



AMERICAN
BANKRUPTCY
INSTITUTE

Midwest Regional Bankruptcy Seminar 2021

Consumer Session

"Stop Where You Are: A Bankruptcy Has Been Filed. But Don't Just Stand There!"

Michael B. Baker, Moderator

The Baker Firm, PLLC | Covington, Ky.

Edward J. Boll, III

Lerner, Sampson & Rothfuss | Cincinnati

Brian D. Flick

DannLaw | Cincinnati

Hon. Jeffery P. Hopkins

U.S. Bankruptcy Court (S.D. Ohio) | Cincinnati



Thursday, August 19, 2021
2:00 – 3:15PM

“Stop where you are. A bankruptcy has been filed. But don’t just stand there!”

Description: Our expert faculty will update you on a potpourri of automatic stay and discharge injunction violation issues, including the latest guidance from the Supreme Court on action vs. inaction, the return of repossessed cars and the collection of discharged debt

Michael B. Baker, Moderator
Baker Firm, PLLC; Covington, Kentucky

Hon. Jeffrey P. Hopkins
U.S. Bankruptcy Court, Southern District of Ohio, Cincinnati

Brian D. Flick
DannLaw, Cincinnati, Ohio

Edward J. Boll III
Cincinnati, Ohio

Poll Question: Is it a stay violation if a creditor repossesses an automobile pre-petition and refuses to return it to Debtor?

***City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code).**

Case arose from four separate bankruptcy cases where Debtors requested that the city of Chicago return a vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City's refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted "to exercise control over" respondents' property in violation of §362(a)(3).

3

***City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code).**

Justice Alito delivered the opinion for a unanimous court, reversing the Seventh Circuit.

The Court reasoned that the language used in section 362(a)(3)—"stay," "**act**," and "**exercise**"—suggested that the automatic stay prohibits only "affirmative acts that would alter the status quo," which would not include mere retention of property.

An "**act**" is "[s]omething done or performed . . . ; a deed."

To "**exercise**" in the sense relevant here means "to bring into play" or "make effective in action."

And to "**exercise something like control**" is "to put in practice or carry out in action."

4

***City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code).**

Justice Sotomayor wrote a concurring opinion recognizing:

“Although the Court today holds that §362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors’ vehicles to their owners.”

Ultimately, the Court's decision is a narrow one. The Court repeatedly states that it is examining only the "mere retention of property" in the context of section 362(a)(3).

5

Questions following *City of Chicago v. Fulton*:

- Can passive retention of estate property violate other aspects of the automatic stay, such as where the refusal to turn over estate property amounts to an effort to collect a prepetition debt?
- What if a creditor holding estate property seeks to use or sell the property?
- **When Debtor files Bankruptcy and the bank repossessed the car pre-petition, what should Debtor’s Counsel do to get the car back?**

Adversary, Motion for Turnover, Plan Provision?

The Federal Rules of Bankruptcy Procedure treat most “proceeding[s] to recover . . . property” as “adversary proceedings.” Rule 7001(1).

6

Best Practices to get the repossessed car back after *Fulton*

- First Day Motion for Turnover?
- Motion for Expedited Hearing/Shorten Time
- Chapter 13 Plans with Adequate Protection Payments
- Current Insurance
- NOTICE, NOTICE, NOTICE

Passive Retention of car not a stay violation, but when is a Creditor obligated to affirmatively act?

Garnishment.

• Automatic Stay violated unless creditor takes affirmative action to dismiss the garnishment upon learning of the bankruptcy. *In re Dungey*, 99 B.R. 814 (Bankr. S.D. Ohio 1989) (failure to return improperly garnished wages to Debtor); *In re Ragone*, Case No. 13-51335, Adv. Pr. No. 18-03070, (Bankr. N.D. Ohio May 21, 2019) (failure to terminate a wage garnishment).

Post-petition bank account debits.

• *In re Witham*, 579 B.R. 787 (Bankr. E.D. Ky. 2017) (failure to stop a post-petition bank account debits for pre-petition tanning bed charges was stay violation).

Foreclosure Sales.

• *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485 (Bankr. S.D. Ohio 1989) (failure to prevent conclusion of foreclosure action a stay violation. The provisions of the automatic stay place the responsibility to discontinue any pending collection proceedings squarely on the shoulders of the creditor who initiated the action);

• *In re Webb*, 472 B.R. 665 (6th Cir. BAP 2012) (The action found by the bankruptcy court to violate the automatic stay was the Appellants' continuation of the state-court foreclosure proceeding after receiving notice of Debtor's chapter 13 filing. Property became property of the estate, even after *lis pendens*).

When is a Creditor obligated to affirmatively act (continued)?

Evictions.

- *In re Humbert*, 567 B.R. 512 (Bankr. N.D. Ohio Aug. 26, 2016) (failure to dismiss an eviction action).

Incarceration.

- *Wohleber v. Skurko (In re Wohleber)*, 596 B.R. 554 (6th Cir. BAP 2019) (failure to prevent the incarceration after a contempt hearing for delinquent payments under domestic court orders).

Pending Motions in Domestic Court.

- *In re Dougherty-Kelsay*, 601 B.R. 426 (Bankr. E.D.Ky. 2019) (failure to modify or withdraw a contempt motion in domestic proceedings after commencement of a bankruptcy).

Disconnecting telephone service and failing to return funds.

- *In re Smith*, 170 B.R. 111 (Bankr. N.D. Ohio 1994) (Telephone company violated the automatic stay by intentionally disconnecting Debtors' telephone service after receiving notice that the bankruptcy code stayed its collection activities.)

9

Automatic Stay Violations

Dismissal of a Foreclosure Complaint During Bankruptcy?

- Trend by State Court Judges wanting explicit stay modification to permit a foreclosure plaintiff to outright dismiss a stayed foreclosure action.
- See e.g., *In re Palmer*, Case No. 15 CV 323, Miami County, Ohio, Court of Common Pleas (Debtor bringing loan current during bankruptcy is not enough to allow creditor to dismiss the foreclosure complaint. Still need relief from stay).

