United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

10:30 AM
8:17-11664 Hannah Kim **Chapter 7**

#1.00 Motion for relief from the automatic stay REAL PROPERTY
(con't from 6-04-19 per order approving stip. to cont. mtn entered 5-24-19)

FEDERAL NATIONAL MORTGAGE ASSOCIATION (FANNIE MAE)
Vs.
DEBTOR

Docket 113
***** VACATED *** REASON: CONTINUED TO 10-08-19 AT 10:30 A.M. PER ORDER APPROVING STIPULATION TO CONTINUE HEARING ON MOTION FOR RELIEF FROM THE AUTOMATIC STAY ENTERED 7-19-19**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Hannah Kim — Represented By
Dana M Douglas

Movant(s):

Federal National Mortgage — Represented By
Nichole Glowin

Trustee(s):

Karen S Naylor (TR) — Represented By
William M Burd
Nanette D Sanders

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

10:30 AM
8:18-11476 Venus Williams **Chapter 13**

#2.00 Motion for relief from the automatic stay REAL PROPERTY

SCHOOLS FIRST FEDERAL CREDIT UNION
Vs.
DEBTOR

Docket 33

Tentative Ruling:

Tentative for 8/6/19:
Grant unless APO.

Party Information

Debtor(s):

Venus Williams	Represented By Amanda G Billyard Andy C Warshaw

Movant(s):

SchoolsFirst Federal Credit Union	Represented By Michelle R Ghidotti Kristin A Zilberstein

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:30 AM
8:18-12120 Gabriela Orozco **Chapter 7**

#3.00 Motion for relief from the automatic stay REAL PROPERTY
(con't from 6-04-19)

THE BANK OF NEW YORK MELLON
Vs
DEBTOR

Docket 12

Tentative Ruling:

Tentative for 8/6/19:
This case was converted to Chapter 13 on 7/11/19. Yet, no opposition was filed. What came of the trustee's sales effort? Is there a §362(d)(2) issue?

No tentative.

Tentative for 6/4/19:
Same.

Tentative for 1/15/19:

This is the continued hearing on the motion of Bank of N.Y. Mellon for relief of stay on the property commonly known as 9792 Ramm Drive, Anaheim ("property"). The bank argues, primarily, that relief should be granted because the instant bankruptcy is part of a scheme to hinder, delay and defraud under §362(d)(4) and/or that there is "cause" because it is not adequately protected within the meaning of §362(d)(1). The (d)(4) theory appears to be based on the argument this is the third bankruptcy involving this property filed by the Orozco family. While that is true and might in

10:30 AM

CONT... Gabriela Orozco **Chapter 7**

isolation have been sufficient reason to grant relief, that calculation is complicated by the fact that now the Chapter 7 Trustee, a person not tainted with any such bad faith, opposes the motion. Apparently, the Trustee sees as much as $200,000 realizable equity, and the possibility of surcharging the homestead for some portion of this in the interest of creditors. In addition, the Trustee argues that monthly adequate protection payments *are* being made to the bank, offering copies of checks dated August through November 2018. Whether there are defaults under that APO regime is left unclear in the papers.

The motion at this point turns on burden of proof. Under §362(g) the bank bears the burden of proof on the question of whether there is a cushion of equity in the property, and that burden is not carried. The bank offers no convincing proof of value. Exhibit "6" is merely an unauthenticated screenshot of the County Treasurer's records showing a value for tax purposes at $513,647. It is common knowledge that assessed values are not the same as fair market values, even if this kind of evidence were admissible.

But this should not be misread by the Trustee. The court is willing to give the Trustee *a reasonable time* to market the property in the interest of creditors. If after such time there are no offers sufficient to justify administration, then relief of stay should be expected. Further, failure to keep current on the adequate protection payments, or failure to cooperate with the marketing effort, magnifies doubt over whether there is "adequate protection" and will likely accelerate the calling of that question.

Deny. Movant may re-file in 60 days to be heard in 90 days absent default of monthly payment or failure to cooperate with marketing, relief for which may be sought on shortened time.

