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NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-13-1373-PaTaKu
)	
MIGUEL ANGEL GRACIA,)	Bankr. No. 09-40594-BR
)	
Debtor.)	
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FABIO BANEGAS; GREGORY L.)	
DOLL,)	
)	
Appellants,)	
v.)	M E M O R A N D U M ¹
)	
MIGUEL ANGEL GRACIA,)	
)	
Appellee.)	
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Argued and Submitted on February 20, 2014
at Pasadena, California

Filed - April 4, 2014

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Ronald M. St. Marie of Doll Amir Eley LLP argued
for appellants Fabio Banegas and Gregory L. Doll;
Steven A. Schwaber argued for appellee Miguel
Angel Gracia.

Before: PAPPAS, TAYLOR and KURTZ, Bankruptcy Judges.

¹ 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.

1 Appellants Fabio Banegas ("Banegas") and Gregory L. Doll
2 ("Doll" and, together, "Appellants") appeal the order of the
3 bankruptcy court finding them in contempt for violation of the
4 discharge order entered in the chapter 7² bankruptcy case of
5 debtor Miguel Gracia ("Gracia"). We AFFIRM.

6 **FACTS**

7 Gracia filed a chapter 7 bankruptcy petition on November 9,
8 2009. He did not list Banegas as a creditor on his schedules.
9 Gracia received a discharge on March 11, 2010, and the bankruptcy
10 case was closed on March 21, 2010.

11 On October 7, 2010, represented by his attorney Doll,
12 Banegas filed a complaint (the "Original Complaint") in Los
13 Angeles Superior Court against Gracia alleging claims for fraud,
14 breach of contract, and conspiracy to commit fraud (the "State
15 Court Proceedings"). The Original Complaint included the
16 following allegations:

- 17 6. In November 2004, [Banegas] loaned [Gracia] \$7,000
18 from [Banegas'] checking account.
- 19 7. [Banegas] and [Gracia] agreed that [Gracia] would
20 invest said money into [Gracia's] business
21 transactions, and that [Banegas] would receive a
22 return on his investment every three to four
23 months. In reality, [Banegas] received a return
24 at irregular intervals.
- 25 8. [Banegas] is informed and believes that [Gracia]
26 invested the money, and would periodically pay
27 commissions to [Banegas].
- 28 9. Most of the commissions paid to [Banegas], in
addition to other savings, were reinvested by
Defendant and amounted to approximately \$45,000 by
the end of 2009.

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

- 1 10. As a form of collateral for the money invested by
2 [Banegas, Gracia] gave [Banegas] checks to
3 guarantee payment of the \$45,000.
4 11. In 2009, [Banegas] requested full payment of the
5 \$45,000, but only received \$10,000 from [Gracia].
6 12. In or about November of 2009, [Gracia] agreed
7 that, by the end of February 2010, [Gracia] would
8 pay the remaining \$35,000 to [Banegas].
9 13. By the end of February 2010, however, [Gracia]
10 failed to return the remaining \$35,000 to
11 [Banegas], as agreed. At considerable time and
12 expense, [Banegas] was able to collect only
13 \$5,000.

14 Original Complaint at 3, October 7, 2010.

15 On January 10, 2011, Gracia filed a motion to reopen his
16 bankruptcy case to add Banegas as a creditor. On March 1, 2011,
17 Appellants filed an opposition to this motion suggesting that
18 Gracia had concealed assets. Gracia responded on March 2, 2011,
19 denying that he had concealed assets. The bankruptcy court
20 reopened the case on March 31, 2011. The case was again closed
21 on April 21, 2011.

22 On October 26, 2012, Gracia filed two motions in the
23 bankruptcy court: a second motion to reopen case ("Second Reopen
24 Motion"), and a motion for a temporary restraining order to halt
25 the State Court Proceedings and to hold Appellants in contempt
26 for violation of the injunction arising from entry of the
27 discharge order in the bankruptcy case ("Contempt Motion").

