

THIS IS A REPLICA OF THE FILED DOCUMENT
PROVIDED IN TEXT SEARCHABLE FORMAT.
THE ORIGINAL IS AVAILABLE ON PACER.

UNITED STATES BANKRUPTCY COURT EASTERN
DISTRICT OF CALIFORNIA

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re)	Case No. 08-92594-E-7
ROBERT ACHTERBERG and)	
STEPHANIE ACHTERBERG,)	
Debtors.)	
<hr/>		
ROBERT L. ACHTERBERG, JR. and)	Adv. Proc. No. 15-9054
STEPHANIE ACHTERBERG,)	
Plaintiffs,)	
v.)	
CREDITORS TRADE ASSOCIATION,)	
INC., dba GREAT WESTERN)	
COLLECTION BUREAU,)	
Defendant.)	
<hr/>		

MEMORANDUM OPINION AND DECISION

This Adversary Proceeding was commenced by Robert and Stephanie Achterberg (“Plaintiff-Debtors”) with the filing of the Complaint on July 23, 2016. In the Complaint Plaintiff-Debtors assert that Creditors Trade Association (“Defendant”) violated both the automatic stay and discharge injunction that arose in Plaintiff-Debtors’ Chapter 7 bankruptcy case.¹ In addition to damages relating to such violations, Plaintiff-Debtors request a determination that the state court judgment issued by the California Superior Court, County of San Francisco (“SF Superior Court”) Case No. CGC-08-480700 (“SF Void Judgment”), obtained by Defendant after Plaintiff-Debtors filed their

¹ Bankr. E.D. Cal. 08-925439 (“Bankruptcy Case.”)

1 Chapter 7 bankruptcy case, is void.² Defendant filed an Answer, denying specific allegations in the
2 Complaint, and asserted affirmative defenses that its conduct was not willful or in reckless disregard,
3 nor done with malice or intent to oppress the Plaintiff-Debtors.³

4 Trial was conducted on September 26, 2016. Though filing an Answer and providing
5 rebuttal testimony at trial, Defendant elected not to present any exhibits or provide any testimony
6 as part of its defense case in chief.⁴ Defendant did file evidentiary objections and a trial brief as
7 provided in the Trial Scheduling Order. The court's rulings on the evidentiary objections are stated
8 orally on the record for the September 26, 2016 trial.

9 Trial having been conducted, the court determines that Defendant knowingly, willfully, and
10 intentionally violated the automatic stay and the discharge injunction by failing to vacate (until after
11 making Plaintiff-Debtors file and serve the Complaint in this Adversary Proceeding) the SF Void
12 Judgment that Defendant obtained in violation of the automatic stay in February 2009. The court
13 does not determine that obtaining the entry of the default judgment in February 2009 itself was a
14 knowing and willful violation of the automatic stay. However, no later than March 2009 and
15 continuing thereafter Defendant had actual knowledge of the December 2008 bankruptcy filing,⁵ the
16 automatic stay going into effect in December 2008 with the filing of the bankruptcy case,⁶ that the
17 issuance of the SF Void Judgment was issued in violation of the automatic stay, and the subsequent
18 entry of the discharge with the discharge injunction going into effect in March 2009.⁷

20 ² Complaint, Dckt. 1.

21 ³ Answer, Dckt. 12.

22 ⁴ Defendant also failed to participate in the mandatory Pre-Trial Conference. Civil
23 Minutes, Dckt. 24, and Trial Setting Order, Dckt. 25.

24 ⁵ Defendant admits knowing of the bankruptcy in December 2008 or January 2009,
25 asserting that learning of the bankruptcy caused Defendant to "close its file" and "send it to
26 storage," using that as the explanation as to why in February 2009 it did not have a "file" to link
the SF Void Judgment to when obtaining it from the SF Superior Court in February 2009.

27 ⁶ 11 U.S.C. § 362(a).

28 ⁷ Bankruptcy Case Dckt. 22; 11 U.S.C. § 524(a).

1 The court determines that the actual damages awarded Plaintiff-Debtors for the continuing
2 violation of the automatic stay by Defendant, as well as the violation of the discharge injunction,
3 beginning in 2009 are: (1) \$1,250.00 for having to extend escrow, (2) \$1,850.00 for emotional
4 distress, and \$18,261.29 in attorneys' fees and costs.⁸

5 In addition, the court awards \$15,000.00 in punitive damages to be paid to Plaintiff-Debtors
6 by Defendant. The court determines that the failure to vacate the default judgment was intentional,
7 as well as both reckless and in callous disregard for the rights of the Plaintiff-Debtors and
8 Defendant's obligations under the Bankruptcy Code to remedy violations of the automatic stay.

9 The Damages awarded total \$36,361.29.

10 **HISTORY OF CHAPTER 7 BANKRUPTCY CASE**
11 **AND**
12 **EVENTS LEADING TO FILING OF ADVERSARY PROCEEDING**

13 Plaintiff-Debtors commenced the Chapter 7 Bankruptcy Case on December 1, 2008.
14 Defendant is listed on the Schedules and Mailing Matrix. As admitted by Defendant at trial,
15 Defendant received notice of the bankruptcy filing and the subsequent March 2009 issuance of
16 Plaintiff-Debtors' discharge being entered. It was presented to the court by Defendant that the likely
17 turn of events was that Defendant filed the SF Superior Court action against Plaintiff-Debtors and
18 requested entry of the default judgment before Defendant then learned of the bankruptcy filing and
19 discharge.⁹

20 It was argued by Defendant, with no evidence other than the rebuttal testimony of Gary
21 Looney (president of Defendant), that Defendant closed its "file" and sent the "file" to storage when

22 ⁸ As discussed *infra*, Congress has expressly provided in 11 U.S.C. § 362(k) that the
23 actual damages for an individual debtor, such as Plaintiff-Debtors, include the attorneys' fees and
24 costs relating to that violation. This is an exception to the general rule that attorneys' fees and
25 costs for the litigation before the court are part of the post-judgment award and not "actual
26 damages." *See* Fed. R. Civ. P. 54(d), Fed. R. Bankr. P. 7054.

27 ⁹ Defendant offered no evidence when the motion for entry of default judgment was
28 filed, but made a general reference to the delay in obtaining default judgment from the California
Superior Court. While unsupported by evidence, the court gives Defendant the benefit of the
doubt with respect to the filing of the SF Superior Court Action and motion for entry of default
judgment.

1 it learned of the Plaintiff-Debtors' December 2008 bankruptcy filing. Then, after the file was closed,
2 the SF Void Judgment was received by Defendant in February 2009. When received, it is contended
3 that the SF Void Judgment was not linked to the closed file that had been sent to storage. Thus,
4 Defendant argues, that is the reason it took no action to immediately vacate the SF Void Judgment
5 in February 2009 or at anytime thereafter until August 2015. For unstated reasons (based on only
6 the rebuttal testimony of Mr. Looney), it was argued that the file could not be recovered from storage
7 at the time of trial. However, there is no credible dispute that Defendant knew of the bankruptcy
8 case being filed prior to the SF Void Judgment being entered, and then the debt being discharged
9 after receiving the SF Void Judgment.

10 Further, Defendant offered no credible evidence for the proposition that when the SF Void
11 Judgment was received it could not be linked to records of Defendant relating to Plaintiff-Debtors.
12 While making the assertion that the "file" had been sent to storage and could not be recovered (with
13 no testimony provided by the storage facility or Defendant's file storage procedures), no evidence
14 was offered by Defendant about its computer records or its attorney's records concerning Plaintiff-
15 Debtors. No credible evidence was presented how sending a "file" to storage rendered Defendant
16 completely unable to link the SF Void Judgment to Plaintiff-Debtors' bankruptcy filing. Finally, no
17 credible evidence was presented explaining why a creditor would "close a file" merely because a
18 debtor filed bankruptcy or how a creditor could have obtained a judgment and then apparently made
19 no effort to try and collect such judgment (after having incurred the cost and expense of obtaining
20 that judgment).¹⁰

21 Plaintiff-Debtors provided testimony of the financial events leading up to the Chapter 7 case
22 being filed in December 2008. These include the Plaintiff-Debtors deciding to open a restaurant,
23 borrowing \$200,000.00 using their home as equity to fund the restaurant endeavor, and then the
24

25 ¹⁰ Merely because a consumer files a bankruptcy case is not the end of the "bankruptcy
26 story," only the beginning. Filing a bankruptcy case does not guaranty that such case will be
27 completed. Even if a debtor files all of the required documents that does not mean the debtor
28 will obtain a discharge. Even if a discharge is entered, the creditor who has commenced debt
collection litigation against a consumer debtor who has filed bankruptcy must address the
bankruptcy filing and discharge in that debt collection litigation.

1 restaurant failing after approximately eighteen months. The Chapter 7 case ensued due to the debts
2 owed, with one of the outcomes being the Plaintiff-Debtors losing their pre-bankruptcy home to
3 creditors.