10

Automatic Stay Violations

In re McCarthy, 6th Circuit BAP 20-8027 -- Sanctions and Willful Stay Violation

On August 26, 2020, the bankruptcy court entered its written order. The order provided:

IT IS THEREFORE ORDERED,

1. That Atlanta Postal Credit Union shall forward the lien free title to the 2007 Chevrolet Corvette such that it is received by Debtor's counsel within seven days of the entry of this order;
2. That Debtor is hereby granted damages for violation of the automatic stay by Atlanta Postal Credit Union in the amount of \$25,000.00; and
3. That Atlanta Postal Credit Union shall forward certified funds made payable to Debtor in payment of said damages in the amount of \$25,000.00 such that said funds are received by Debtor's counsel within seven days of the entry of this order.

(Order Granting Mot. Sanctions Against Credit Union ("Order") at 1-2, Aug. 26, 2020, 2:15-bk-29883, ECF No. 61.)

In re McCarthy, 6th Circuit BAP 20-8027 Cont'd

After Complying with Order, Debtor appealed because not enough money...

Under 11 U.S.C. §362(k), an "individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." See, *Archer v. Macomb Cnty. Bank*, 853 F.2d 497, 499 (6th Cir. 1988). "Damages under §362(k) must also be proven with reasonable certainty and must not be speculative or based on conjecture." *Grine v. Chambers* (In re Grine), 439 B.R. 461, 469 (Bankr. N.D. Ohio 2010). The party seeking recovery has "the burden of proving entitlement to damages." *Id.* See also, *TranSouth Fin. Corp. v. Sharon* (In re Sharon), 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999)("The bankruptcy court appropriately assigned to the Debtor the burden to prove entitlement to damages."); *IRS v. Mathews* (In re Mathews), 209 B.R. 218, 220 (B.A.P. 6th Cir. 1997); *In re Perrin*, 361 B.R. 853, 856-58 (B.A.P. 6th Cir. 2007). In addition to actual damages, if a "bankruptcy court believes that the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay . . . the bankruptcy court is free to impose an appropriate amount of punitive damages." *Archer*, 853 F.2d at 500.

Automatic Stay Violations

Squire v. Stringer, 6th Circuit 19-3987 (Aug 10, 2020) (Unpublished)

The Bankruptcy Code, in fact, provides a specific mechanism for Creditors to request relief from a § 362 stay. Under 11 U.S.C. § 362(d), a bankruptcy court can grant such relief so long as it provides notice and a hearing to the other parties. This mechanism ensures both that a creditor's request for relief is meritorious and that the interests of the other parties are adequately protected. And to ensure that those interests are preserved, a creditor who acts without prior approval from the bankruptcy court (like Creditors here) risks being held in contempt of the stay. *In re Webb*, 472 B.R. 665 (Table), at *12 (B.A.P. 6th Cir. 2012) ("A creditor seeking to proceed with an action prohibited by the automatic stay must seek relief from the stay pursuant to § 362(d)."); *In re Clark*, 207 B.R. 559, 565 (Bankr. S.D. Ohio 1997) ("Unless a particular proceeding is specifically designated an exception to the automatic stay, creditors must obtain relief from the stay prior to taking any action involving property of the estate. To the extent creditors fail to do so, they act at their own peril.") (internal citations omitted).

Squire v. Stringer, 6th Circuit 19-3987 (Aug 10, 2020) (Unpublished)

Honoring Creditors' unauthorized pursuit of self-help, it bears adding, would contravene the basic vision of the Bankruptcy Code. The automatic stay allows the debtor's assets and debts to be accounted for in one forum, facilitating an organized, collective plan that considers the interests of all parties. The stay gives debtors relief from collection efforts, harassment, and foreclosure actions, and permits them to attempt a repayment or reorganization plan. *In re Robinson*, 764 F.3d 554, 559 (6th Cir. 2014). At the same time, it helps creditors "preserve what remains of the debtor's insolvent estate and provide a systematic equitable liquidation procedure." *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 382–83 (6th Cir. 2001) (cleaned up). Allowing a creditor to circumvent the automatic stay based upon his own judgments would lead to the very "chaotic and uncontrolled scramble for the debtor's assets" the stay was designed to prevent. *Id.* (quoting *Holtkamp v. Littlefield*, 669 F.2d 505, 508 (7th Cir. 1982)). Here, Creditors knew of the § 362 stay and pursued their state court collection action anyway, without prior approval from the bankruptcy court, in willful violation of the stay. See *Weary v. Poteat*, 627 F. App'x 475, 477 (6th Cir. 2015) (holding that a willful violation of a § 362 stay occurs when a creditor takes action to coerce a debtor into paying the creditor despite "knowledge of the bankruptcy stay").

Automatic Stay Violations

In re Reed, EDM I Case No. 20-4187

A/P filed after a demand for turnover for garnished funds which were a preference. Creditor returns funds 14 days after A/P filed. Court then asks the parties to address the following question which is where things took a turn..

Legal Issue: Is it a violation of the automatic stay, under 11 U.S.C. § 362(a)(6) or under any other provision of 11 U.S.C. § 362(a), when the transferee of a pre-petition transfer done through a wage garnishment, which transfer is avoidable under 11 U.S.C. § 547(b), fails to comply, or delays in complying, with a post-petition demand by the bankruptcy debtor for payment of the garnishment amount that was paid pre-petition to the transferee?

Judge Tucker's answer: No stay violation. Court's reasoning beginning on Page 6...