Party Information

Debtor(s):

Gabriela Orozco Represented By

10:30 AM
CONT... Gabriela Orozco **Chapter 7**

Christopher J Langley

Movant(s):

The Bank of New York Mellon fka — Represented By
Erin M McCartney
Mark S Krause

Trustee(s):

Richard A Marshack (TR) — Represented By
D Edward Hays
Laila Masud

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

10:30 AM
8:19-11479 Brisa M Cornejo **Chapter 13**

#4.00 Motion for relief from the automatic stay REAL PROPERTY

HSBC BANK USA
Vs.
DEBTOR

Docket 27

Tentative Ruling:

Tentative for 8/6/19:
Grant. Appearance is optional.

Party Information

Debtor(s):

Brisa M Cornejo — Pro Se

Movant(s):

HSBC Bank USA, National — Represented By
Angie M Marth

Trustee(s):

Amrane (SA) Cohen (TR) — Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

10:30 AM
8:19-11898 Kristen Joy Noel **Chapter 7**

#5.00 Motion for relief from the automatic stay REAL PROPERTY

US BANK NATIONAL ASSOCIATION
Vs.
DEBTOR

Docket 15

Tentative Ruling:

Tentative for 8/6/19:
Grant. Appearance is optional.

Party Information

Debtor(s):

Kristen Joy Noel	Represented By Brian J Soo-Hoo

Movant(s):

U.S. Bank National Association	Represented By Darlene C Vigil

Trustee(s):

Karen S Naylor (TR)	Pro Se

11:00 AM
8:16-14633 Cathy Jean Inc. **Chapter 7**

#6.00 Trustee's Final Report And Applications For Compensation:

WENETA M.A. KOSMALA, CHAPTER 7 TRUSTEE

LAW OFFICES OF WENETA M.A., ATTORNEY FOR TRUSTEE

HAHN FIFE & COMPANY, LLP, ACCOUNTANT FOR TRUSTEE

FRANCHISE TAX BOARD (ADMINISTRATIVE)

INTERNATIONAL SURETITES, LTD

Docket 154

Tentative Ruling:

Tentative for 8/6/19:
Allow as prayed. Appearance optional.

Party Information

Debtor(s):

Cathy Jean Inc. Pro Se

Trustee(s):

Weneta M Kosmala (TR) Represented By
Erin P Moriarty

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

11:00 AM

8:13-11495 Point Center Financial, Inc. **Chapter 7**

#7.00 Motion for Order Pursuant to FRBP 9019 Approving Stipulation Among Chapter 7 Trustee, Mission Ridge Ladera Ranch, LLC, SRF Real Estate Corporation, Columbia Development, LLC, and Steve Freed

Docket 1713

Tentative Ruling:

Tentative for 8/6/19:
Grant.

Party Information

Debtor(s):

Point Center Financial, Inc.	Represented By Robert P Goe Jeffrey S Benice Carlos F Negrete - INACTIVE -

Trustee(s):

Howard B Grobstein (TR)	Represented By Rodger M. Landau Roye Zur Kathy Bazoian Phelps John P. Reitman Robert G Wilson - SUSPENDED - Monica Rieder Jon L. Dalberg Michael G Spector Peter J. Gurfein Jack A. Reitman Thomas A Maraz

11:00 AM
8:18-11723 Scott Alan English **Chapter 7**

#8.00 Motion for Order to Show Cause why on Deck Capital Inc. and Aubrey Law Firm P.C. Should not be held in Contempt of Court for Knowingly Violating the Discharge Injunction

Docket 17

Tentative Ruling:

Tentative for 8/6/19:

This is a hearing on the Court's Order to Show Cause issued May 10, 2019. The subject of the OSC is "Why On Deck Capital, Inc. and Aubrey Law Firm P.C. should not be held In Contempt of Court for Knowingly Violating the Discharge Injunction."

1. Facts

The following facts are not disputed.

Debtor and his spouse Gregory M. Suding ("Suding") were married in late 2015 following the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which concluded that same-sex couples have the right to marry under the Fourteenth Amendment to the United States Constitution. The couple had been together for more than a decade prior to the marriage and had no pre or post-nuptial agreements. In addition to being spouses, the couple are also business partners, operating dry cleaning businesses. To expand their business, they took out a loan in 2016 with Celtic Bank, a bank chartered under the laws of Utah. Both Debtor and Mr. Suding executed personal guarantees on the Celtic loan. Shortly after making the loan, Celtic assigned the loan to On Deck Capital, Inc., ("ODC") one of the alleged contemnors.