4 Plaintiff-Debtors obtained their discharge and proceeded with their bankruptcy “Fresh Start”
5 in March 2009. By 2015 Plaintiff-Debtors were financially ready to purchase a new residence. In
6 the Spring of 2015, Plaintiff-Debtors entered into a contract to purchase real property commonly
7 known as 1956 Altessa Lane, Ceres, California (the “Ceres Property”).¹¹ Escrow was opened and
8 Plaintiff-Debtors’ loan officer provided them with a copy of their credit report – noting that the credit
9 report showed there being an outstanding judgment from the SF Superior Court owed by Plaintiff-
10 Debtors to Defendant that dated back to 2009.

11 A copy of the Old Republic Credit Services Report is provided as Exhibit 2 at trial. On
12 “Page 7/10” (upper right-hand corner, actual page 3 of Exhibit 2), the following information is
13 provided:

PUBLIC RECORDS			
Filing Date February 6, 2009	Judgment	Municipal Court	Docket CGC08480700
Reported Date “2009-02”		Plaintiff Creditors Trade Associ	

14
15
16
17
18
19 The only dispute raised by Defendant as to the item appearing on the credit report was
20 whether Plaintiff-Debtors asserted that Defendant placed the information on the credit report. As
21 pointed out by counsel for Defendant, the information on the credit report is under the “Public
22 Records” section of the creditor report. This indicates that the credit reporting agencies obtained the
23 information from public records (the SF Superior Court public records), as opposed to it being
24 reported by Defendant.

25 The evidence presented does not show that Defendant affirmatively reported the judgment
26 to any of the credit reporting agencies. However, the Complaint and claims focus first on the entry
27

28 ¹¹ Exhibit 15, copy of Extension of Time Addendum citing to Purchase Agreement.

1 of the SF Void Judgment against Plaintiff-Debtors in violation of the automatic stay. Then, on
2 Defendant's failure to correct the continuing violation of the automatic stay from the time Defendant:

- 3 (1) learned in December 2008 or February 2009 of the bankruptcy case being filed,
- 4 (2) obtained the entry of the SF Void Judgment in 2009 after the filing of the bankruptcy
5 case,
- 6 (3) allowed the SF Void Judgment continuing to be of record at the time of and after the
7 discharge being entered for Plaintiff-Debtors in 2009,
- 8 (4) took no action to correct the continuing violation of the automatic stay and the discharge
9 injunction during the period March 2009 through May 2015, and
- 10 (5) took no action to vacate the SF Void Judgment from May 2015 (when Defendant's
11 counsel of record in the SF Superior Court Action first sent the demand to correct the
12 continuing violation of the automatic stay) through early August 2015,

13 until after Plaintiff-Debtors were compelled to file and serve the Complaint in this Adversary
14 Proceeding to address the continuing violation of the automatic stay and discharge injunction.

15 Plaintiff-Debtors present evidence that the pending purchase of the Ceres Property was put
16 at peril due to the SF Void Judgment obtained by Defendant continuing to be of public record at the
17 SF Superior Court. The Exhibits include communications with Plaintiff-Debtors' loan broker stating
18 that the loan documents were good until August 6, 2015, after which they would have to be
19 redrawn.¹² Ms. Silva again contacted counsel for Plaintiff-Debtors on July 20, 2015, advising him:¹³

20 I just wanted to let you know that our borrower [**Plaintiff-Debtors**] is in a position
21 of losing this transaction [**Ceres Property purchase**], if there is anything that you
22 can help with this, we are still waiting on my end for the underwriter to find out if
23 HUD is going to accept the documentation, buy my fear is that they will want it [**the
24 San Francisco County judgment**] to be vacated or released.

25 Ms. Silva subsequently communicated on July 22, 2015, that the loan broker needed proof that the
26 motion to vacate the San Francisco Superior Court Judgment had been filed.¹⁴

27 Robert Achterberg, one of the Plaintiff-Debtors, provides his testimony that the escrow to
28 close the Ceres Property purchase was stalled because of the San Francisco Superior Court Judgment

26 ¹² Exhibit 4, pg. 1; email from loan broker representative Patsy Silva to counsel for
27 Plaintiff-Debtors.

28 ¹³ *Id.*, p. 1; July 22, 2015 email Patsy Silva to counsel for Plaintiff-Debtors.

¹⁴ *Id.*, pp. 2-4.

1 that appeared of record on his credit report. This forced Plaintiff-Debtors to pay a \$1,250.00
2 extension fee to maintain their existing contract rights to purchase the Ceres Property while they
3 attempted to get Defendant to vacate the SF Void Judgment. Robert Achterberg further testified that
4 if the extension was not obtained and the Purchase Contract lapsed, Plaintiff-Debtors would have
5 lost the \$2,800.00 that they had already deposited into the purchase escrow.

6 **COMMUNICATIONS STATING TO BE FROM**
7 **DEFENDANT’S COUNSEL CONCERNING THE**
8 **CONTINUING VIOLATION OF THE AUTOMATIC STAY**

9 Before discussing the events of 2015 and communications from the current attorney for
10 Defendant, the court reviews the evidence presented about various attorneys for Defendant. The
11 undisputed testimony is that Defendant had several “in-house counsel”¹⁵ who represented it from the
12 time the SF Void Judgment was obtained in violation of the automatic stay through this trial. The
13 original “in-house counsel” was Stephen M. Kappos, Esq., whose office is located in Granite Bay,
14 California.¹⁶ Mr. Looney, Defendant’s president, testified that the “in-house counsel” services of
15 Mr. Kappos started around 2007 and terminated in April 2014.

16 Mr. Kappos was replaced as “in-house counsel” by Ralph Pollard, an attorney who has his
17 office in Concord, California.¹⁷ On the Substitution of Attorney¹⁸ and pleadings filed by
18 Mr. Pollard, the address of 3785 Brickway Boulevard, Suite 201, Santa Rosa, California

19 ¹⁵ The court makes the reference to “in-house counsel” in quotes because the evidence
20 presented that such attorneys were not “in-house employees” of Defendant but third-party law
21 firms that had Defendant and other collection agencies as their respective clients, in addition to
22 other clients for the law firm. As in this Adversary Proceeding, the purported “in-house
23 counsel,” Ralph Pollard expressly represents on his pleadings that he is “Ralph L. Pollard, Esq.”
of the “Law Offices of Ralph L. Pollard,” and not the “in-house legal department of Creditors
Trade Association.”

24 ¹⁶ Mr. Kappos is reported by the California State Bar as having continuously in practice
25 as an attorney in California from July 7, 1989, through the issuance of this Decision.
<http://members.calbar.ca.gov/fal/Member/Detail/141371>.

26 ¹⁷ Mr. Pollard is reported by the California State Bar as having continuously in practice
27 as an attorney in California from December 16, 1980, through the issuance of this Decision.
28 <http://members.calbar.ca.gov/fal/Member/Detail/95975>.

¹⁸ Dckt. 20.

1 (Defendant's business address) is stated as the address for Law Offices of Ralph L. Pollard.
2 However, Mr. Looney testified that Defendant makes space available for Mr. Pollard to provide his
3 services as "in-house counsel," with no credible evidence presented that Mr. Pollard operates the
4 Law Offices of Ralph Pollard from Defendant's offices. *See* Answer to Interrogatories 2 and 4 of
5 the Special Interrogatories, Exhibit 24.

6 In reviewing the Exhibits, all written communications from the Law Office of Ralph L.
7 Pollard concerning the violations of the automatic stay and discharge injunction are sent from the
8 Defendant's 3785 Brickway Boulevard, Suite 210, Santa Rosa, California. All communications from
9 the Law Offices of Ralph L. Pollard are signed by Gary Looney bearing the title "Case
10 Administrator" for the Law Offices of Ralph L. Pollard. *See* Exhibits 5, 6, 9, 11, 12, and 14.
11 Mr. Looney testified that he is not an employee of the Law Offices of Ralph L. Pollard and offered
12 no testimony as to why or how he was authorized to execute letters and communicate in the name
13 of the Law Office of Ralph L. Pollard. Rather, Ralph L. Pollard was expressly stated to be the "in-
14 house counsel" for Defendant. Ralph L. Pollard volunteered at trial (not testifying as a witness) that
15 he serves as such "in-house counsel" for several collection agencies, in addition to his law practice
16 at the Law Office of Ralph L. Pollard.

17 From the evidence presented, while it appears that Mr. Looney could be a "case manager"
18 (which position was never defined) for Defendant, no credible evidence was presented that
19 Mr. Looney was an employee of or authorized agent for the Law Office of Ralph L. Pollard. Further,
20 the testimony is that Mr. Pollard was "in-house counsel," not a third-party law firm representing
21 Defendant. No credible evidence was presented of any action taken by Ralph L. Pollard, personally,
22 as "in-house counsel" (or in any attorney role) in connection with this violation of the automatic stay
23 and discharge injunction. Though afforded the opportunity to provide evidence and testimony in
24 opposition and as rebuttal, the only testimony provided for Defendant was by Gary Looney, who was
25 called as a hostile witness by Plaintiff. Such testimony was stated by Defendant to serve as any
26 rebuttal witnesses that Defendant would want to present.