In re Reed, EDM I Case No. 20-4187

Sharon is distinguishable from this case. Under 11 U.S.C. § 541(a)(1), the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." In the case of *In re Parham*, No. 16-44233, 2017 WL 3207663 (Bankr. E.D. Mich. July 26, 2017), the court noted the difference between a creditor's post-petition retention of a vehicle that was repossessed pre-petition, on the one hand, and a creditor's post-petition retention of garnished funds received pre-petition, on the other hand: repossessed before filing bankruptcy, still have an interest in the property until it is sold. However, the Court finds Debtor's interest in the garnished funds was terminated with finality upon [the creditor's] pre-petition receipt. The garnished funds were not property of the estate. *Id.* at * 2 (italics in original). The Court agrees with Parham. The garnished funds received pre-petition by the Defendant were never property of the bankruptcy estate under 11 U.S.C. 541(a)(1), and the automatic stay was not implicated.

In this case, the garnished funds were transferred to the Defendant pre-petition and, at the time the bankruptcy case was filed, belonged to the Defendant. The Defendant's ownership of the funds continued after the Debtor's bankruptcy filing, and would continue unless and until the transfer was actually avoided and recovered, or as in this case, until the Defendant voluntarily returned the funds to the Debtor.

Automatic Stay Violations

In re Newberry - EDMI August 9th, 2019

A Michigan Stay Opinion Raises Contempt Issues from the Supreme Court

Does inaction or refusal to turn over estate property absent a turnover order violate the automatic stay?

An opinion by Bankruptcy Judge Joel D. Applebaum of Flint, Mich., raises an issue the Supreme Court may tackle in the new term to begin in October: **Does a creditor's inaction violate the automatic stay?**

Judge Applebaum's August 9 opinion raises a second question arising from a decision handed down in June by the Supreme Court: **Can a creditor be held in contempt of the automatic stay if the creditor had an "objectively reasonable belief" that the stay did not apply?**

In re Newberry - EDMI August 9th, 2019

The Garnishment

Armed with an unsatisfied judgment, the creditor properly took all actions required by Michigan law to garnish the debtor's tax refund when it would come due for payment in the future. The debtor did not object to the writ of garnishment within 14 days as permitted by state law.

After the debtor filed a tax return showing him eligible for a refund of some \$700, the state issued another notice, this time telling the debtor he had 28 days to file a notice of bankruptcy, in which event the state would turn the refund over to the bankruptcy trustee.

Within the 28-day period, the debtor filed a chapter 7 petition and notified the judgment creditor the same day. Five days later, the state paid the \$700 refund to the creditor. The debtor claimed an exemption in the refund under Section 522(b) and sought to avoid the garnishment under Section 522(f)(1). However, the creditor refused to turn over the refund after demand by the debtor's counsel.

On motion by the debtor, Judge Applebaum ruled that the creditor committed a willful violation of the automatic stay and was liable to turn over the refund, plus costs and attorneys' fees under Section 362(k)(1).

In re Newberry - EDMI August 9th, 2019

Judge Applebaum said that federal law decides what property is included in the estate, but state law governs the debtor's property rights. Analyzing the Michigan tax garnishment statute, he concluded that the failure to object within the initial 14-day period "did not entirely divest the Debtor of any interest in the tax refund at issue."

Consequently, Judge Applebaum held that the tax refund was property of the estate to which the automatic stay applied. Further, the refund was exempt by virtue of Section 522, he said.

Judge Applebaum acknowledged there is a split of circuits on the question of whether inaction violates the automatic stay. "In this district," he said, the creditor violated the stay because "failing to halt a pre-petition garnishment or receiving funds post-petition and refusing to turn them over to the debtor constitute stay violations."

Next, Judge Applebaum ruled that the refusal to "unwind" the garnishment and turn over the refund was a willful stay violation.

Judge Applebaum ordered the creditor to turn the refund over to the debtor and gave the debtor's counsel 15 days to apply for recovery of costs and attorneys' fees.

In re Dougherty-Kelsay EDKY Bankr. 18-20085

The parties stipulated to facts about their settlement negotiations regarding Debtor's Stay Violation Motion. Notably, there is no evidence that Creditor attempted to address Debtor's stay violation issues until after the Stay Violation Motion was filed. On April 3, 2018, Creditor offered to pay \$1,000 in full settlement of the Motion, and Debtor declined. Creditor offered \$2,500 in full settlement on April 13, 2018 and withdrew that offer four days later. Creditor's counsel emailed Debtor's counsel to inquire about the April 13 offer on April 23, 2018. Debtor countered with a \$15,000 settlement demand two days later, and Creditor declined on May 3, 2018. Seven months later, in December 2018, Creditor offered \$5,000 in full settlement. The same day, Debtor declined and again countered with a \$15,000 demand.

In re Dougherty-Kelsay EDKY Bankr. 18-20085

The parties stipulated to facts about their settlement negotiations regarding Debtor's Stay Violation Motion. Notably, there is no evidence that Creditor attempted to address Debtor's stay violation issues until after the Stay Violation Motion was filed. On April 3, 2018, Creditor offered to pay \$1,000 in full settlement of the Motion, and Debtor declined. Creditor offered \$2,500 in full settlement on April 13, 2018 and withdrew that offer four days later. Creditor's counsel emailed Debtor's counsel to inquire about the April 13 offer on April 23, 2018. Debtor countered with a \$15,000 settlement demand two days later, and Creditor declined on May 3, 2018. Seven months later, in December 2018, Creditor offered \$5,000 in full settlement. The same day, Debtor declined and again countered with a \$15,000 demand.

Automatic Stay Violations

In re Wohleber, Jr. 6th Cir BAP 18-8008

The debtor appellant, Lawrence J. Wohleber ("Wohleber"), is appealing an order of the bankruptcy court for the Northern District of Ohio dismissing his complaint seeking damages under 11 U.S.C. § 362(k) for violations of the automatic stay by his former wife, appellee Jennifer Skurko ("Skurko"), and her attorney, appellee Leslie Gentile ("Gentile"). The adversary complaint alleged that Skurko and Gentile violated the stay by allowing the post-petition sentencing portion of a pre-petition contempt proceeding to continue despite their knowledge that the automatic stay was in effect. At sentencing, Wohleber was ordered confined to jail until he paid a property settlement previously ordered by the domestic relations court. Ruling from the bench on a motion for judgment on partial evidence at the conclusion of Wohleber's case, the bankruptcy court found no violation of the automatic stay occurred because: a) the former wife and her counsel did not take affirmative action post-petition to try to collect the debt, such as trying to negotiate a settlement of the property settlement award; and b) there was no affirmative action they could take to prevent the domestic relations judge from jailing the debtor for nonpayment of the property settlement because the contempt motion was already ruled upon, and therefore could not be withdrawn, and all that was left was for the judge to "sentence" the debtor for his contempt of her order.