The new business venture performed poorly, and after desperate

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CONT... Scott Alan English **Chapter 7**

attempts to keep the new business afloat failed, Debtor filed a voluntary Chapter 7 petition on May 11, 2018. ODC was given notice of Debtor's filing. Debtor listed an outstanding debt owed to ODC in the amount of $30,000 on his Schedule F. In July of 2018, despite having notice of Debtor's filing, Mr. Henry Veasley ("Veaseley") of the Aubrey Law Firm ("ALF") called Suding attempting to collect the debt owed to ODC, and sent an email to Debtor's business email address containing Debtor's and Suding's personal information such as social security numbers and banking information. (English Decl., dkt. # 37, p. 26). Debtor and Suding notified their counsel, Richard Marshack ("Marshack"), of these communications. On August 11, 2018, Veasley emailed Marshack demanding that Suding make payments on the outstanding balance owed to ODC. During these exchanges, Veasely allegedly acknowledged that Debtor's debt had been discharged. Marshack also notified Veasley that the ODC debt was a community debt, and therefore, the debt was not collectible against the community property of Suding. (Marshack Decl., dkt #17, Ex. 3, p. 136) Debtor received his discharge in August of 2018. Notice of the discharge order was sent on August 28, 2018 (Dkt. #16). ODC was included in the notice list. *Id*. at 1.

In October of 2018, approximately two months after Debtor obtained his discharge, ODC, through its counsel, ALF, filed a complaint against Debtor, Suding, and their corporate entity, The Bonded Boys, Inc., in Utah state court alleging breach of contract and breach of guaranty. (Motion For Order To Show Cause, Ex. D, pp 27-33) The complaint sought damages in the amount of $29,907.75, plus pre and post judgment interest. *Id*. ODC pursued this course of action despite having been served with notice of Debtor's discharge and having received direct information of the bankruptcy and discharge through the communications with Marshack. After Debtor and Suding were served with summons and complaint in the Utah state action, Marshack attempted to contact ALF informing them that filing the complaint and naming Debtor as a defendant violated the discharge injunction. There was no further documentation or communications sent to Debtor or Suding

until February of 2019, when Debtor and Suding's joint bank accounts were frozen by the bank under a levy obtained by ODC and ALF. ODC and ALF refused to unfreeze the accounts or return the levied funds. These remain frozen even until now. This OSC followed.

2. Alleged Damages

Debtor and Suding allege that a total of $4,772.74 was levied and frozen from their joint bank accounts. As a result, they have been unable to timely pay monthly bills including their mortgage. Movants were also charged a late fee of $190.76 and an insufficient funds fee of $15.00, for a total of $205.76 in penalties attributable to the late payment. Finally, the unpaid amount of $4,777.80 continues to accrue additional interest at an annual rate of 5%. Since February 2019, Movants have been charged an additional six months of interest for a total of $119.44. Movants also assert that since late February 2019, Suding has been grinding his teeth at night to the point where he has lost two of the crowns on his teeth. Suding was allegedly told by his dentist that an operation to fix his crowns would cost $3,530 – money that he does not have. Additionally, after the levy and freeze, Suding reportedly developed stress-related shingles, which has been causing him daily discomfort. As a result, Movants are seeking medical damages in the amount of $3,350.00.

In addition to the medical damages, Movants are also seeking damages in the amount of $10,000 for emotional distress. Due to the levy on their joint accounts, Movants have had difficulty paying their bills. The stress over these concerns has allegedly had physical manifestations as described above.

Movants believe that they are entitled to recover attorney's fees in the amount of $21,709.05 for Marshack's services performed since July 2018.

Movants assert that this figure is subject to upward adjustment as additional fees and costs are incurred.

Finally, Movants request that this court assess punitive damages in the amount of $40,336.99 because, Movants argue, ODC's and ALF's alleged misconduct was willful, wanton, and oppressive and would likely deter similar future misconduct.

3. Contempt Standards

It is well-established that a bankruptcy court is authorized to exercise civil contempt power. *Hansbrough v. Birdsell (In re Hercules Enterprises, Inc.),* 387 F.3d 1024, 1027 (9th Cir. 2004). To find a defendant in contempt, the court must find that he violated a specific and definite order and that he had sufficient notice of its terms and the fact that he would be sanctioned if he didn't comply. *Id*. at 1028, citing *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178, 1190-91 (9th Cir. 2003). Where the language of an order is too vague, enforcement is not appropriate. *Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982). All ambiguities or inconsistencies are resolved in favor of the enjoined party. *U.S. v. Holtzman,* 762 F.2d 720, 726 (9th Cir. 1985). Civil contempt may be used to coerce compliance with a court's order or to compensate for losses sustained. *U.S. v. United Mine Workers of America,* 330 U.S. 258, 303-304 (1947). Where the purpose is compensatory, the award must be based on evidence of actual loss. *Id*. at 304. Violations of the discharge injunction are treated as contempt. *Nash v. Clark County Dist. Atty's. Office (In re Nash)*, 464 B.R. 874, 880 (9th Cir. BAP 2012).