28 On October 30, 2012, Appellants responded to the Second
29 Reopen and Contempt Motions. They generally argued that, in the
30 State Court Proceedings, Banegas was pursuing the recovery of
31 post-petition debts evidenced by the bounced checks given to him
32 by Gracia after the bankruptcy, which debts they claimed had not

1 been discharged.

2 The bankruptcy court held its first hearing on the Second
3 Reopen and Contempt Motions on November 7, 2012. After hearing
4 from counsel, the court concluded that, based on the facts
5 alleged in the Original Complaint, Banegas was indeed asserting a
6 prepetition claim against Gracia stemming from Banegas' payment
7 of the \$7,000 to Gracia in 2004, and that assertion of such
8 claims amounted to a violation of the discharge injunction. The
9 bankruptcy court therefore ordered that the State Court
10 Proceedings be stayed but, assuming there was a proper basis to
11 do so, directed Appellants to amend the complaint to recover only
12 post-petition debts. The bankruptcy court gave clear
13 instructions to Banegas and Doll regarding the contents of any
14 amended complaint: "By December 7th you'll file an amended
15 complaint in the Superior Court . . . and make it very clear that
16 that complaint will only deal with the . . . events that happened
17 post-petition . . . as long as there's no allegations of any
18 obligations of this debtor prepetition." Hr'g Tr. 21:4-22,
19 November 7, 2012. The court continued the hearing on the Second
20 Reopen and Contempt Motions.

21 On November 9, 2012, Appellants filed a motion in state
22 court for leave to file a First Amended Complaint ("FAC"). The
23 state court granted leave on February 20, 2013, and the FAC was
24 filed in the state court. Dissatisfied with its contents, Gracia
25 submitted a copy of the FAC to the bankruptcy court on March 2,
26 2013. The FAC alleged, among other facts, that:

- 27 6. In November 2004, [Banegas] invested \$7,000
28 through [Gracia] based on the representation that
said money would be invested by [Gracia] and earn

1 a higher rate of return than interest earned from
2 a bank account.

- 3 7. Specifically, [Banegas] and [Gracia] agreed that
4 [Gracia] would "invest said money into loan
5 transactions, and that [Banegas] would receive a
6 return on his investment every three to four
7 months. In reality, [Banegas] received a return
8 at irregular intervals.
- 9 8. [Banegas] is informed and believes that [Gracia]
10 invested the money in A to Z Cash, which [Banegas]
11 now understands is a business controlled by
12 [Gracia's] daughter, Massiel Gracia. Periodically,
13 [Gracia] would pay money earned from the
14 investment to [Banegas].
- 15 9. Most of the returns on the initial investment paid
16 to [Banegas], in addition to other savings, were
17 reinvested by [Gracia] on [Banegas'] behalf.
18 Eventually said amounts totaled approximately
19 \$45,000 by the end of 2009.
- 20 10. In 2009, [Banegas] requested full payment of the
21 \$45,000, yet initially received \$10,000 from
22 [Gracia].
- 23 11. After November 4, 2009, [Gracia] agreed that, by
24 the end of February 2010, [Gracia] would
25 personally pay the remaining \$35,000 to [Banegas].
26 In consideration for this, [Banegas] agreed to
27 forbear on any immediate collection efforts to
28 recover the debt owed by A to Z Cash or [Gracia's]
daughter.
12. By the end of February of 2010, however, [Gracia]
failed to return the remaining \$35,000 to
[Banegas], as agreed. At considerable time and
expense, [Banegas] was able to collect only
\$5,000. To assure future payments, [[Gracia]
agreed to issue, and after November 4, 2009 did
issue, personal checks in the amount of \$5,000
each, totaling \$30,000.
13. On or about April 29, 2010, [Banegas] again agreed
to pay Plaintiff the remainder of the debt in two
installments of \$15,000.

25 FAC at 3, November 9, 2012.

26 At the continued hearing on the Second Reopen and Contempt
27 Motions, held on March 19, 2013, the bankruptcy court reviewed
28 the FAC and found that it also alleged facts stating a claim in

1 violation of the discharge injunction. The court ordered that
2 the bankruptcy case be reopened and ruled that the FAC violated
3 the discharge injunction. The court gave Appellants one last
4 opportunity to prepare another amended complaint, to be presented
5 first to the bankruptcy court for review, that omitted the
6 offensive allegations. The hearing was continued again.