27 At best, this "in-house counsel" relationship appears to be one in which Mr. Pollard relied
28 upon the services of Gary Looney to do everything for Mr. Pollard's law firm. At worst, it could be

1 a situation where Mr. Pollard gave Mr. Looney his letterhead and law license, empowering
2 Mr. Looney (who is not licensed to practice law¹⁹) to act as a lawyer and engage in the unlicensed
3 practice of law under the name of the Law Offices of Ralph L. Pollard.

4
5 **VIOLATION OF THE AUTOMATIC STAY,
6 DETERMINATION THAT CONDUCT VIOLATING THE STAY IS VOID,
7 AND OBLIGATIONS ARISING FOR A CREDITOR WHOSE
8 CONDUCT HAS VIOLATED THE AUTOMATIC STAY**

9 Congress and the Ninth Circuit Court of Appeals have made it clear that a violation of the
10 automatic stay is a very serious matter. A creditor who violates the stay has an affirmative obligation
11 to correct the violation and cannot assert a defense based on the lack of action by a debtor to force
12 the remedy of that creditor’s violation. Congress has enacted a statutory stay that arises,
13 automatically, upon the commencement of a bankruptcy case that prevents creditors from taking
14 many acts, including the following:

- 15 A. “(1) the commencement or continuation, including the issuance or employment of
16 process, of a judicial, administrative, or other action or proceeding against the debtor
17 that was or could have been commenced before the commencement of the case under
18 this title, or to recover a claim against the debtor that arose before the commencement
19 of the case under this title; . . .”²⁰
- 20 B. “(6) any act to collect, assess, or recover a claim against the debtor that arose before
21 the commencement of the case under this title;....”²¹

22 As established by the evidence presented, Defendant knowingly obtained a default judgment
23 against Plaintiff-Debtors in February 2009, which occurred after commencement of the Plaintiff-
24 Debtor’s bankruptcy case in December 2008. Defendant received notice of the December 2008
25 filing of Plaintiff-Debtors’ bankruptcy case prior to obtaining the SF Void Judgment. Defendant,
26 with knowledge of the filing of the bankruptcy case, purports to have “closed” the file and sent it to
27 storage before the SF Void Judgment was issued. Defendant states that the reason the judgment was
28 not “caught” is because the file had been “closed” and did not get associated to it by the time the

29 ¹⁹ [http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=gary+looney
&SoundsLike=false&x=0&y=0](http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=gary+looney&SoundsLike=false&x=0&y=0).

30 ²⁰ 11 U.S.C. § 362(a)(1).

31 ²¹ 11 U.S.C. § 362(a)(6).

1 SF Void Judgment was issued in February 2009. As discussed above, no credible evidence is
2 presented how the “closing of a file” sometime after December 2008 (when the bankruptcy notice
3 was received) and prior to obtaining the SF Void Judgment in February 2009 (barely two months
4 later) rendered Defendant incapable of linking the SF Void Judgment to the Plaintiff-Debtors’
5 bankruptcy case, the automatic stay, the discharge, and the discharge injunction in Plaintiff-Debtors’
6 December 2008 filed bankruptcy case.

7 What Defendant admits is that it had full knowledge of the bankruptcy case by the time it
8 received the SF Void Judgment, having “closed” the file because Defendant received notice of the
9 bankruptcy case being filed. The evidence also establishes that since February 2009 Defendant has
10 had actual knowledge of the Plaintiff-Debtors’ 2008 bankruptcy case and since March 2009 the entry
11 of Plaintiff-Debtors’ discharge, which includes the debt that is the subject of the SF Void
12 Judgment.²²

13 **The Person Violating the Automatic Stay Has the Burden of**
14 **Avoiding the Violation, and When a Violation Occurs, to**
15 **Remedy Such Violation**

16 The automatic stay is just that, automatic, with no obligation on a debtor to affirmatively
17 enforce the stay for it to be effective. When a creditor has notice of a bankruptcy case, it is the
18 creditor’s burden to determine the extent of the automatic stay and seek such relief as is
19 appropriate.²³

20 The automatic stay imposes an affirmative duty of compliance by the creditor.²⁴ As one of

21 ²² The evidence includes a copy of the Discharge and Certificate of Service listing the
22 discharge order having been served on Defendant. Exhibit 19, Discharge and Certificate of
23 Service; Exhibit 24, Response to Interrogatory Question 1; and Testimony of Gary Looney of the
24 address of Defendant.

25 ²³ COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 362.02; *Carter v. Buskirk (In re*
26 *Carter)*, 691 F.2d 390 (8th Cir. 1982); *Hillis Motors v. Hawaii Automobile Dealers’ Association*
27 *(In re Hillis Motors)*, 997 F.2d 581, 586 (9th Cir. 1993) (“Where through an action an individual
or entity would exercise control over property of the estate, that party must obtain advance relief
from the automatic stay from the bankruptcy court. *Carroll v. Tri-Growth Centre City Ltd. (In re*
Carroll), 903 F.2d 1266, 1270-71 (9th Cir. 1990).”)

28 ²⁴ *State of Cal. Emp’t Dev. Dep’t v. Taxel (In re Del Mission Ltd.)*, 98 F.2d 1147, 1151-
52 (9th Cir. 1996).

1 the fundamental principles girding the Bankruptcy Code, “the automatic stay requires a creditor to
2 maintain the *status quo ante* and to remediate acts taken in ignorance of the stay.”²⁵ The automatic
3 stay imposes an affirmative duty to discontinue actions in violation of the stay.²⁶ A creditor cannot
4 use the state court enforcement action as leverage in negotiations once the bankruptcy case has been
5 commenced.²⁷

6 Once the creditor learns or has notice of a bankruptcy case having been filed, any actions that
7 it intentionally undertakes are deemed willful.²⁸ As the Ninth Circuit Court of Appeals explained
8 in *Goichman v. Bloom*:²⁹

9 A “willful violation” does not require a specific intent to violate the automatic stay.
10 Rather, the statute provides for damages upon a finding that the defendant knew of
11 the automatic stay and that the defendant’s actions which violated the stay were
12 intentional. Whether the party believes in good faith that it had a right to the property
is not relevant to whether the act was “willful” or whether compensation must be
awarded.

13 It is well established that an “ignorance of the law” or advice of counsel is not a *bona fide* defense
14 to a willful violation of the automatic stay.³⁰

15 Though ignorance of a bankruptcy case being filed may be a defense to liability for damages
16

17 ²⁵ *Franchise Tax Bd. v. Roberts (In re Roberts)*, 175 B.R. 339, 343 (B.A.P. 9th Cir.
18 1994).

19 ²⁶ *Sternberg v. Johnson*, 595 F.3d 937, 944 (9th Cir. 2010); *Eskanos & Adler, P.C. v.*
20 *Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002) (addressing the obligation to discontinue post-
petition collection proceedings).

21 ²⁷ *Eskanos & Alder*, 309 F.3d at 1215.

22 ²⁸ *In re Risner*, 317 B.R. 830, 835 (Bankr. D. Idaho 2004); *see also Eskanos and Adler,*
23 *P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002); *Thompson v. GMAC, LLC*, 566 F.3d 699,
24 702-3 (7th Cir. 2009); *Emp’t. Dev. Dept. v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151
25 (9th Cir. 1996) (holding that the knowing retention of estate property violates the automatic stay).

26 ²⁹ *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989) (citing *INSLAW,*
Inc. v. United States (In re INSLAW, Inc.), 83 B.R. 89, 165 (Bankr. D.D.C. 1988)).

27 ³⁰ *Botell v. United States*, No. 2:11-cv-01545-GEB-GGH, 2012 U.S. Dist. LEXIS 41172
28 (E.D. Cal. March 26, 2012); *Joe Hand Promotions, Inc. v. Estradda*, No.
1:10-cv-02165-OWW-SKO, 2011 U.S. Dist. LEXIS 61010 (E.D. Cal. June 8, 2011).