4. Did ODC and/or ALF Violate the Automatic Stay or Discharge

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CONT... Scott Alan English **Chapter 7**
Injunction?

As an initial observation, the court notes that the motion here is styled as a motion for order to show cause why ODC and ALF should not be held in contempt for violating the discharge injunction. However, in reading the Movants' motion, it appears that Movants might also be asserting violations of the automatic stay as grounds for contempt as a few events as recited came just before entry of the discharge (Dkt. 17, p.17). Upon review of ODC's and ALF's briefs, it does not appear that either entity addressed the alleged violation(s) of the automatic stay. Their failure to do so could be due to one or a combination of a couple of reasons. First, it could be that ODC and ALF are quietly conceding that they violated the automatic stay. Second, due to the wording of the motion and OSC, ODC and ALF may have believed that alleged violations of the automatic stay are beyond the scope of this inquiry. Therefore, out of an abundance of caution (perhaps overabundance), the court will allow ODC and ALF an opportunity to file written responses, should they wish to do so, to the alleged violations of the automatic stay as a separate matter as presented in Movants' motion. But in practical terms, most of the dispute here relates to events occurring after the discharge was entered and so this memorandum focuses on the discharge injunction. The analysis is in any event largely identical.

5. Discharge Injunction and Community Property

Mr. Suding asserts that the debt to ODC was discharged when debtor, his husband, received a discharge in August of 2018. Therefore, Mr. Suding asserts, because the discharged debt to ODC was community property, he is also no longer liable for payment of the debt. If Mr. Suding is correct, then ODC and ALF wrongfully violated the discharge injunction. However, contempt sanctions are not to be issued for inadvertent violations of the discharge injunction, but for willful violations. Both sides concede that the community property issue was discussed prior to the filing of this motion.

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Neither side sought declaratory relief from the court on this issue, despite some expressions now regarding uncertainty as to the law. Nevertheless, before the court is a threshold question of whether the debt owed to ODC constitutes a community debt which, once discharged, means that the debtor's spouse's acquired community property thereby became immune, making it uncollectable by ODC.

In support of this position, Movants cite 11 U.S.C. §§541(a)(2) and 524(a)(3). Section 541(a)(2) provides:

> "(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
>
> (A) under the sole, equal, or joint management and control of the debtor; or
>
> (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable."

11 U.S.C. §524(a)(3) provides:

> (a) A discharge in a case under this title—
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and

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> 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

Movants also cite California Family Code §910(a), which states:

> (a) Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

Movants cite *Rooz v. Kimmel (In re Kimmel),* 378 B.R. 630, 636 (B.A.P. 9th Cir. 2007) (aff'd, 302 Fed.Appx. 518 (9th Cir. 2008)), explaining the effect(s) of §524(a)(3):

> [A] nondebtor spouse in a community property state typically benefits from the discharge of the debtor spouse. According to Section 524(a)(3), after--acquired community property is protected by injunctions against collection efforts by those creditors who held allowable community claims at the time of filing. This is so even if the creditor claim is against only the nonbankruptcy spouse; the after-acquired community property is immune. *Id*. citing *Burman v. Homan (In re Homan),* 112 B.R. 356, 360 (9th Cir. BAP 1989).

The *Kimmel* court continued:

> Although the nondebtor spouse is not actually discharged of liability, the consequence of § 524(a) (3) is that the property that is vulnerable to judgment enforcement against a nondebtor spouse is diminished by the protection of after-acquired

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community property. Hence, a judgment creditor of the nondebtor spouse on a community claim loses the ability to collect from anything other than the judgment debtor's separate property. *Id*.