In re Wohleber, Jr. 6th Cir BAP 18-8008

Is the continuation of a contempt proceeding against a debtor a violation of the automatic stay when the contempt was found pre-petition, but the “sentencing hearing” at which the court ordered the debtor jailed for failure to pay a property settlement was post-petition, and the only condition to purge the contempt was to pay the property settlement?

Does a creditor and her legal counsel violate the automatic stay when they take no action to stop a state court from proceeding with a contempt hearing, the stated purpose of which is to confine the debtor to jail for failure to pay a dischargeable property settlement, and in failing to act to prevent the state court from sentencing the debtor to jail under such circumstances?

In re Wohleber, Jr. 6th Cir BAP 18-8008

Is the continuation of a contempt proceeding against a debtor a violation of the automatic stay when the contempt was found pre-petition, but the “sentencing hearing” at which the court ordered the debtor jailed for failure to pay a property settlement was post-petition, and the only condition to purge the contempt was to pay the property settlement?

Does a creditor and her legal counsel violate the automatic stay when they take no action to stop a state court from proceeding with a contempt hearing, the stated purpose of which is to confine the debtor to jail for failure to pay a dischargeable property settlement, and in failing to act to prevent the state court from sentencing the debtor to jail under such circumstances?

In re Wohleber, Jr., 6th Cir BAP 18-8008

A property division awarded in a domestic relations case prior to the filing of a bankruptcy petition is a debt of the debtor. *Towne v. Towne* (In re Towne), Adv. No. 08–5106, 2009 Bankr. LEXIS 278, at *5 (Bankr. D. Kan. Feb. 3, 2009); *Cantor v. Lever* (In re Lever), 137 B.R. 243, 246 (Bankr. N.D. Ohio 1992); 11 U.S.C. § 101(5) & (12). Thus, absent an applicable exception to the automatic stay, the commencement or continuation of a proceeding to collect a property division award of a domestic relations court is stayed.

In re Wohleber, Jr. 6th Cir BAP 18-8008

For these reasons, the Panel finds that the sentencing hearing was a continuation of a judicial proceeding against the debtor to recover a pre-petition debt of the debtor and further, that no statutory or court-made exceptions apply. Therefore, the sentencing hearing and confinement of Wohleber were stay violations. The panel now turns to the issue of whether Skurko and Gentile are liable for these violations.

***In re Wohleber, Jr.* 6th Cir BAP 18-8008**

As a general matter, the responsibility to enforce the automatic stay is placed on creditors because “[t]o place the onus on the debtor, . . . to take affirmative legal steps to recover property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory.” *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (alterations in original) (quoting *Miller v. Sav. Bank of Balt. (In re Miller)*, 22 B.R. 479, 481 (D. Md. 1982)) (internal quotation marks omitted).

***In re Addelman*, NDOH 17-16032**

Susan Addleman filed bankruptcy to get back the car she desperately needed. But the used car dealer, Loudon Motor Sales, LLC (“Loudon Motor”), refused to return her car and later sold it to a third party. For the reasons that follow, the Court finds that Loudon Motor willfully violated the automatic stay and orders Loudon Motor to pay the debtor \$18,603 in actual damages, including \$2,625 in attorney’s fees, plus \$25,000 in punitive damages by November 30, 2018.

In re Addelman, NDOH 17-16032

The debtor filed bankruptcy on Wednesday, October 11, 2017, four days after the second repossession. On the same day that she filed bankruptcy, the debtor texted both Walter Loudon and attorney O'Malley to notify them of her bankruptcy filing. The debtor's text to Walter Loudon stated: Hi mr. Loudon this is Susan addleman I have filed bankruptcy and named you as a creditor the case number is 17-16032 a relief ordered you are being instructed not to dispose of the car or any of the belongings contents in the car if you do you will be held in contempt of a federal court order I have also forwarded your attorney Patrick O'Malley who will not speak to me

Walter Loudon admitted in his deposition that he received this text.

In re Addelman, NDOH 17-16032

During the two months after filing the debtor's bankruptcy, the debtor's attorney did not contact Loudon Motor or attorney O'Malley or file a motion seeking assistance from the Court. On December 13, 2017, the debtor's attorney filed a motion to return possession of the debtor's car, which was set for a hearing on January 9, 2018. On January 2, 2018, the debtor's attorney also filed a motion to redeem the car, but he later withdrew this motion.

In re Addelman, NDOH 17-16032

On February 2, 2018, the debtor took a certified copy of the Court's order to the Canton used car location of Loudon Motor, 2001 Whipple Avenue NW, Canton, Ohio 44708. The local police also arrived at the location with the debtor. While there, someone pulled a car up to the side door that the debtor believed was her car; however, she was not allowed to get close enough to read the vehicle identification number. Someone on the lot then referred her to another Loudon used car lot in Alliance, Ohio.

In re Addelman, NDOH 17-16032

While taking an Uber to the used car lot in Alliance, the debtor attempted to contact Walter Loudon. Walter Loudon answered his phone and demanded to know how much money the debtor had to pay him. After the debtor stated she only owed \$122 and reminded him that she had offered to pay him \$900 on the Monday following the repossession, Walter Loudon hung up the phone.

The debtor arrived at the used car lot in Alliance and similarly requested the presence of the Alliance police. The debtor's car was not at the used car lot in Alliance, and a police officer unsuccessfully attempted to contact Walter Loudon. A few days later, the police officer informed the debtor that Loudon Motor had sold her car.