1 (not taking a willful act with knowledge of a bankruptcy case), such “innocent” violation does not
2 absolve the creditor of liability for failing to correct the violation once the creditor learns of the
3 bankruptcy case having been filed.³¹ A party who takes an action in violation of the stay not only
4 has an obligation to cease the continuing violation, but also has an affirmative duty to remedy the
5 violation.³² It is not for the debtor, debtor-in-possession, Chapter 7 trustee, or Chapter 11 trustee
6 to chase the creditor and correct the continuing violation and force the creditor to begrudgingly
7 comply with federal law.³³ “The responsibility is placed on the creditor to address the continuing
8 violation of the automatic stay because to place the burden on the debtor to undo the violation
9 ‘would subject the debtor to the financial pressures the automatic stay was designed to temporally
10 abate.’”³⁴

11 **Acts Taken in Violation of the Automatic** 12 **Stay Are Void, Not Voidable**

13 That an act taken in violation of the automatic stay is void, not merely voidable, is well-
14 established law in the Ninth Circuit as addressed by the court in *Far Out Productions, Inc. v. Oskar*
15 *et al.*³⁵

16
17 ³¹ *In re Cordle*, 187 B.R. 1, 4 (N.D. Cal. 1995).

18 ³² *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191-92 (9th Cir. 2003).

19 ³³ *Taxel*, 98 F.3d at 1151.

20 ³⁴ *Johnson v. Parker (In re Johnson)*, 321 B.R. 262, 283 (D. Ariz. 2005) (citation
21 omitted).

22 ³⁵ *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001). *See also*
23 *United States of America (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992), [emphasis in
24 original] holding:

25 Our decision today clarifies this area of the law by making clear that violations of
26 the automatic stay are void, not voidable. See *In re Williams*, 124 Bankr. 311,
27 316-18 (Bankr. C.D. Cal. 1991) (recognizing that the Ninth Circuit adheres to the
28 rule that violations of the automatic stay are void and criticizing the BAP decision
in this case). . .

The automatic stay is one of the fundamental debtor protections
provided by the bankruptcy laws. It gives the debtor a breathing

1 In fact, the automatic stay provision is so central to the functioning of the bankruptcy
2 system that this circuit regards judgments obtained in violation of the provision as
3 void rather than merely voidable on the motion of the debtor. See [*In re Schwartz*,
4 954 F.2d 569, 571 (9th Cir. 1992)]. Courts regularly void state court default
5 judgments against debtors when the judgments are obtained in violation of the
6 automatic stay provision, even where the debtor filed for bankruptcy in the midst of
7 the state court proceedings. See, e.g., *In re Fillion*, 181 F.3d 859, 861 (7th Cir. 1999);
8 *In re Graves*, 33 F.3d 242, 247 (3d Cir. 1994).

9 Creditors who wish to take action against a debtor or property that is subject to the automatic stay
10 “[h]ave the burden of obtaining relief from the automatic stay.”³⁶

11 The Ninth Circuit revisited this issue in *40235 Washington Street Corporation v. Lusardi (In*
12 *re Lusardi)*, 329 F.3d 1076 (9th Cir. 2003), addressing a county tax sale of real property that
13 occurred after a bankruptcy case was filed, with neither the county nor the purchaser having any
14 knowledge of the bankruptcy case. The Ninth Circuit concluded that because the tax sale occurred
15 while the bankruptcy case was pending, the sale was void, and that the debtor, not the purchaser, was
16 the owner of the real property. This ruling finding that the sale was void was issued more than
17 12 years after the sale had occurred and the county not having refunded the purchase money paid by
18 the buyer at the tax sale.

19 At trial, Defendant (weakly) advanced an argument that because the automatic stay rendered
20 the SF Void Judgment void, Defendant’s continuing violation of the automatic stay really did not
21 harm the Plaintiff-Debtors. This contention advanced by Defendant does not just miss the mark, but
22 foreshadows a more sinister motive behind Defendant’s conduct. Though knowing that the
23 Bankruptcy Case had been filed, Defendant allowed the SF Void Judgment to remain in the public
24 records of the SF Superior Court – falsely telling the world (including consumer reporting agencies)
25 that Defendant held a judgment against Plaintiff-Debtors.

26 spell from his [or her] creditors. *It stops all collection efforts, all*
27 *harassment, and all foreclosure actions.* It permits the debtor to
28 attempt a repayment or reorganization plan, or simply to be
relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978
U.S.C.C.A.N. 5963, 6296-97 (emphasis added).

³⁶ *In re Schwartz*, 954 F. 2d at 572.

1 **Liability for Violations of the Automatic Stay**

2 A violation of the automatic stay is addressed as “ordinary civil contempt.” For individual
3 debtors Congress has created additional statutory remedies pursuant to 11 U.S.C. § 362(k).³⁷

4 The basic analysis as discussed by the Ninth Circuit Court of Appeals in *Dyer v. Lindblade*³⁸
5 for considering civil contempt is stated as follows:

6 “The standard for finding a party in civil contempt is well settled: The
7 moving party has the burden of showing by clear and convincing evidence that the
8 contemnors violated a specific and definite order of the court.” *Bennett*, 298 F.3d at
9 1069. Because the “metes and bounds of the automatic stay are provided by statute
and systematically applied to all cases,” *Jove Eng'g v. IRS (In re Jove Eng'g)*, 92 F.3d
1539, 1546 (11th Cir. 1996), there can be no doubt that the automatic stay qualifies
as a specific and definite court order.

10 In determining whether the contemnor violated the stay, the focus ‘is not on
11 the subjective beliefs or intent of the contemnors in complying with the order, but
whether in fact their conduct complied with the order at issue.’ *Hardy v. United*
12 *States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996) (internal citations omitted);
accord *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 93 L. Ed. 599, 69 S.
13 Ct. 497 (1949). (Because civil contempt serves a remedial purpose, “it matters not
with what intent the defendant did the prohibited act.”)

14 The threshold standard for imposing a civil contempt sanction in the context
of an automatic stay violation therefore dovetails with the threshold standard for
15 awarding damages under § 362(h). *Pace*, 67 F.3d at 191 (incorporating the
willfulness standard of § 362(h) as explicated by *Pinkstaff v. United States (In re*
16 *Pinkstaff)*, 974 F.2d 113, 115 (9th Cir. 1992)). Under both statutes, the threshold
question regarding the propriety of an award turns not on a finding of ‘bad faith’ or
17 subjective intent, but rather on a finding of ‘willfulness,’ where willfulness has a
particularized meaning in this context:

18 ‘[W]illful violation’ does not require a specific intent to violate the automatic
19 stay. Rather, the statute provides for damages upon a finding that the
defendant knew of the automatic stay and that the defendant's actions which
20 violated the stay were intentional.

21 *Pace*, 67 F.3d at 191; see also *Pinkstaff*, 974 F.2d at 115; *Hardy*, 97 F.3d at 1390;
22 cf. *Bennett*, 298 F.3d at 1069 (describing standard for imposing civil contempt
sanctions under § 105(a) for violation of discharge injunction).

23 Congress has created the additional statutory remedies for an individual debtor who asserts
24 claims for violation of the automatic stay, providing in 11 U.S.C. § 362(k) [emphasis added]:

25 (k) (1) Except as provided in paragraph (2), an **individual injured by any willful**
26 **violation** of a stay provided by this section **shall recover** actual damages, including

27 ³⁷ *Dyer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190-91 (9th Cir. 2003).

28 ³⁸ *Id.*

1 costs and attorneys' fees, and, in appropriate circumstances, **may recover punitive**
2 **damages.**

3 (2) If such violation is based on an action taken by an entity in the good faith belief
4 that subsection (h) applies to the debtor, the recovery under paragraph (1) of this
5 subsection against such entity shall be limited to actual damages.

6 **Actual Damages**

7 The basic measure of damages for violation of the automatic stay is the amount of economic
8 loss the debtor has suffered as the proximate result of the defendant's violation. The court takes into
9 account the fair market value of the property that was disposed of in violation of the automatic stay.³⁹
10 Actual damages for violation of the automatic stay include emotional distress damages.⁴⁰ For a
11 debtor to state a claim for emotional distress damages, the individual must (1) suffer significant
12 harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between the
13 significant harm and the violation of the automatic stay.⁴¹ Medical evidence of emotional distress
14 is not required; the testimony of family members, friends, and co-workers is sufficient to establish
15 an emotional distress claim.⁴² In some cases no corroborating evidence is required. An example
16 cited in *Dawson* is where the egregious conduct was the creditor pretending to hold a gun to the
17 debtor's head.⁴³ Additionally, the court in *Dawson* stated that even when the conduct was not
18 egregious, the court could award emotional distress damages where the circumstances make it
19 obvious that a reasonable person would suffer emotional harm, such as the emotional distress of
20
21

22 ³⁹ *In re Kaufman*, 315 B.R. 858, 866 (N.D. Cal. 2004).

23 ⁴⁰ *Dawson v. Wash. Mut. Bank (In re Dawson)*, 390 F.2d 1139, 1148 (9th Cir. 2004).

24 ⁴¹ *Id.* at 1149.

25 ⁴² *Id.*, citing *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 821-22 (B.A.P. 1st Cir.
26 2002) (holding that testimony of debtor's wife was sufficient to support an award of medical
27 damages without medical testimony).

28 ⁴³ *Dawson*, 390 F.2d at 1149 (citing *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 905
(Bankr. E.D. Pa. 1987)).