7 As directed, Appellants submitted a proposed Second Amended
8 Complaint ("SAC") to the bankruptcy court for review on April 25,
9 2013. The hearing concerning the SAC, Second Reopen Motion and
10 Contempt Motion occurred on May 7, 2013. In its order granting
11 the Second Reopen Motion on May 16, 2013, the bankruptcy court
12 determined that the SAC, as presented, did not violate the
13 discharge injunction, that the State Court Proceedings could go
14 forward, and that there would be a continued hearing on sanctions
15 for violation of the discharge injunction.

16 The bankruptcy court held a final hearing on July 23, 2013.
17 The court granted the Contempt Motion; it awarded Gracia damages
18 based on the attorney fees and costs he had incurred in
19 prosecuting the Contempt Motion, but declined any award for his
20 fees and costs incurred in the State Court Proceedings. The
21 bankruptcy court entered an order on August 5, 2013, imposing the
22 compensating sanctions against Appellants, jointly and severally,
23 in the amount of \$13,673.00. The order recited, in part, that:

24 [Appellants] violated the statutory discharge
25 injunction imposed under 11 U.S.C. § 524(a)(2) by
26 filing their original Complaint and their First Amended
27 Complaint in the Los Angeles Superior Court case
28 entitled Fabio B[a]negas v. Miguel Gracia, Superior
Court case no. 10CB4343.

These violations were willful on [Appellants' part.]

1 Appellants filed a timely notice of appeal of the bankruptcy
2 court's order on August 9, 2013.

3 JURISDICTION

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 §§ 1334 and 157(b)(2)(A) and (I). We have jurisdiction under
6 28 U.S.C. § 158.

7 ISSUES

8 Whether the bankruptcy court clearly erred when it
9 determined that Appellants willfully violated the discharge
10 injunction.

11 Whether the bankruptcy court abused its discretion when it
12 determined that Appellants were in contempt.

13 STANDARDS OF REVIEW

14 The bankruptcy court's finding that a willful violation of
15 the § 524 discharge injunction has occurred is reviewed for clear
16 error, and its imposition of sanctions for contempt is reviewed
17 for abuse of discretion. Sciarrino v. Mendoza, 201 B.R. 541, 543
18 (E.D. Cal 1996). A finding is clearly erroneous if it is
19 illogical, implausible, or without support in the record. United
20 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).
21 In applying the abuse of discretion standard, we first "determine
22 de novo whether the [bankruptcy] court identified the correct
23 legal rule to apply to the relief requested." Id. at 1262. If
24 the correct legal rule was applied, we then consider whether its
25 "application of the correct legal standard was (1) illogical,
26 (2) implausible, or (3) without support in inferences that may be
27 drawn from the facts in the record." Id. Only in the event that
28 one of these three apply are we then able to find that the

1 bankruptcy court abused its discretion. Id.

2 **DISCUSSION**

3 **A.**

4 In a chapter 7 case, with exceptions not relevant here,
5 “[t]he [bankruptcy] court shall grant the debtor a discharge.”
6 § 727(a). When entered, this order “discharges the debtor from
7 all debts that arose before the date of the [bankruptcy filing].”
8 § 727(b). To give the discharge teeth, § 524(a)(2) prescribes
9 that the discharge “operates as an injunction against the
10 commencement or continuation of an action . . . to collect,
11 recover or offset any such debt as a personal liability of the
12 debtor, whether or not discharge of such debt is waived[.]” See
13 Aldrich & Imbrogno (In re Aldrich), 34 B.R. 776, 779 (9th Cir.
14 BAP 1983) (explanation of how §§ 524 and 727 work together).

15 Unlike § 362(k), addressing violations of the § 362(a)
16 automatic stay, there is no provision in the Code providing a
17 specific remedy for violations of the § 524(a) discharge
18 injunction. Instead, a discharge violation must be pursued via a
19 motion invoking the bankruptcy court’s contempt powers embodied
20 in § 105(a). In re Nash, 464 B.R. at 879-80 (citing Walls ex rel
21 Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir.
22 2002) and Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069
23 (9th Cir. 2002)).