In re Addelman, NDOH 17-16032

On January 27, 2018, a related Loudon entity owned by Walter Loudon's son, Gregory D. Loudon, signed a contract to sell the 2007 Ford Mustang to a third party for \$6,244.97. The contract appears to have been signed by Gregory D. Loudon. As of the date of this contract, the 2007 Ford Mustang was still titled in the debtor's name. It is unclear when the third party took possession of the 2007 Ford Mustang; however, neither Loudon Motor nor anyone acting on behalf of Loudon Motor ever released the lien on the debtor's certificate of title or obtained a new certificate of title in its own name to the 2007 Ford Mustang until March 13, 2018.

In re Addelman, NDOH 17-16032

Also on March 13, 2018, someone transferred title of the 2007 Ford Mustang from Loudon Motor to the third party purchaser. In other words, on January 27, 2018, the related Loudon entity sold a car for which it held no certificate of title. On March 13, 2018, that same related entity then transferred title from the debtor to a third party with actual knowledge of both the debtor's pending bankruptcy and the Court's February 1, 2018, order to return the debtor's car, based on the debtor's visit to the Loudon used car lot in Alliance on February 2, 2018.

The Co-Debtor Stay

11 U.S.C § 1301 - Stay of action against codebtor

(a) . . . after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor; or that secured such debt, unless—

- (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
- (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

Damages for violating the codebtor stay

▶ While § 362(k) imposes damages for any willful violation of the automatic stay, § 1301 does not contain a similar provision. However, some courts have imposed damages for willful violations of the co-debtor stay in reliance on § 1301's legislative history or 11 U.S.C. § 105(a), which states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

▶ *In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio, April 23, 1992)(Judge Aug) (awarding damages to the debtors for the creditor's violation of the co-debtor stay because the legislative history of § 1301 and § 362 make it clear that both provisions were enacted to protect the debtor).

35

Poll Question: Is order granting (or denying) Motion for Relief from Stay a final, appealable order?

Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582 (2020)

Adjudication of an order to grant relief from the automatic stay is a final, appealable order, while also noting generally that "[o]rders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case.

36

Discharge Violations

Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)

- The Bankruptcy Court, in holding the creditor in civil contempt for discharge order violation, applied a standard that it described as akin to "strict liability." It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was " 'aware of the discharge' " order and " 'intended the actions which violate[d]' " it.
- The Court of Appeals for the Ninth Circuit, however, disagreed with that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable."
- The Supreme Court concluded that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in their 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.**

37

Taggart - WHAT DOES WILLFUL MEAN?

"Does the standard for contempt of the discharge injunction announced by the Supreme Court in *Taggart* make a difference in the outcome of actual contempt proceedings? *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019). Well, it did in *Taggart*. On remand, the Ninth Circuit found that there was an objectively reasonable basis for the creditor's view that *Taggart* had "returned to the fray," and that their motion for post-petition attorney fees might have been lawful. Thus, under the "significantly higher standard" adopted by the Supreme Court, the creditors were not liable for contempt sanctions. *In re Taggart*. 980 F.3d 1340 (9th Cir. 2020)."

Discharge Violations

In re Jones, EDKY Bankr. 05-55697

This matter is before the Court on Debtor's Motion for Contempt [ECF No. 19 ("Contempt Motion")] against Creditor Capital One Bank. Debtor Linda Kay Jones seeks a ruling that Creditor violated the discharge injunction in § 524(a)(2)1 by failing to release a judgment lien that a prior Order of this Court avoided more than 13 years ago, after Debtor received her chapter 7 discharge. Debtor requests that the Court hold Creditor in contempt for that violation and award Debtor actual damages, attorney's fees, costs, and mild non-compensatory damages.

In re Jones, EDKY Bankr. 05-55697

The Judgment Lien's interference with Debtor's efforts to sell the Pokeberry Property illustrates the financial pressure that the Lien's continued presence places on Debtor. A judgment lien "represent[s] to the least sophisticated consumer and the public that the creditor had a final judgment, had a right to execute on that judgment, and had a valid interest in the debtor's [real estate]." *Currier*, 762 F.3d at 535 (citation omitted).

In re Jones, EDKY Bankr. 05-55697

Even though Debtor's debt to Creditor was discharged in 2006, and the Judgment Lien was avoided in 2006, the Lien's presence caused the other parties to the proposed Pokeberry Property sale to refuse to proceed unless Debtor agreed to a reduced purchase price and a commensurate reduction in her portion of the sale proceeds. That placed an improper burden on Debtor and her interest in the Pokeberry Property in violation of the § 542(a)(2) discharge injunction. See *Currier*, 762 F.3d at 534-35 (citation omitted) (noting, in the context of a Fair Debt Collection Practices Act claim, that an invalid "judgment lien placed an improper burden on [debtor's] home, restricting her rights in her own property until [creditor] decided to release the lien or [debtor] undertook the burden of filing an action to quiet title"). Debtor's interest in the Vine Property is similarly burdened. Although Debtor is not presently attempting to sell or obtain debt secured by the Vine Property, the Judgment Lien remains a cloud on its title.

In re Jones, EDKY Bankr. 05-55697

Sanctions are warranted in this case. Creditor's Judgment Lien has improperly been a cloud over Debtor's real estate interests in Scott County, Kentucky for more than thirteen years. Creditor has had knowledge of this matter at least since January 23, 2019. Despite having the opportunity to make written and oral arguments before this Court, and to remedy its ongoing discharge injunction violation, Creditor chose to do neither. Creditor's failure to act demonstrates its abject disregard for three separate Orders of this Court—the Discharge Order, the Avoidance Order, and the Release Order—and for its obligations under the Bankruptcy Code.