1 having to cancel a child’s birthday party because the debtor’s checking account was frozen.⁴⁴

2 Congress has also provided that the “actual damages” for an individual debtor seeking to
3 redress a violation of the automatic stay “shall” include “costs and attorneys’ fees.” 11 U.S.C.
4 § 362(k)(1). The costs and attorneys’ fees include those incurred in the individual debtor in having
5 to prosecute the action to recover the damages caused by the violation of the stay even after the
6 violation has been abated, but the violating party fails to pay the then existing damages (as with the
7 violation now before the court).⁴⁵

8 **Punitive Damages**

9 In addition to actual damages, 11 U.S.C. § 362(k)(1) permits the recovery of punitive
10 damages “in appropriate circumstances.” The Ninth Circuit has cautioned that punitive damages are
11 only appropriate if there has been some showing of “reckless or callous disregard for the law or
12 rights of others.”⁴⁶ The bankruptcy court is given considerable discretion in granting or denying
13 punitive damages under 362(k).⁴⁷ Punitive damages are properly awarded to punish unlawful
14 conduct and deter its repetition.⁴⁸

15 A debtor entitled to actual damages does not automatically qualify under § 362(k)(1) to
16 recover punitive damages. The court must decide whether the circumstances of each case warrant
17
18
19

20 ⁴⁴ *Id.* (citing *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995)
21 (\$5,000.00 award of emotional distress damages because ‘it is clear that the appellee suffered
22 emotional damages’ when she was forced to cancel her son’s birthday party because her checking
account was frozen)); *see also Sternberg*, 595 F.3d at 943.

23 ⁴⁵ *America’s Servicing Company v. Schwartz-Tallard (In re Schwartz Tallard)*, 803 F.3d
24 1095, 1101 (9th Cir. 2015). This even includes the right to attorneys’ fees for having to defend
25 an award of damages pursuant to 11 U.S.C. § 362(k) on appeal. *Id.*

26 ⁴⁶ *Bloom*, 875 F.2d at 228.

27 ⁴⁷ *Id.*

28 ⁴⁸ *See Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001); *BMW of N.
Am. v. Gore*, 517 U.S. 559, 568 (1996);

1 punitive damages.⁴⁹ When considering an award for damages, the court considers the gravity of the
2 offense and sets the amount of punitive damages to assure that they will both punish and deter.⁵⁰ A
3 creditor's good faith or lack thereof is relevant to sanctions under § 362(k)(1).⁵¹ In determining the
4 appropriate amount of punitive damages, the court usually considers the following factors: (1) the
5 nature of the defendants' acts; (2) the amount of compensatory damages awarded; and (3) the wealth
6 of the defendants.⁵²

7 In evaluating the "nature" of the Defendant's acts, the court considers the purpose of the
8 automatic stay and the role it serves in the bankruptcy process. The automatic stay, as stated by
9 Congress, is a fundamental protection given the debtor and creditors.⁵³ Violations of the automatic
10 stay are not something with which a creditor may trifle. Even when a violation occurs, the creditor
11 can purge the improper conduct and avoid more significant damages by correcting the violation.

13 ⁴⁹ *Henry v. Assocs. Home Equity Servs. (In re Henry)*, 266 B.R. 457, 481-83 (Bankr. C.D.
14 Cal. 2001).

15 ⁵⁰ *Id.*

16 ⁵¹ *See Walls v. Wells Fargo Bank (In re Walls)*, 262 B.R. 519, 529 (Bankr. E.D. Cal.
17 2001).

18 ⁵² *Bauer v. NE Neb. Fed. Credit Union (In re Bauer)* No. EC-09-1281, 2010 Bankr.
19 LEXIS 5096, (B.A.P. 9th Cir. Apr. 8, 2010).

20 ⁵³ H. Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp.
340-344:

21 The automatic stay is one of the fundamental debtor protections provided
22 by the bankruptcy laws. It gives the debtor a breathing spell from his
23 creditors. It stops all collection efforts, all harassment, and all foreclosure
24 actions. It permits the debtor to attempt a repayment or reorganization
plan, or simply to be relieved of the financial pressures that drove him into
bankruptcy.

25 The automatic stay also provides creditor protection. Without it, certain
26 creditors would be able to pursue their own remedies against the debtor's
27 property. Those who acted first would obtain payment of the claims in
28 preference to and to the detriment of other creditors. Bankruptcy is
designed to provide an orderly liquidation procedure under which all
creditors are treated equally. A race of diligence by creditors for the
debtor's assets prevents that.

1 The court also considers the proportionality of the punitive damages to the compensatory
2 damages awarded to the Plaintiff-Debtors. The rule in both the Ninth Circuit and in California is
3 that punitive damages must be proportional and be reasonably related to compensatory damages.⁵⁴
4 However, there is no fixed ratio or formula for determining the proper proportion between the two.⁵⁵
5 In a 2004 decision, *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408 (2004),
6 the Supreme Court discussed the Constitutional reasonableness requirement in determining the
7 amount of punitive damages. While not setting a maximum ratio between punitive damages and
8 compensatory damages, the Supreme Court stated that punitive damage awards that are a single digit
9 multiple of the compensatory damages are more likely to withstand constitutional scrutiny.⁵⁶ The
10 Court in *State Farm* cited to its earlier holding in *BMW of North America v. Gore*⁵⁷ that a punitive
11 damage award (that in *Gore* was 500 times the compensatory damages) in excess of four times the
12 compensatory damages might be close to the line of constitutional impropriety.

13
14 **DETERMINATION THAT CONDUCT OF DEFENDANT WAS WILLFUL**
15 **AND IN CALLOUS DISREGARD FOR THE RIGHTS OF PLAINTIFF-DEBTORS**
16 **AND THE OBLIGATIONS OF DEFENDANT UNDER 11 U.S.C. § 362(a)**

17 Though the evidence does not show that Defendant was aware of the bankruptcy filing when
18 the motion for entry of default judgment in the San Francisco State Court Action was filed, it is clear
19 that Defendant had actual knowledge of the December 2008 bankruptcy filing when the SF Void
20 Judgment was entered and received by Defendant in February 2009. It is further clear that Defendant
21 had knowledge that any obligation to Defendant was discharged and the imposition of the discharge
22 injunction in March 2009 when Defendant was served with the Discharge issued by this court. From
23 the period February 2009 through July 2015, Defendant took no action to vacate the SF Void

24 ⁵⁴ *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1162-63 (9th Cir. 1987).

25 ⁵⁵ *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1024-25 (9th Cir.
26 1985).

27 ⁵⁶ *Cooper Industries v. Leatherman Tool Group*, 532 U.S. at 425.

28 ⁵⁷ 517 U.S. at 582.

1 Judgment obtained in violation of the automatic stay or to correct the false public recording stating
2 that Defendant had a judgment against Plaintiff-Debtors.⁵⁸

3 With full knowledge of the bankruptcy case and discharge, Defendant failed to act for:

- 4 A. Ten Months in 2009.....306 days
- 5 B. Twelve more Months in 2010.....365 days
- 6 C. Twelve more Months in 2011.....365 days
- 7 D. Twelve more Months in 2012.....366 days
- 8 E. Twelve more Months in 2013.....365 days
- 9 F. Twelve more Months in 2014.....365 days
- 10 G. Seven more Months in 2015.....212 days

11 For a Total of Seventy-Seven Months = 2,343 days,

12 until Defendant forced Plaintiff-Debtors to file this Adversary Proceeding (and incur all of the costs
13 and expenses relating thereto) to address Defendant’s continuing violation of the automatic stay.
14 Only after the Adversary Proceeding was filed did Defendant take action to correct the SF Void
15 Judgment. During the above period, the SF Void Judgment was allowed by Defendant to be a
16 continuing false statement to the world (including consumer reporting agencies) in the SF Superior
17 Court public record that Defendant held an enforceable judgment against Plaintiff-Debtors.

18 The action, and inaction, of Defendant in 2015 manifests conduct that goes beyond merely
19 “willful,” but that was in reckless or callous disregard of the law and the rights of Plaintiff-Debtors.
20 From Defendant’s conduct in May through August 2015, as well as the inaction in February 2009
21 through April 2015, the court concludes that Defendant intentionally failed to vacate the SF Void
22 Judgment. Defendant knew that the SF Void Judgment was obtained and allowed to continue as a
23 matter of public record falsely stating that a judgment existed in violation of the automatic stay

24 ⁵⁸ Though afforded the opportunity to present evidence to the court of the attempts made
25 by Defendant, nothing was presented but the testimony of Gary Looney (called as a hostile
26 witness by Plaintiff-Debtors and offered as a rebuttal witness). It appears that part of the
27 explanation is that Defendant cannot get the file back from storage because it is reported as lost.
28 However, that contention rings hollow in the 21st Century when businesses maintain electronic
data bases and records, including electronic logs of the actions taken in the course of operating
the business. Striking in its absence is the failure of Defendant to present the court with
evidence and documents of all its “good works” in June and July 2015 to promptly address its
continuing violation of the automatic stay and vacate the SF Void Judgment. There was not any
presented that Defendant’s 2015 and thereafter “files” (physical and electronic) relating to the SF
Void Judgment and actions taken to correct the violation of the automatic stay when requested,
and then demanded, in 2015 are “lost.”