24 To be subject to sanctions for violating the discharge
25 injunction, a party’s violation must be “willful.” In re Nash,
26 464 B.R. at 880. The Ninth Circuit applies a two-part test to
27 determine whether the willfulness standard has been met: (1) did
28 the alleged offending party know that the discharge injunction

1 applied; (2) and did such party intend the actions that violated
2 the discharge injunction? Id. at 880 (citing Espinosa v. United
3 Student Aid Funds, Inc., 553 F.3d 1193, 1205 n.7 (9th Cir. 2008),
4 aff'd, 559 U.S. 260 (2010)); see also, Zilog, Inc. v. Corning
5 (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006). In
6 applying the second prong of this test, the bankruptcy court's
7 focus is not on the offending party's subjective beliefs or
8 intent, but on whether the party's conduct in fact violated the
9 order at issue. Bassett v. Am. Gen. Fin. (In re Bassett),
10 255 B.R. 747, 758 (9th Cir. BAP 2000), rev'd on other grounds,
11 285 F.3d 882 (9th Cir. 2002). "A party's negligence or absence
12 of intent to violate the discharge order is not a defense against
13 a motion for contempt." Jarvar v. Title Cash of Mont., Inc.
14 (In re Jarvar), 422 B.R. 242, 250 (Bankr. D. Mont. 2009) (citing
15 Atkins v. Martinez (In re Atkins), 176 B.R. 998, 1009-10 (Bankr.
16 D. Minn. 1994)); see Hardy v. United States (In re Hardy),
17 97 F.3d 1384, 1390 (11th Cir. 1996) (in determining "willful"
18 violations of the discharge injunction, "the focus of the court's
19 inquiry. . . is not on the subjective beliefs or intent of the
20 alleged contemnors in complying with the order, but whether in
21 fact their conduct complied with the order at issue").

22 To support contempt, the moving party must prove by clear
23 and convincing evidence that the offending party violated the
24 discharge order. In re Zilog, Inc., 450 F.3d at 1007; Knupfer v.
25 Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003). The
26 moving party bears this same burden to prove that sanctions are
27 justified. Espinosa, 553 F.3d at 1205 n.7. If adequate proof is
28 produced, the burden then shifts to the alleged offending party

1 to demonstrate why it was unable to comply with the discharge
2 injunction. In re Bennett, 298 F.3d at 1069. If a bankruptcy
3 court finds that a party has willfully violated the discharge
4 injunction, it may award a debtor actual damages, punitive
5 damages, and attorney's fees and costs. In re Nash, 464 B.R. at
6 880 (citing Espinosa, 553 F.3d at 1205 n.7). The bankruptcy
7 court has broad discretion in fashioning a remedy for violation
8 of the discharge injunction. In re Bassett, 255 B.R. at 758.

9 **B.**

10 The bankruptcy court did not clearly err in determining that
11 Appellants violated the discharge injunction in this case. The
12 discharge was entered in the bankruptcy case on March 11, 2010.
13 On October 7, 2010, Appellants filed the Original Complaint in
14 state court which alleged that Banegas had "loaned" \$7,000 to
15 Banegas in 2004; that over the years Gracia had invested the
16 money; and that Banegas had demanded payment and Gracia did not
17 make full payment. As the transactions between Banegas and
18 Gracia were described in the Original Complaint, there is little
19 room to argue that Appellants were not engaged in an effort to
20 collect a debt arising before Gracia filed his bankruptcy
21 petition that, pursuant to § 727(b), had been discharged.

22 On January 10, 2011, Gracia filed a motion to reopen the
23 bankruptcy case and to add Banegas as a creditor. By responding
24 to that motion on March 1, 2011, Appellants demonstrated that
25 they were now aware of the bankruptcy case and the discharge
26 order.