Discharge Violations

In re Mention, SDOH Bankr. 15-13347

On December 11, 2018, this Court entered its Contempt Order holding Toyota in contempt of court for violating the discharge injunction by knowingly and willfully seeking to collect a debt from Debtor Brittany Mention (“Ms. Mention”) that was discharged in bankruptcy. Toyota was ordered to cease its collection efforts and report to the three major credit reporting bureaus “forthwith” that Ms. Mention’s debt to Toyota had been discharged in bankruptcy and that the debt was not reaffirmed.

In re Mention, SDOH Bankr. 15-13347

Ms. Mention testified to the impact of Toyota’s erroneous reporting of the lease debt. In addition to the time and money Ms. Mention expended in attempts to have Toyota correct its reporting, Ms. Mention testified to the embarrassing and expensive process she went through to purchase a reliable vehicle. The many rejections by lenders negatively impacted her and, although she is a hard working individual, she often felt like giving up. She sometimes had to use other people’s vehicles and was worried what affect her failure to obtain a reliable vehicle would have on her job. Nonetheless, she testified that she never sought medical or mental health treatment of any kind.

After months of searching, Ms. Mention was finally able to purchase a vehicle from CarMax on March 15, 2019 but with less than ideal terms. Per the installment agreement entered into evidence [Ex. 12], she financed \$21,265.36 over 72 months with an annual interest rate of 25% giving her a finance charge totaling \$20,379.44. She opined that if Toyota had reported the debt correctly, she would qualify for better financing.

Discharge Violations

In re Van Pelt, EDKY Bankr. 12-52575

A hearing was held on March 7, 2019. Counsel for Chase stated at the hearing that this is a matter of plan interpretation and Chase does not seek an opportunity to present evidence. The matter was taken under submission and is ready for decision. Upon review of the record and arguments of counsel, it is found that the debt owed to Chase was provided for in the plan and the Debtor's personal liability on the debt was discharged. 11 U.S.C. § 1328(a) and (c). The record also confirms Chase knew of the bankruptcy discharge and willfully violated the discharge injunction by refusing to correct its inaccurate reporting of the debt as a personal liability.

In re Van Pelt, EDKY Bankr. 12-52575

The review herein shows Chase knew the plan provided for its claim and the Debtor received her discharge. *In re Joseph*, 584 B.R. 696, 702 (Bankr. E.D. Ky. 2018). Chase does not dispute the Debtor's allegations that its reporting to the credit agencies was inaccurate and it refused to correct it when asked. Chase's only attempt at a defense is the argument the debt was not discharged. This argument was decisively rejected in the preceding analysis.

The prior review leads to a conclusion that the argument is an unsupportable attempt to find a way around Chase's violation of the discharge injunction. Without any explanation otherwise, it is reasonable to infer that Chase's reporting and subsequent refusal to correct the inaccurate information is an attempt to collect a discharged debt. See *In re Russell*, 378 B.R. 735, 743 (Bankr. E.D. N.Y. 2007) (a court may infer intent to collect a discharged debt from a refusal to correct inaccurate credit information); *Torres v. Chase Bank USA, N.A.* (In re Torres), 367 B.R. 478, 485-486 (Bankr. S.D. N.Y. 2007) (same).

Discharge Violations

Is a Billing Statement Disclaimer Enough to Avoid Contempt for Discharge Violation?

- *Roth v. Nationstar Mortgage, LLC (In re Roth)*, 935 F.3d 1270 (11th Cir. 2019) (An “Informational Statement” sent by the mortgage holder is not an unlawful debt collection in violation of 11 U.S.C. § 524 because it contained a bold disclaimer on the first page that the statement was for informational purposes only, and the included payment coupon was marked in large lettering as “voluntary.”).

47

Duty to Mitigate

In re Phillips, No. 3:15-bk-30632-SHB (Bankr. E.D. Tenn. July 13, 2015)

- Debtors sought actual and punitive damages and attorneys' fees against creditor for a willful violation of the automatic stay of 11 U.S.C. § 362(a) for post-petition contacts with Debtors and their relatives to demand payment on a pre-petition debt. Because the court found “Debtors failed to carry their burden to prove actual damages caused by [creditors] stay violation and they did not attempt to mitigate any damage, the court need not reach the question of whether the automatic stay was willful and the related issue of whether the presumption of receipt of the Notice arises in this case. . . **the court finds that the Motion could easily have been avoided had Debtors taken any action to mitigate their damages.**”

In re Crowder, No. 16-20440-PRW (Bankr. W.D.N.Y. June 16, 2016)

- Debtor filed a Motion for Sanctions and Attorneys' Fees for Violation of the Automatic Stay based on Creditor's post-petition written communication to Debtor, the subsequent repossession by the bank of a 2015 Dodge Ram 1500 truck—jointly owned by Debtor and his son, followed by another written communication to Debtor. The Court held the Debtor's “motion must fail. **No attempt was made by [Debtor] or his attorney to mitigate the potential for damage by contacting [Creditor] . . . and the most modest of efforts would probably have ended this yarn before it became legally interesting.**” 48

Duty to Mitigate

In re Witham, 579 B.R. 787 (Bankr. E.D. Ky. 2017)(Judge Wise)

- After considering the record in this case, the Court finds that Debtors appropriately attempted to mitigate their damages. Debtors took multiple steps to avoid this contested matter.

In re Mitchell, 545 B.R. 209 (Bankr. N.D. Ohio 2016)(Harris)

- Even damages that are actually suffered may not be recoverable as **"debtors have an obligation to attempt to mitigate damages prior to seeking court intervention."** . . . The duty to mitigate reflects the sound judicial policy that profit-making from violations of either the automatic stay or discharge injunction is "inherently improper."

In re Cousins, 404 B.R. 281, (Bankr. S.D. Ohio 2009)

- Considered whether the debtor or debtor's counsel took reasonable actions to resolve the matter in a non-litigious manner prior to filing an action for violation of the automatic stay, especially when the immediate damage to the debtor is minimal and contacting the creditor would not be burdensome.



Questions?