California is a community property state. The debt owed to ODC was certainly a community property liability because it was incurred during the marriage and both spouses signed the loan agreement with ODC while residing in California. It was also incurred for a community property business. The ODC debt was then discharged through Debtor's Chapter 7 case as to Debtor. Therefore, pursuant to §523(a)(3) and the language from *Kimmel*, Suding was also immunized from collection efforts against all existing and future acquired community property. As the *Kimmel* court explained, the only assets that ODC could possibly reach would be Suding's separate property. However, as the correspondence in evidence shows, Mr. Marshack put ALF on notice that Mr. Suding did not have any separate property assets. (Dkt. # 17, Ex. 8, p. 165) Moreover, if the accounts levied were existing community property at the time of the petition, then the conclusion is even more clear as it was 'property of the estate.'

Therefore, it is clear that California community property law, in conjunction with the Bankruptcy Code, immunized Suding from further collection efforts by ODC and ALF to the extent that the couple's community property was sought, and then levied as a result of the Utah state court action. Normally, this would end our inquiry and the court could decide that ODC and ALF willfully violated this court's discharge injunction and took deliberate affirmative actions toward doing so; or at the very least, remained willfully ignorant that the discharge injunction immunized Suding's share of the community property (which is apparently the only type of property he owns).

But ODC and ALF argue that Movants have failed to prove several material facts such as, showing that the money in the levied accounts are

solely community property in nature because it is not known when these accounts were opened (implying that the accounts could pre-date the 2015 marriage), etc. However, this does not absolve ODC and ALF of failing to exercise their due diligence in researching the case law. Had they done so, in every likelihood they would have discovered the above controlling case law. Instead, they recklessly and aggressively pursued both Debtor and Suding in Utah state court knowing that there was at least some risk that they would be violating this court's discharge injunction. This is likely enough by itself to hold ODC and ALF in contempt. ODC and ALF do not even discuss *In re Kimmel*, which is rather telling. In any case, as Movants point out, all property acquired during a marriage is presumed to be community property. *In re Marriage of G.C. and R.W.*, 23 Cal.App.5th 1, 22 (2018). ODC and ALF do not offer the slightest evidence or reason to overcome the presumption. The levied funds were acquired during the marriage and while Movants were domiciled in California, entitling them to the community property presumption.

6. Choice of Law

ALF and ODC argue that there is a choice of laws issue and that somehow Utah law should apply. Upon analysis, however, this proves to be a red herring.

ODC and ALF cite the Restatement 2d. of Conflict of Laws §132 which states:

> "[t]he local law of the forum determines what property of a debtor within the state is exempt from execution unless another state, by reason of such
> circumstances as the domicile of the creditor and the debtor within its territory, has the dominant interest in the question of **exemption**. In that event, the local law of the other state will be applied." (emphasis

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added)

ODC and ALF argue that the above language means the law of Utah applies because Utah is the forum state where the lawsuit was filed. They further argue ODC's predecessor in interest is incorporated in Utah, and thus, Utah law determines what property within a state is exempt from execution. Further, ODC and ALF argue that even if this court were to find that Restatement §132 did not apply, application of §187 of the Restatement leads to the same result. §187 applies where a contract selects the law of a particular jurisdiction to govern disputes. *Chan v. Soc'y Expeditions, Inc.,* 123 F.3d 1287, 1297 (9th Cir. 1997); Restatement (Second) of Conflicts of Laws § 187. They also argue that, according to Section 187, courts should enforce the parties' contractual choice of law if the issue "is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (Second) of Conflict of Laws §187(1). Here, ODC and ALF argue that the loan agreement, which originated the debt at issue, provides as follows:

> Borrower and Lender agree that this Agreement, and Borrower's Loan *will be governed by federal law*, and, to the extent state law applies, the substantive law of Utah. These laws will apply no matter where Borrower lives or obtained this Loan. Subject to Section 33 below, Borrower and Lender agree that any action or proceeding to enforce or arising out of this Agreement shall be brought in any court of the State of Utah, or in the United States District Court for the District of Utah, and Borrower waives personal service of process. Borrower and Lender agree that venue is proper in such courts. (italics added)

The court is not persuaded. First, the issue at bar has nothing to do with exemptions and thus Restatement 2d §132, by its own terms, simply has no application. But even if it did, there is also mention in that section about the paramount interests of another state, which would be California in this context (see below). More importantly, the issue at bar has to do with federal

bankruptcy law and whether property of a certain character, i.e. community property, is protected, not by exemption law, *but by the bankruptcy discharge injunction* which is derived from a federal statute, i.e. 11 U.S.C. §524(a)(3). Second, references to choice of law provisions have no application either. It should be obvious that parties cannot, by contract, override the bankruptcy code or bargain away the protection of a discharge or the discharge injunction. But even it that were different, the very clause cited from the contract specifically invokes federal law, and so there is just no room left to argue that Utah law has any application whatsoever. Moreover, that should be obvious.