1 during that six-year period. Additionally, in the May to August 2015 period, Defendant failed to act
2 in response to the direct requests to correct the continuing violation of the automatic stay, forcing
3 Plaintiff-Debtors to incur further costs, expenses, and damages in having to file and prosecute the
4 present Adversary Proceeding. The Adversary Proceeding was first necessary to compel Defendant
5 to first correct the continuing violation of the automatic stay and discharge injunction. Then, even
6 though Defendant showed it could quickly vacate the SF Void Judgment (but only after being served
7 with the summons and Complaint), the prosecution of this Adversary Proceeding was necessary to
8 enforce Plaintiff-Debtors' right to recover damages caused by the continuing violation of the
9 automatic stay and discharge injunction.

10 It appears that Defendant may have believed that if it failed to act to correct the continuing
11 violation, Plaintiff-Debtors' counsel would give up and not file the Complaint given the cost and
12 expense of such litigation. This would allow Defendant to continue in the violation of the automatic
13 stay and maintain the false appearance of having a judgment against Plaintiff-Debtors, who
14 Defendant may have perceived as desperate to purchase their new home.

15 It also may have been that Defendant believed that Plaintiff-Debtors' counsel might suggest
16 that Plaintiff-Debtors take a "financially expedient route," forgo filing the Complaint (and incurring
17 tens of thousands of dollars in attorneys' fees for years of litigation) and throw a couple thousand
18 dollars at Defendant to "buy" a correction of the false public record and continuing violation of the
19 automatic stay. In this matter now before the court, Plaintiff-Debtors' counsel did not give advice
20 to throw money at Defendant to "buy" a correct credit report and "buy" the correction to the
21 continuing violation of the automatic stay. Plaintiff-Debtors did not take the easy way out, instead
22 electing to enforce the rights provided for by Congress in the Bankruptcy Code.

23 The court also notes that Plaintiff-Debtors and Plaintiff-Debtors' counsel went to great
24 lengths to afford Defendant the opportunity to correct the continuing violation of the automatic stay.
25 Even when the counsel of record who obtained the SF Void Judgment failed to respond to Plaintiff-
26 Debtors' counsel, Defendant and its current counsel (with all communications being with and
27 through Mr. Looney, president of Defendant, making the communications for Defendant's attorney)
28 were given more time to correct the continuing violation. Even though given additional time and

1 opportunities, while Defendant and Defendant’s counsel (as communicated by Mr. Looney)
2 promised the SF Void Judgment would be vacated, no action was taken by Defendant.

3 That Defendant could quickly and easily vacate the SF Void Judgment is demonstrated by
4 Defendant doing that—but only after being served with the summons and Complaint in this Adversary
5 Proceeding. Once sued, Defendant had the SF Void Judgment vacated within days. The Certificate
6 of Service states that Defendant was served by mail with the Summons and Complaint by it being
7 placed in the United States Mail, postage prepaid, on July 29, 2015, Dckt. 9; and testimony of
8 Malcolm Gross. July 29, 2015, was a Wednesday, and assuming prompt delivery of the mail, the
9 Summons and Complaint would have been received by Defendant on Friday, July 31, 2016.

10 By Monday, August 3, 2015, the Law Offices of Ralph L. Pollard, in a correspondence
11 written by Gary Looney, states that Defendant has arranged to present the motion to vacate at an
12 *ex parte* hearing on Friday, August 7 – just four days later. Exhibit 11.

13 Defendant has demonstrated that it had the ability, if it wanted to act, to have the SF Void
14 Judgment vacated within days of having actual knowledge of the bankruptcy case and discharge in
15 2009. More significantly, Defendant had the ability to have the SF Void Judgment vacated within
16 days of the July 2, 2015 letter sent to Stephen Kappos (as Defendant’s State Court counsel) and
17 Defendant, and the July 14, 2015 response from the Law Offices of Ralph Pollard as the attorney for
18 Defendant (which is signed by Gary Looney) stating that the motion to vacate will be filed.⁵⁹ No
19 explanation is given as to why and how Defendant did not promptly act to immediately vacate the
20 SF Void Judgment in the first week or two of July 2015, rather than forcing Plaintiff-Debtors to file
21 the Adversary Proceeding and serve the Summons and Complaint on July 29, 2015.

22 The less than business reasonable conduct (reasonable conduct being that intended to
23 minimize litigation and avoid incurring otherwise unnecessary expense and cost) continued by
24 Defendant through trial. In connection with the determination of attorneys’ fees and costs awarded
25 as part of Plaintiff-Debtor’s actual damages, Defendant argued that \$4,346.00 was the maximum
26 amount of reasonable fees because that is the amount that existed as of August 2015, when
27

28 ⁵⁹ Exhibits 3 and 5.

1 Defendant finally acted to vacate the SF Void Judgment. Therefore, Defendant argues that Plaintiff-
2 Debtor should be denied all of the actual damages legal fees incurred in trying to recover the
3 financial, emotional distress, and attorneys' fees actual damages which admittedly existed as of
4 August 2015. This contention that the actual damages attorneys' fees do not include the attorneys'
5 fees in having to litigate this action is without legal support as shown by the ruling of the Ninth
6 Circuit Court of Appeals in *America's Servicing Co. v. Schwartz-Tallard* discussed *supra*.

7 To the extent that Defendant seeks to contend that having to incur any legal fees past the
8 August 2015 vacating of the SF Void Judgment was unnecessary, Defendant's conduct is to the
9 contrary. Defendant fails to present any evidence that it ever made an offer to pay the actual
10 damages in August 2015, or at any time during the period from August 2015 through the December
11 2016 hearing to determine the amount of attorneys' fees and costs as actual damages. No evidence
12 is presented of any monies being tendered for the actual damages which existed as of August 2015
13 or at any time thereafter. No evidence is presented that Defendant made a Federal Rule of Civil
14 Procedure 68 and Federal Rule of Bankruptcy Procedure 7068 offer to base a contention that any
15 further attorneys' fees and costs are unreasonable in light of such an offer to have judgment entered
16 against Defendant.

17 Defendant's Opposition to the Motion to Determine Attorneys' Fees⁶⁰ demonstrates a
18 continuing pattern of attempting to leverage the cost of Plaintiff-Debtors having to enforce their
19 rights to letting Defendant avoid paying what it owed. Defendant's contention that the Plaintiff-
20 Debtors should not be awarded attorneys' fees for having to prosecute litigation to obtain a judgment
21 for damages that Defendant did not or would not pay, is without merit. Further, it manifests a
22 systemic problem with Defendant's conduct in failing to address the continuing violation of the
23 automatic stay and the damages caused by it. It manifests a coordinated, willful scheme to violate
24 the automatic stay and the rights of Plaintiff-Debtors.

25 ///

26 ///

27
28 ⁶⁰ Dckts. 48 and 50,

1 **DAMAGES FROM WILLFUL CONDUCT OF DEFENDANT**

2 **Actual Damages**

3 The Actual Damages awarded Plaintiff in this Adversary Proceeding total \$21,361.29 and
4 are comprised of the following parts.

5 Economic Damages. The evidence establishes that due to the SF Void Judgment not being
6 vacated, and Defendant ignoring and failing to affirmatively act to correct its continuing, knowing
7 violation of the automatic stay, Plaintiff-Debtors were forced to pay \$1,250.00 to extend the escrow
8 to not only avoid losing the ability to purchase the house, but also not lose the \$2,800.00 escrow
9 deposit they had made as part of the purchase contract.⁶¹ The undisputed evidence shows that the
10 escrow for the purchase of the home by Plaintiff-Debtors was delayed because the SF Void Judgment
11 continued to be reported in the official records of the San Francisco Superior Court.⁶² These
12 damages flow directly from Defendant continuing to violate the automatic stay by allowing the
13 SF Void Judgment to remain of public record and failing to act in the May - August 2015 period to
14 correct the continuing violations of the stay.

15 Defendant’s argument that because it did not “report” the item to credit reporting agencies,
16 the fact that it appeared on the Plaintiff-Debtors’ credit report having been obtained from the public
17 record (SF Superior Court) could not be Defendant’s “fault,”⁶³ is not only without merit on these
18 facts, but demonstrates continuing intentional conduct to avoid the legal obligations of Defendant.
19 The judgment was requested by Defendant. The judgment was obtained in violation of the automatic
20 stay by Defendant. Defendant knew it was in the public record, being told of the credit report
21 problem, and failed to act.