**American Bankruptcy Institute
Midwest Regional Bankruptcy Seminar**

**Thursday, August 19, 2021
2:00 – 3:15PM**

“Stop where you are. A bankruptcy has been filed. But don’t just stand there!”

Description: Our expert faculty will update you on a potpourri of automatic stay and discharge injunction violation issues, including the latest guidance from the Supreme Court on action vs. inaction, the return of repossessed cars and the collection of discharged debt

Michael B. Baker, Moderator
Baker Firm, PLLC; Covington, Kentucky

Hon. Jeffrey P. Hopkins
U.S. Bankruptcy Court, Southern District of Ohio, Cincinnati

Brian D. Flick
DannLaw, Cincinnati, Ohio

Edward J. Boll III
Cincinnati, Ohio

**Edward J. Boll III, Esq.
Cellphone: (513) 519-8088
Email: udlawyer@hotmail.com**

- I. INTRODUCTION**
 - A. The Automatic Stay**
 - B. Automatic Stay Violations**
 - C. The Co-Debtor Stay**
 - D. Discharge Injunction**
 - E. Duty to Mitigate**
 - F. Case Law**

A. The Automatic Stay

1. 11 U.S. Code § 362 - Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

2. There is not a stay of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;. *See* §362(b)(20)

3. There is not a stay of any act to enforce any lien against or security interest in real property if (a) the debtor is ineligible under §109(g) to be a debtor in such case, or (b) the case was filed in violation of bankruptcy court order in a prior case prohibiting the debtor from being a debtor in another bankruptcy case. *See* §362(b)(21).

4. If a single or joint case of the debtor was pending but was dismissed within 1 year before a new petition by such individual under chapter 7, 11, or 13, then the stay shall terminate with respect to such debtor on the 30th day after the filing of the later case. *See* §362(c)(3)

a. Majority of Courts have held §362(c)(3)(A) applies only to the automatic stay terminating as to the “debtor” and not to all “property of the estate” or

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

“property of the debtor.” The automatic stay in §362(a) protects not only the “debtor” and the “property of the debtor,” but separately protects “property of the estate.”

b. §362(c) provides, in part:

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

c. Case law raises some question about when it is proper for a creditor to proceed with its state court remedies in a “30 Day Stay” case. *See e.g. In Re Brown*, 342 B.R. 248 (Bankr.D.Md., May 06, 2006), but see, *In re Jupiter*, 344 B.R. 754 (Bankr.D.S.C., June 21, 2006).

- Should a secured creditor opposing a motion to extend the stay beyond 30 days pursuant to §362(c)(3)(B) also include a request for relief from stay?
- If Debtor only eligible for a 30 day stay under §362(c)(3)(A) fails to file a motion to extend the stay, is a request for abandonment appropriate?

d. The court may extend the stay beyond 30 days on the motion of a party in interest if the hearing is completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. §362(c)(3)(B)

e. Some argue nothing prevents the Court from using 11 U.S.C. §105 to re-impose the stay after 30-days.

f. Can a Debtor that is not eligible for protection of the automatic stay impose a “stay” by providing for the reorganization of a debt in a Chapter 13 Plan? What if a Creditor fails to object? *See In re Murray*, 2006 WL 2594838 (Bankr.S.D.Ohio, September 11, 2006)(Waldron, J.).

5. If 2 or more single or joint cases of the debtor were pending but dismissed within 1 year before a new petition by such individual, no stay shall go into effect with respect to such debtor upon the filing of the later case. §362(c)(4)
 - a. The court may impose a stay on the motion of a party in interest filed within 30 days of the filing of the case only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed. §362(c)(4)(B)
 - b. Such a stay shall be effective on the date of the entry of the order imposing the stay. §362(c)(4)(C)
 - c. Again, there is a presumption of lack of good faith, which can be rebutted by clear and convincing evidence, if (1) there was more than one such prior case in the past year; (2) if the previous case was dismissed because the debtor failed to follow a court order contained therein; (3) there has not been a substantial change in circumstances since the dismissal of the prior case; or if on the date of the dismissal of the prior case any creditor had a proceeding for stay relief pending or resolved by order modifying the stay in any respect. §362(c)(4)(D)
 - d. Can a Debtor impose a “stay” by providing for the reorganization of a debt in a Chapter 13 Plan? What if a Creditor fails to object?
6. Although Congress has gone to great lengths, in BAPCPA, to limit the applicability of the automatic stay to situations that debtors have long used to abuse the bankruptcy laws, Congress made no mention of any limitations on the “co-debtor stay” of section 1301. Therefore, in chapter 13 single filings, the creditor must review the debt agreement to determine whether a co-debtor stay comes into effect, even where no automatic stay comes into effect for the debtor.
 - a. More cases filed by individual debtor rather than joint debtors?

§ 302. Joint cases

- (a) *A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.*
- (b) *After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.*

7. Abandonment

Creditor still needs to obtain abandonment in most Chapter 7 Bankruptcy Cases, even where debtor is only entitled to protection of the automatic stay for 30 days.

8. In the absence of an objection to the claim of exemption, property claimed as exempt ceases to be property of the bankruptcy estate 30 days after the meeting of creditors under § 341(a) is concluded or 30 days after any amended Schedule C is filed, whichever occurs later. Fed. R. Bankr. P. 4003(a) and (b). Hence, after expiration of the period within which to object to Debtor’s claimed exemption, Debtor’s interest in the Property is no longer part

of the bankruptcy estate. *See* 11 U.S.C. § 522(b)(1) and (l). *See, also, In re Odell*, No. 17-8012 (B.A.P. 6th Cir. Jan. 30, 2018) (dismissing as moot the borrower’s appeal of an order granting relief and abandonment to the creditor. Held the automatic stay as to property of the estate automatically terminates 30 days after the 341 meeting (or 30 days after filing an amended Schedule C) in the absence of an objection to exemption, when property is claimed as completely exempt by the debtor).