Although it is hardly necessary to consider additional points, Movants argue that California courts would not favor the application of Utah law in this case. Movants cite *Colaco v. Cavotec SA*, 25 Cal.App.5th 1172, 1188 (2018) for the proposition that,

> California courts will enforce a choice-of-law provision unless (1) the chosen state's law conflicts with a fundamental public policy of the state whose law otherwise would apply, and (2) the other state "has a 'materially greater interest than the chosen state in the determination of the particular issue.'"

Here, Movants argue, California has two fundamental public policy concerns which favor application of California law over Utah law. First, California has an interest in application of its community property law to California residents who obtain property in California during a legal marriage. Second, Movants believe that the terms of the loan with ODC were usurious and offensive to the California Constitution under Article XV. Finally, Movants argue that, in any event, the Loan Agreement is no longer operative. Movants cite *Rodarte v. Cohen (In re Rodarte)*, 2012 U.S. Dist. LEXIS 190699 (Distr. C.D. Cal. 2012) for the proposition that once judgment is entered, a contract merges into the judgment. Movants conclude that ODC and ALF were attempting to enforce a Utah judgment against community

property of a married couple living in California, and so certainly California law would apply. While all those points are valid, fundamentally choice of law is not the issue. This is a question of the character of the property levied (community property) which is presumed to be community under California law, and once that point is established, the federal Bankruptcy Code makes very clear that it is protected by the discharge injunction. End of story.

7. Standing

ODC and ALF challenge Suding's standing to bring this motion in the first place because he is not the debtor and so, is not enforcing his own discharge. In support of this contention, they cite several cases, none of which mention community property as an issue in a standing analysis. Therefore, those cases do not bear on the legal issues in this case. This is not altogether surprising as the cases cited are from states that do not recognize community property laws (Oregon, North Carolina, and Ohio). As the court stated in *Bahnsen v. Discover Fin. Servs. (In re Bahnsen),* 547 B.R. 779, 786-87 (B.C. N.D. Ohio 2016) "[t]o satisfy Article III's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of a defendant, the injury must be fairly traceable to the challenged action, and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury."

Suding has a judgment against him seeking repayment on a loan that was discharged in his spouse's Chapter 7 bankruptcy. Pursuant to both 11 U.S.C. §541(a)(2) and §524(a)(3) as discussed above, Suding's community property – the only kind of property he owns – was immunized from further collection efforts by ODC. Therefore, when ODC obtained a judgment allowing them to garnish Suding's wages, which are entitled the presumption that they are community property, or to levy his joint account also containing community property, Suding manifestly suffered an injury that is easily traceable to ODC's alleged misconduct. The remedy sought by Suding here

would redress Suding's injury. Therefore, he clearly has standing in the matter.

8. Fair Ground for Doubt?

The United States Supreme Court in evaluating violations of the discharge injunction, articulated the "fair ground of doubt" standard in *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019). The *Taggart* court stated:

> We conclude that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in our view, a court may hold a creditor in civil contempt for violating a discharge order if there is no fair ground of doubt as to whether the order barred the creditor's conduct. In other words, civil contempt may be appropriate if there is *no objectively reasonable basis* for concluding that the creditor's conduct might be lawful. (italics added)

Here, we have at least one clear violation of the discharge order, that the Debtor was named as a defendant in the Utah state court action after the discharge. The court cannot find a reasonable basis upon which ODC and ALF could have believed that the Debtor's discharge did not apply to the ODC loan. And yet, they willfully named the Debtor as a defendant in an unlawful attempt to collect on the discharged debt. Moreover, they set about levying on that judgment against assets in Debtor's name. The question might be somewhat closer as to Suding insofar as naming him as a defendant in the Utah state court action. But in levying upon that judgment, in what was rather clearly community property, ODC and ALF have little ground to stand upon. The court also notes that these issues could have, and perhaps should have been resolved before ODC and ALF rather cavalierly filed the Utah state court action. This is especially true since the correspondence between Mr. Marshack and ALF conclusively demonstrates that ALF knew their actions would be challenged (even if they incorrectly assumed Mr. Marshack was

bluffing).