22
23 ⁶¹ Direct Testimony Statement and Testimony at Trial of Robert Achterberg.

24 ⁶² It was argued that Plaintiff-Debtors also lost a portion of an escrow credit due to the
25 delay in closing caused by the SF Void Judgment not being vacated and remaining in the public
26 record. However, the possible evidence for that was to be provided by Patsy Silva, the loan
27 officer. Ms. Silva was not presented as a witness at trial as required by L.B.R. 9017-1 and no
basis was presented to the court to accept written testimony in lieu of the required live testimony.

28 ⁶³ Old Republic Credit Services credit report, listing the State Court Judgment as one
obtained by Defendant for a judgment in the amount of \$6,467.00 against Plaintiff-Debtors.

1 Emotional Distress Damages. Plaintiff-Debtors have requested emotional distress damages
2 for the delay in being able to close escrow to purchase their home and the stress of that purchase
3 being in peril by the SF Void Judgment that Defendant did not have vacated. The knowledge of this
4 SF Void Judgment putting the purchase of Plaintiff-Debtors' home in jeopardy occurred during the
5 period of May 2015 through August 7, 2015, when the SF Void Judgment was vacated (after this
6 Adversary Proceeding was commenced) by Defendant.

7 The evidence of emotional distress damages is provided in the testimony of Robert
8 Achterberg. He testifies that having found the home they desired purchase (having finally
9 rehabilitated Plaintiff-Debtors' credit and recovered from the financial losses that necessitated the
10 2008 bankruptcy), Plaintiff-Debtors had to "deal" to keep the escrow alive. For Mr. Achterberg,
11 Plaintiff-Debtors' last resort was to have their attorney file this Adversary Proceeding (and incur all
12 the costs and expenses relating thereto) to try and save the escrow after Defendant failed to have
13 Void SF Judgment vacated pursuant to Plaintiff-Debtor's multiple requests. The court observed
14 Mr. Achterberg at trial during his testimony. He is a credible witness and demonstrated how
15 significantly the impediment the SF Void Judgment, and Defendant's failure to vacate the SF Void
16 Judgment, caused with the possible loss of the house the Plaintiff-Debtors were attempting to
17 purchase as their new home.

18 It is obvious to a reasonable person that, having weathered the Chapter 7 bankruptcy,
19 rehabilitating their credit, and finding a house to be Plaintiff-Debtors' home, and then the purchase
20 of that home being blocked by a void judgment, Plaintiff-Debtors would suffer emotional distress.
21 While not causing Plaintiff-Debtors to cease working or suffer a mental breakdown, it did cause
22 emotional distress. For ninety-three (93) days of emotional distress of having the loss of the future
23 family home and the \$2,850.00 escrow deposit, the court awards \$1,850.00 of emotional distress
24 damages. This works out to \$19.89 a day of damages, a very modest, reasonable amount.

25 Costs and Attorneys' Fees Damages. Congress mandates that the costs and attorneys' fees
26 incurred by an individual debtor from an automatic stay violation, including the litigation to recover
27 damages, shall be awarded the individual debtor. After conducting the trial, the court had a separate
28 hearing on December 15, 2016, to determine the amount of costs and attorneys' fees to be awarded

1 as actual damages. The separate hearing for the costs and attorneys' fees served several purposes.
2 First, going into the trial the actual legal fees for the "trial" could not be stated with any certainty.
3 Having a separate hearing on that issue allowed the parties to present clear evidence and arguments
4 on the issue of what proper costs and fees should be allowed. Additionally, it afforded Defendant
5 an opportunity (after participating in the trial and hearing the court's comments at the conclusion of
6 the trial) to try and resolve this dispute, limiting further costs and expenses.

7 At the hearing on December 15, 2016, the court determined that the reasonable and necessary
8 costs and attorneys' fees incurred as part of the 11 U.S.C. § 362(k)(1) actual damages are \$18,261.29
9 (\$17,589.00 in attorneys' fees and \$672.29 in costs).⁶⁴ No serious argument was made that the
10 attorneys' fees requested were not necessary and reasonable for the litigation of Adversary
11 Proceeding through judgment by Plaintiff-Debtors.⁶⁵ The only argument advanced by Defendant
12 was the unreasonable contention that the actual damages attorneys' fees do not include the fees that
13 an individual debtor has to incur to enforce the right to recover the damages already caused by the
14 violation of the automatic stay.

15 **Punitive Damages**

16 The evidence establishes that Defendant intentionally acted with recklessness (at least in
17 2009 through April 2015) and intentionally and in callous disregard (clearly for May 2015 into
18 August 2015) of the law, the rights of Plaintiff-Debtors, and the obligations of Defendant arising
19 under the Bankruptcy Code for the automatic stay (11 U.S.C. § 362(a)) and the discharge injunction
20 (11 U.S.C. § 524(a)(2), (3)) in failing to act to vacate the SF Void Judgment. Arguably, this callous
21 disregard continued through trial, with Defendant not presenting any evidence of attempts to pay for
22 the damages caused and contending it is unreasonable to pay the mandatory attorneys' fees for

23
24 ⁶⁴ Civil Minutes, Dckt. 54, and Order, Dckt. 56.

25 ⁶⁵ In the Opposition to Plaintiff-Debtors' Motion for Attorneys' Fees:

26 Creditors Trade Association, Inc. does not object to the hourly rates
27 asserted by plaintiffs' counsel nor does CTA question the actual time
28 spent.

Opposition, Dckt. 50.

1 making Plaintiff-Debtor to endure more than a year of litigation to recover the statutorily mandated
2 damages in 11 U.S.C. § 362(k).

3 The court concludes from the Evidence that in July 2015, Defendant intentionally chose not
4 to vacate the SF Void Judgment. The court further determines that in failing to act Defendant did
5 so intentionally, in an apparent attempt to exert pressure on the Plaintiff-Debtors by using the
6 SF Void Judgment to block the purchase of Plaintiff-Debtors' home.

7 This intentional conduct, both reckless and in callous disregard of Plaintiff-Debtors' rights
8 under the automatic stay and the discharge injunction, warrants the award of punitive damages to
9 correct the conduct of Defendant. Additionally, Defendant and other similarly situated persons must
10 be deterred from trying to use void judgments and violations of the automatic stay to leverage a
11 debtor into forgoing his or her rights because of the costs and expenses of having to seek remedy the
12 creditor's continuing violations through litigation. Defendant has demonstrated that it pushed
13 Plaintiff-Debtors into having to incur the costs and expenses of litigation to remedy Defendant
14 improperly impairing Plaintiff-Debtors' ability to purchase of a home. Though afforded multiple
15 opportunities to act to vacate the SF Void Judgment, Defendant, failed to act. Only after it put
16 significant economic burdens on Plaintiff-Debtors (cost of commencing the litigation), Defendant
17 finally acted to correct the continuing violation—which remedy only took less than one week. Then,
18 Defendant complains that Plaintiff-Debtor proceeded with the litigation to recover the statutory
19 damages that Defendant's failure to act caused.

20 Not to award punitive damages would give Defendant and similarly situated creditors the
21 green light to knowingly continue to violate the stay, and refuse and fail to remedy that continuing
22 violation.

23 Plaintiff-Debtors have not provided the court with financial information of the Defendant to
24 be used in determining how large the punitive damages need to be to have the desired deterrent
25 effect. However, sufficient information has been provided for the court to determine appropriate
26 punitive damages. First, Defendant presents itself to this court as an active debt collector of
27 sufficient size that it has for years maintained an "in-house counsel" to represent it. In this
28

1 Adversary Proceeding alone, Defendant has chosen to be represented by multiple law firms.⁶⁶ This
2 demonstrates a level of ongoing business operations of significant economic size. The amount of
3 the SF Void Judgment obtained in violation of the automatic stay was \$8,405.65 when obtained in
4 February 6, 2009.⁶⁷ Using only whole months and computing post-judgment interest from March
5 2009 through July 2015, the SF Void Judgment Defendant allowed to continuously be represented
6 to the public as a valid judgment totaling \$13,779.24 as of July 2015 (including post-judgment
7 simple interest of 10% per annum pursuant to Cal. C.C.P. § 685.010.)

8 Given the intentional conduct of Defendant and the callous disregard of the rights of
9 Plaintiff-Debtors and Defendant’s obligation to remedy the continuing violation of the automatic
10 stay, the court determines that punitive damages in the amount of \$15,000.00 is necessary and
11 appropriate. It is necessary to deter Defendant from continuing to engage in such conduct, ignoring
12 its obligations under the automatic stay, and make it clear that there is no economic incentive to
13 violate the stay and not correct a continuing violation of the automatic stay. Further, it is an
14 appropriate amount to deter similarly situated creditors from “gambling” that a debtor may elect to
15 pay a creditor to remedy a continuing violation of the stay rather than pursuing the debtor’s rights
16 under 11 U.S.C. § 362(k).

