompliant conduct and, if so, what that amount of
6 damages was. At the conclusion of trial, the court came close to
7 rendering findings on the damages issue when it stated as
8 follows:

9 I noticed as an aside, because it's not germane to my
10 ultimate decision, that there was reference to damages.
11 I don't -- I looked all over. I couldn't actually find
12 specific evidence regarding damages. I may have
13 overlooked that. I assume there were some compensatory
14 damages at least relating to maybe attorney's fees.

15 Hr'g Tr. (May 21, 2012) at 45:14-19. Ultimately, however, the
16 court declined to render damages findings and instead relied on
17 its finding regarding Starkus' knowledge and belief concerning
18 the discharge to support its ruling that Starkus was not liable
19 for contempt sanctions.

20 On remand, the bankruptcy court will need to determine
21 whether, based on the evidence presented at trial, Chionis proved
22 that he incurred damages as a result of Starkus' violation of the
23 discharge injunction and, if so, the amount of damages Chionis
24 incurred.⁹

25 ⁹At oral argument before this Panel, counsel for Chionis
26 asserted that the bankruptcy court did not permit Chionis to
27 present evidence of damages at the time of trial. But we have
28 not found anything in the record to support this assertion. We
leave it to the bankruptcy court on remand to decide what, if
any, additional opportunity ought to be afforded to the parties
to submit evidence concerning the extent of Chionis' damages.

CONCLUSION

For the reasons set forth above, we REVERSE the bankruptcy court's finding regarding Starkus' subjective knowledge, we VACATE the bankruptcy court's judgment in favor of Starkus, and we REMAND for further proceedings consistent with this decision.

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