9. Damages

As described above, Movants are requesting several categories of damages. The medical damages should be denied due to insufficient showing that the teeth grinding is solely the result of stress brought on by ODC and ALF's attempts to collect the debt. The court observes, based on Suding's declaration, that there were multiple sources of stress in his life. The Complaint and Summons were served in October of 2018, and Suding reportedly began grinding his teeth in February 2019 (approximately 5 months later). Shingles are also reported as "stress-related" but causation is not narrowed beyond a connection to "stress" in general, so it becomes a leap in logic to assume only the contemnors' activities are the cause. Therefore, the court is wary of awarding these damages when the causal connection is not clear, or when there are multiple other possible/probable contributing factors. Professional testimony would have been appropriate (indeed, indispensable) on the issue of causation. Therefore, the claimed medical damages will be denied.

In California, emotional distress damages are considered part and parcel of actual, compensatory damages. *McNairy v. C.K. Realty,* 150 Cal.App.4th 1500, 1506 (2007) ("the plain language 'actual damages include damages for emotional distress. As another court explained, 'emotional distress is a form of actual damage…'") (citing *Merlo v. Standard Life & Accident Insurance Co*., 59 Cal.App.3d 5, 16 (1976)). Emotional distress damages are included as actual damages recoverable as a result of a willful violation of the automatic stay. *Dawson v. Washington Mutual Bank (In re Dawson),* 390 F.3d 1139, 1148 (9th Cir. 2004). While these are not technically for violation of stay, the court sees no principled difference when the subject is discharge violation damages. To recover damages for

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emotional distress for a violation of the discharge injunction, the "individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between the significant harm and the violation [of the discharge injunction]." *In re Breul*, 533 B.R. 782, 796 (Bankr. C.D. Cal. 2015) (Tighe, J.) citing *Dawson* at 1139. Emotional distress damages "reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of the recovery, the only standard being such an amount a reasonable person would estimate as fair compensation." *In re Farley*, 2016 Bankr. LEXIS 4490 at *9-10 (Bankr. N.D. Cal. 2016) (citing *Duarte v. Zachariah*, 22 Cal.App.4th 1652, 1664-65 (1994)). (Reply, dkt. 37, p. 19); *Bruel* at 796-97.

Here, emotional distress damages are very appropriate. ODC and ALF clearly willfully violated the discharge order when they named Debtor as a defendant in the Utah state court action attempting to collect on the discharged debt. As a result of the Utah state court action, Debtor's and Suding's joint bank accounts were frozen and levied. This caused Debtor and Suding to get behind in rent and other bills. Moreover, such disruption to their lives, right on the heels of a bankruptcy petition, can only have been expected to have caused considerable hardship. Thus, there is no doubt that Debtor and his spouse suffered significant emotional harm, the harm is clearly established, and the harm Debtor and Suding suffered was caused directly by ODC and ALF's misconduct.

Regarding the request for attorney's fees, Debtor and Suding clearly should not have had to expend any time or money continuing to fight against ODC and ALF because the debt was discharged and notice of the discharge was provided. As evidenced by the correspondence, ALF took Mr. Marshack's assessment regarding the community property issue clearly with a grain of salt and pressed ahead with the Utah state court action. Had they

taken the time to research the issue or sought leave of this court to pursue the Utah action, much time and expense could likely have been saved.

"[I]n appropriate circumstances," an aggrieved debtor may recover punitive damages for a willful violation of the automatic stay. 11 U.S.C. § 362(k)(1). Punitive damages may also be imposed for a willful violation of the discharge injunction. See, e.g., *Henry v. Associates Home Equity Services (In re Henry),* 266 B.R. 457, 481-82 (Bankr. C.D. Cal. 2001). "An award of punitive damages should be based on the gravity of the offense and set at a level sufficient to ensure that it will punish and deter." *Id*. at 482-83 (awarding punitive damages of $65,700 to a debtor who was subjected to a continuing violation of the automatic stay and discharge injunction by an institutional creditor who had actual notice of the automatic stay and discharge injunction yet failed to honor them). "When considering an award for [punitive] damages, the court considers the gravity of the offense and sets the amount of punitive damages to assure that they will both punish and deter." See, e.g., *Achterberg v. Creditors Trade Ass'n (In re Achterberg),* 573 B.R. 819, 840-42 (Bankr. E.D. Cal. 2017) (awarding punitive damages of $15,000 as an amount reasonably related to the compensatory damages). Among the factors to be considered are "(1) the nature of the defendant's acts; (2) the amount of compensatory damages awarded; and (3) the wealth of the defendants." *Id*. at 835. (Reply, dkt. #37, p. 20)