17 Punitive damages in the amount of \$15,000.00 is a relatively modest amount, both in the
18 amount of absolute dollars and the financial facts of the violation. The SF Void Judgment Defendant
19 left hanging over Plaintiff-Debtors’ heads and impairing the home purchase escrow had grown to
20

21 ⁶⁶ In this Adversary Proceeding Defendant has been represented by two different law
22 firms. First, the law firm of Provencher & Flatt, LLP appeared with Douglas Provencher of that
23 firm filing the answer for Defendant. Dckt. 12. On March 21, 2016, a Substitution of Attorney
24 was filed by which Mr. Provencher and his firm were substituted out, and Ralph Pollard and the
25 Law Offices of Ralph L. Pollard were substituted in as counsel of record for Defendant in this
26 Adversary Proceeding. Dckt. 20.

27 Then, on November 30, 2016, Mr. Provencher and his firm filed an Opposition to Motion
28 for Attorneys’ Fees, listing Mr. Provencher and his firm as co-counsel with Mr. Pollard and his
firm for Defendant in this Adversary Proceeding. Dckt. 50. An association of counsel was filed
on December 12, 2016. Dckt. 54.

⁶⁷ Exhibit “A” to the Complaint.

1 \$13,779.24 as of July 2015. The \$15,000.00 is only slightly more than the amount of the SF Void
2 Judgment when it was finally vacated in 2015.

3 Additionally, the actual damages required by Congress to be awarded Plaintiff-Debtors total
4 \$21,361.29. The \$15,000.00 punitive damage award is less than the actual damages, well within the
5 single digit multiple guidelines of the Supreme Court.

6 Even if the court were to consider only the economic and emotional distress damages which
7 total \$3,100.00, the \$15,000.00 is less than 5-times those damages, well within the single digit
8 multiple guidelines of the Supreme Court.

9 While modest, the \$15,000.00 in punitive damages should be sufficient to deter Defendant
10 and other similarly situated persons who are or have violated the automatic stay from forcing debtors
11 to commence litigation to stop continuing violations of the automatic stay. It will also deter
12 Defendant and other similarly situated persons from trying to “hardball” a debtor into walking away
13 from enforcing his or her right to recover damages by failing to make a good faith offer to settle the
14 dispute, pay the damages, or at least make a Federal Rule of Civil Procedure 68 offer for judgment
15 to cap the liability. The \$15,000.00 punitive damages reasonably make Defendant’s practices
16 demonstrated in connection with this violation make such a stay violation game not worth the
17 damages candle.⁶⁸

18 **DISCHARGE INJUNCTION VIOLATIONS**

19 In addition to the asserted violations of the automatic stay, Plaintiff-Debtors assert that
20 Defendant has also violated the discharge injunction. Congress has provided in 11 U.S.C. § 524(a)
21 that a discharge granted in a case under Title 11 (Bankruptcy Code):

22 (a) A discharge in a case under this title --

23 (1) voids any judgment at any time obtained, to the extent that such judgment is a
24 determination of the personal liability of the debtor with respect to any debt
25 discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not
26 discharge of such debt is waived;

27 ⁶⁸ The phrase that “the game is not worth the candle” is a phrase meaning that the cost of
28 the endeavor is not worth the possible benefit. Cambridge Advanced Learner’s Dictionary &
Thesaurus, Cambridge University Press.

1 (2) operates as an injunction against the commencement or continuation of an
2 action, the employment of process, or an act, to collect, recover or offset any such
3 debt as a personal liability of the debtor, whether or not discharge of such debt is
4 waived; and

5 (3) operates as an injunction against the commencement or continuation of an
6 action, the employment of process, or an act, to collect or recover from, or offset
7 against, property of the debtor of the kind specified in section 541(a)(2) of this title
8 that is acquired after the commencement of the case, on account of any allowable
9 community claim, except a community claim that is excepted from discharge under
10 section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in
11 accordance with the provisions of sections 523(c) and 523(d) of this title, in a case
12 concerning the debtor's spouse commenced on the date of the filing of the petition in
13 the case concerning the debtor, whether or not discharge of the debt based on such
14 community claim is waived.

15 As discussed in COLLIER ON BANKRUPTCY, SIXTEENTH EDITION, ¶ 524.02[a], an act to try
16 and collect or obtain payment on a discharged debt violates the discharge injunction. This includes
17 attempts to have a debtor “voluntarily” pay a discharged debt in order to obtain a future loan (such
18 as a home purchase) by leaving a discharged debt being reported as a current obligation on a credit
19 report. *Id.*, ¶ 524.02[b].

20 A party who knowingly violates the discharge injunction can be held in contempt under
21 11 U.S.C. § 105(a). *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2005).
22 It must be shown that the party asserted to have violated the discharge injunction: (1) knew the
23 discharge injunction was applicable and (2) intention the actions which violated the injunction. *Id.*
24 From the evidence presented the court concludes that Defendant knew of the discharge, was aware
25 of the discharge injunction, failed to act to correct the void judgment after learning of the discharge
26 in 2009, and then in 2015 when expressly told that the void judgment was impairing Plaintiff-
27 Debtors’ fresh start and ability to buy a home, Defendant failed to take any action to correct this
28 violation until forcing Plaintiff-Debtors to sue it. No good faith reason was shown by Defendant for
failing to act or why only after forcing Plaintiff-Debtors to incur the cost and expense of actually
having to sue Defendant that Defendant could get the void judgment vacated in just a couple of days.

///

///

///

///

1 **DEFENDANT’S CONDUCT ALSO CONSTITUTES CONTEMPT IN**
2 **THE VIOLATION OF THE AUTOMATIC STAY**
3 **AND**
4 **VIOLATION OF THE DISCHARGE INJUNCTION**

5 Plaintiff-Debtors have presented clear and convincing evidence of Defendant’s violation of
6 both the automatic stay and discharge injunction. It is undisputed that Defendant was not only aware
7 of the bankruptcy case being filed but Plaintiff-Debtors having obtained their bankruptcy discharges
8 in March of 2009. Defendant purports to not having known it needed to vacate the SF Void
9 Judgment because it had “closed the file” because Plaintiff-Debtors had filed bankruptcy. Defendant
10 offers no explanation how a judgment just sat around its office orphaned from any client and any
11 consumer debtor.

12 Defendant offers no credible, good faith explanation as to why it failed to act in the Summer
13 of 2015, though promising to vacate the judgment. Defendant’s intention to continue in the violation
14 of the automatic stay and violate the discharge injunction are shown by its failure to act. This
15 occurred even though Defendant and its attorneys, the Law Office of Ralph Pollard (with Gary
16 Looney communicating for that Law Office with counsel for Plaintiff-Debtors), knew that the
17 SF Void Judgment was improperly impairing Plaintiff-Debtors’ ability to purchase a home.
18 Defendant’s quick about face and getting the SF Void Judgment vacated within days demonstrates
19 that any delay and promises were not in good faith.

20 Fortunately for Defendant the damages for the violation of the discharge injunction are the
21 same damages as those for the continuing violation of the automatic stay. As for punitive damages,
22 the court believes that the \$15,000.00 of punitive damages are sufficient to address both the violation
23 of the automatic stay and the violation of the discharge injunction.

24 **JUDGMENT TO BE GRANTED PLAINTIFF-DEBTORS**

25 Judgment is granted for Robert and Stephanie Achterberg, the Plaintiff-Debtors, in the
26 amount of \$36,561.29 (in the amount specified above) against Creditors Trade Association, the
27 Defendant. The court also grants judgment determining that the SF Void Judgment was a void
28 judgment, having been issued in violation of the automatic stay.

 This Memorandum Opinion and Decision constitutes the court’s findings of fact and

1 conclusions of law. Fed. R. Civ. P. 52 and Fed. R. Bankr. P. 7052.

2 Dated: February 3, 2017

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/
RONALD H. SARGIS, Chief Judge
United States Bankruptcy Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Instructions to Clerk of Court

Service List - Not Part of Order/Judgment

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked , via the U.S. mail.

Debtor(s)	Attorney for the Debtor(s) (if any)
Bankruptcy Trustee (if appointed in the case)	Office of the U.S. Trustee Robert T. Matsui United States Courthouse 501 I Street, Room 7-500 Sacramento, CA 95814
Robert and Stephanie Achterberg 2467 Millcreek Court Modesto, CA 95351	Steven S. Altman, Esq. 1127 12 th Street, Ste. 104 Modesto, CA 95354
Creditors Trade Association Attn: Gary Looney, President 3785 Brickway Blvd., Ste. 210 Santa Rosa, CA 95403	Ralph L. Pollard, Esq. 5098 St. Celestine Court Concord, CA 94521
Malcolm D. Gross, Esq. 1040 S. Mt. Vernon Avenue, Ste. G-316 Colton, CA 92324	Douglas B. Provencher, Esq. 823 Sonoma Avenue Santa Rosa, CA 95403