27 After Gracia filed the Contempt Motion on October 26, 2012,
28 Appellants argued to the bankruptcy court that they were not

1 attempting to pursue collection of any prepetition debts in the
2 State Court Proceedings. However, at the first hearing on the
3 Contempt Motion on November 7, 2012, the bankruptcy court made
4 its finding that, by asserting in the Original Complaint that the
5 debt owed by Gracia to Banegas arose in 2004, and that it had not
6 been repaid, Appellants had violated the discharge injunction.
7 As a reaction to their argument that, they were attempting to
8 collect post-bankruptcy debts from Gracia, the bankruptcy court
9 gave clear, unambiguous instructions to Appellants to file an
10 amended complaint in the State Court Proceedings to make it "very
11 clear that . . . [the critical] events that happened post-
12 petition" Hr'g Tr. 21:4-22, October 26, 2012.

13 Appellants ignored the bankruptcy court's admonition that
14 any amended complaint should not allege that Gracia's obligations
15 stemmed from his prepetition dealings with Gracia. Instead,
16 Appellants filed the FAC which, while it deleted a direct
17 reference to the 2004 "loan" from Banegas to Gracia, nonetheless
18 contained allegations concerning Gracia's obligations to Banegas
19 occurring before his bankruptcy. As a result, at the continued
20 hearing on March 19, 2013, the bankruptcy court found that the
21 FAC still contained offending allegations such that its filing
22 was also a violation of the discharge injunction.

23 Appellants argued in the bankruptcy court, and now on
24 appeal, that they never intended to collect a prepetition debt
25 from Gracia. However, they conceded that the first two
26 complaints were, at least, ambiguous. The bankruptcy court found
27 no ambiguity in the allegations of the Original Complaint, and
28 informed Appellants that the content of the complaint appeared to

1 bring into play a prepetition debt, and that, to avoid a
2 discharge violation, it must be amended to make it "very clear"
3 that no prebankruptcy obligations were targeted. Unfortunately,
4 the bankruptcy court's instructions went unheeded because, at
5 best, the FAC contained allegations that tied Gracia's execution
6 of the post-bankruptcy checks to Banegas directly to Banegas'
7 original "loan" to Gracia in 2004, and Gracia's alleged conduct
8 in "investing" that money in his daughter's business, all events
9 that preceded his bankruptcy filing. Because these allegations
10 suggest that Banegas' right to collect from Gracia and his
11 daughter stem from prebankruptcy events, they constitute a
12 discharge violation as to Gracia.

13 The bankruptcy court determined that, in the FAC, Banegas
14 was again attempting to collect a prepetition debt owed to him by
15 Gracia. Since the discharge applies to "debts," we refer to the
16 Supreme Court's explanation of the meaning of that term in the
17 Bankruptcy Code:

18 A "debt" is defined in the Code as "liability on a
19 claim," § 101(12), a "claim" is defined in turn as a
20 "right to payment," § 101(5)(A), and a "right to
21 payment," we have said, "is nothing more nor less than
22 an enforceable obligation." Pennsylvania Dept. of
23 Public Welfare v. Davenport, 495 U.S. 552, 559,
24 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990).

25 Cohen v. de la Cruz, 523 U.S. 213, 218 (1998).

26 Here, Banegas asserted in the FAC that he had provided funds
27 to Gracia in 2004 that originally totaled \$7,000, FAC at ¶ 6;
28 that over time, those funds, with interest and investment
returns, amounted to \$45,000, FAC at ¶ 9; and that, prepetition
in 2009, "[Banegas] requested full payment of the \$45,000, yet
initially received \$10,000 from [Gracia]." FAC at ¶ 10. Fairly

1 construed, these allegations in the FAC assert that Gracia is
2 indebted to Banegas stemming from his receipt of the original
3 tender of funds in 2004, and that Banegas made a demand that
4 Gracia repay him before Gracia's bankruptcy. The FAC also
5 elaborates the difficulties Banegas encountered in recovering the
6 debt prepetition. ¶¶ 11-12. It is only in ¶ 12 that Banegas
7 alleges that Gracia had tendered checks to Banegas in payment of
8 this obligation "after November 9, 2009," the filing date of
9 Gracia's petition. While Appellants refuse to believe it, the
10 FAC effectively alleges that Banegas was asserting a prepetition
11 right to payment of a financial obligation by Gracia and that
12 Banegas had attempted to recover from Gracia before Gracia issued
13 the bounced checks.