Here, knowingly violating the discharge injunction by naming the discharged Debtor, after receiving notice of the discharge, in an out-of-state lawsuit to collect on the discharged debt does not sit well with the court. Further, making attempts to collect on a debt after the Debtor has filed a bankruptcy petition is not taken lightly either. Neither ODC nor ALF responded to those allegations as discussed above. The court does not understand, and no explanation is provided, as to how Debtor ended up as a named defendant in the Utah state court action. While the naming of Suding might arguably be somewhat less egregious given that he was not discharged and these alleged contemnors from out of state could (charitably) be less

conversant with community property, it is very hard to explain how they could have persisted in their view months after speaking and corresponding directly with Mr. Marshack on the issues, and then even going to the second and third steps of obtaining judgment and levying that judgment. The naming of the Debtor in a post-discharge lawsuit is indefensible. The offense was compounded by levying of a judgment against what was clearly community property. Further, to have refused return of the funds until even now bespeaks of a contumacious refusal to abide by the law, perhaps reckoning that these parties lacked the funds or will to hold the contemnors to account. Nothing about these offenses could be regarded as inadvertent. The legal arguments offered are transparently red herrings more indicative of too-clever, after the fact excuse-making than sincerely held views. They do not strike the court as within the realm of "objectively reasonable" as described in *Taggart*. Moreover, these contemnors ODC and ALF are, respectively, a large institution well acquainted with assignment of debts for collection and a law firm apparently also acquainted with collection in many states. Therefore, the need for example making is high. ODC is a large publicly-traded firm with a vast amount of wealth at its disposal; therefore, punitive damages to be felt will have to be substantial. Therefore, considering the willful disregard of this court's order, the punitive damages should be at least equal to the compensatory damages.

10. Conclusion

ODC and ALF have not shown any cause why they should not be held in contempt for violating the discharge injunction. Therefore, the court finds them both in contempt for naming the Debtor in a post-discharge lawsuit, and then compounding the offense by going to judgment thereon and levying against an asset that was clearly community property despite §524(a)(3), and then further compounding the offense by refusing to lift the levy or return the funds. Damages will be awarded, jointly and severally, as follows:

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CONT... Scott Alan English **Chapter 7**

Compensatory damages:

$4772.74 - levied account

411.52 - late fees, NSF fee and interest

10,000 - emotional distress

21,709.05 + any additional fees incurred since filing the Reply - attorney's fees

Total $36,893.31 (subject to additional attorney's fees)

Punitive damages: $36,000

Grand total=$72,893.31 plus possible adjustment upward

Party Information

Debtor(s):

Scott Alan English — Represented By Richard A Marshack

Trustee(s):

Jeffrey I Golden (TR) — Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

11:00 AM

8:19-11570 JT Realty And Investments Inc **Chapter 7**

#9.00 Order To Show Cause RE: Debtor Is An Entity That Must Be Represented By An Attorney
(con't from 6-04-19)

Docket 1

Tentative Ruling:

Tentative for 8/6/19:
OSC can go off calendar.

Tentative for 6/4/19:
Dismiss.

Party Information

Debtor(s):

JT Realty And Investments Inc Pro Se

Trustee(s):

Jeffrey I Golden (TR) Pro Se

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar

Tuesday, August 6, 2019 **Hearing Room 5B**

11:00 AM

8:19-11308 David James Wendel **Chapter 7**

#10.00 United States Trustee To Determine Whether Compensation Paid To Counsel Was Excessive Under 11 U.S.C. Section 329 And F.R.B.P., Rule 2017

Docket 8

***** VACATED *** REASON: ORDER APPROVING STIPULATION REGARDING COUNSEL'S FEES PURSUANT TO U.S. TRUSTEE'S MOTION UNDER 11 U.S.C. SECTION 329 ENTERED 7/16/19**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

David James Wendel — Represented By Richard L. Sturdevant

Trustee(s):

Karen S Naylor (TR) — Pro Se