14 We have examined the FAC and, giving it a fair reading,
15 conclude that the bankruptcy court did not clearly err in finding
16 that Appellants were attempting to collect prebankruptcy debts
17 allegedly owed by Gracia to Banegas. As noted above, whether
18 Appellants committed a violation of the discharge injunction is a
19 finding of fact that we review for clear error. Sciarrino,
20 201 B.R. at 543. The bankruptcy court considered the two
21 complaints filed by Appellants against Gracia, together with
22 Appellants' explanation of the allegations in those complaints,
23 and found that both asserted the right to enforce obligations of
24 Gracia that had been discharged. Where two permissible views of
25 the evidence exist, the fact finder's choice between them cannot
26 be clearly erroneous. Anderson v. City of Bessemer City, N.C.,
27 470 U.S. 564, 573-74 (1985).

28 Appellants also contend that the debt targeted by Banegas'

1 allegations in the FAC was really that of Gracia's daughter, and
2 that Gracia, after his bankruptcy filing, had agreed to pay her
3 debt to Banegas. But this argument is belied by the allegations
4 of the FAC. Therein, it is clear that Banegas sought to recover
5 funds from Gracia, not just from his daughter, based on the
6 representation that Gracia invested in his daughter's business
7 using money obtained from Banegas in 2004.

8 We agree with the bankruptcy court that the FAC alleges
9 facts and seeks recovery from Gracia on account of a prepetition
10 debt. Perhaps this was a drafting error by Doll, and this may
11 have been remedied in the SAC. Nevertheless, Appellants filed
12 the FAC in the State Court Proceedings after the bankruptcy court
13 directed them to remove any prepetition allegations against
14 Gracia. They submitted the FAC to the state court with the
15 offending allegations against Gracia. The bankruptcy court did
16 not clearly err in determining that there was a violation of the
17 discharge injunction in the FAC.

18 That there was a violation of the discharge injunction in
19 this case requires us to review the bankruptcy court's decision
20 to find that Appellants' actions constituted contempt of the
21 discharge order. According to the two-prong test in In re Nash,
22 the bankruptcy court must find that: (1) Appellants knew that the
23 discharge injunction prohibited their actions; and (2) Appellants
24 intended the actions that violated the discharge injunction.
25 464 B.R. at 880.

26 On this record, there may be some doubt whether Appellants
27 were aware of the Gracia bankruptcy filing and entry of the
28 discharge order at the time they filed the Original Complaint.

1 However, there is no doubt that Appellants knew before filing the
2 FAC that there was a bankruptcy and discharge injunction.
3 Appellants nevertheless filed the FAC that continued to allege
4 that Gracia's prepetition activities created a debt, in defiance
5 of the bankruptcy court's instruction to remove any such
6 allegations. We conclude that the first part of the Nash test is
7 satisfied.

8 The second requirement of Nash is also met. It was not
9 necessary that the bankruptcy court find that Appellants intended
10 to violate the discharge injunction by filing the FAC. It was
11 sufficient if they intended the acts that violated the
12 injunction. In re Jarvar, 422 B.R. at 250. Nor is it relevant
13 that Appellants might have not understood that their actions
14 violated the injunction. Hardy, 97 F.3d at 1390. Here, the
15 bankruptcy court had instructed Appellants to remove all
16 references to Gracia's prepetition obligations in any amended
17 complaint. Appellants seemed to ignore those instructions and
18 asserted similar allegations in the FAC. Therefore, at least as
19 to the FAC, the bankruptcy court did not abuse its discretion in
20 finding that Appellants were in contempt for violating the
21 discharge injunction or in awarding compensatory sanctions.³

22 CONCLUSION

23 We AFFIRM the order of the bankruptcy court.
24
25

26
27 ³ Appellants do not challenge the amount of the bankruptcy
28 court's sanctions award on appeal, so we do not review that
aspect of the order.