9. ***In rem* Orders**

- a. The court shall grant relief, upon motion of a creditor whose claim is secured by an interest in real property and after notice and a hearing, from the stay of an act against such real property if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either (a) transfer of an ownership interest in such real property without the consent of the secured creditor or court approval; or (b) multiple bankruptcy filings affecting such real property. §362(d)(4)
- b. If an order issued under §362(d)(4) is recorded in the county where the real estate is located, the order shall be binding in any case filed within 2 years after the date of entry of the order, except that the debtor may move for relief from the order upon a showing of good cause or a change of circumstances. §362(d)(4)
- c. Any filing within 2 years of the entry of an order under §362(d)(4) will not invoke a stay of any act to enforce any lien against or any security interest in real property, except that the debtor may move in any subsequent case for relief from the order upon a showing of good cause or a change of circumstances. §362(b)(20)
- d. Delay, hinder, or defraud is exceptional.
- e. Some argue that since Congress establishes a bright-line rule defining when *in rem* relief is appropriate (delay, hinder, or defraud) that Courts should not grant it in other circumstance.

10. In any case filed by an individual under chapter 7, 11, or 13, the stay shall terminate 60 days after a motion for relief is filed, unless a final decision is rendered by the court during such 60-day period, or such 60-day period is extended by (a) agreement of all parties in interest, or (b) by the court for such definite period as is required for good cause and as described in findings made by the court. §362(e)(2)

11. 11 U.S.C. § 109(g)(2):

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

B. Automatic Stay Violations

1. Willful Stay Violations

a. 11 U.S.C. 362(k)

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

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

2. In stay violation litigation, debtors bear the burden of proof to establish by a preponderance of evidence the following elements:

- (1) that a bankruptcy petition was filed,
- (2) that the debtors are "individuals" under the automatic stay provision,
- (3) that the creditors received notice of the petition,
- (4) that the creditors' actions were in willful violation of the stay, and
- (5) that the debtors suffered damages.

See *In re Flack*, 239 B.R. 155 (Bankr. S.D. Ohio 1999).

3. Contempt is Not a Proper Remedy for a Stay Violation.

Contempt is not the proper remedy for violating the automatic stay as Section 362(k) provides Debtors an express right of action to address willful stay violations and contains a specific statutory remedy, unlike the discharge provisions of § 524, which may be enforced by contempt and include no private right of action).

4. Emotional Damages as Actual Damages for Stay Violations?

In re Tapp, Case No. 19-62481 (Bankr. N.D. Ohio, July 10, 2020)(Kendig)

The bankruptcy court undertook a review of the history of § 362(k)(1) and found that while contempt actions may not traditionally provide recourse for emotional injury, the court did not find the term "actual damages" so limiting. The court found "emotional damages qualify as "actual damages" under § 362(h). By seeking to protect against non-pecuniary emotional

harm with the automatic stay and by enacting the “actual damages” enforcement provision soon thereafter, Congress sufficiently indicated a departure from any prior practice that may have neglected emotional harms resulting from stay violations.

“Giving teeth to the automatic stay by awarding actual damages for willful violations of the stay serves to protect debtors and deter creditors. Such damages may at times include recovery for emotional loss or injury. Not all emotional distress is compensable and the burden of proof is demanding, in part because of the ease of manufacturing emotional injury. Debtor failed to meet his burden and is therefore unable to recover damages for emotional injury.””

5. Is it a stay violation if a creditor repossesses an automobile pre-petition and refuses to return it to Debtor?

a. *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code).

- Case arose from four separate bankruptcy cases where Debtors requested that the city of Chicago return a vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City’s refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted “to exercise control over” respondents’ property in violation of §362(a)(3).
- Justice Alito delivered the opinion for a unanimous court, reversing the Seventh Circuit. The Court reasoned that the language used in section 362(a)(3)—“stay,” “act,” and “exercise”—suggested that the automatic stay prohibits only “affirmative acts that would alter the status quo,” which would not include mere retention of property
 - An “**act**” is “[s]omething done or performed . . . ; a deed.” Black’s Law Dictionary 30 (11th ed. 2019); see also Webster’s New International Dictionary 25 (2d ed. 1934) (“that which is done,” “the exercise of power,” “a deed”).
 - To “**exercise**” in the sense relevant here means “to bring into play” or “make effective in action.” Webster’s Third New International Dictionary 795 (1993).
 - And to “**exercise**” **something like control** is “to put in practice or carry out in action.” Webster’s New International Dictionary.
- Justice Sotomayor wrote a concurring opinion recognizing:

“Although the Court today holds that §362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors’ vehicles to their owners.”

- Ultimately, the Court's decision is a narrow one. The Court repeatedly states that it is examining only the "mere retention of property" in the context of section 362(a)(3).
 - Can passive retention of estate property violate other aspects of the automatic stay, such as where the refusal to turn over estate property amounts to an effort to collect a prepetition debt?
 - What if a creditor holding estate property seeks to use or sell the property?

6. Obligation of creditors to affirmatively act to prevent violations of the automatic stay:

a. Garnishment.

Automatic Stay violated unless creditor takes affirmative action to dismiss the garnishment upon learning of the bankruptcy:

In re Dungey, 99 B.R. 814 (Bankr. S.D. Ohio 1989) (failure to return improperly garnished wages to Debtor).

In re Ragone, Case No. 13-51335, Adv. Pr. No. 18-03070, (Bankr. N.D. Ohio May 21, 2019) (failure to terminate a wage garnishment).

b. Post-petition bank account debits.

In re Witham, 579 B.R. 787 (Bankr. E.D. Ky. 2017) (failure to stop a post-petition bank account debits for pre-petition tanning bed charges was stay violation).

c. Foreclosure Sales.

Ledford v. Tiedge (In re Sams), 106 B.R. 485 (Bankr. S.D. Ohio 1989) (failure to prevent conclusion of foreclosure action a stay violation. The provisions of the automatic stay place the responsibility to discontinue any pending collection proceedings squarely on the shoulders of the creditor who initiated the action);

In re Webb, 472 B.R. 665 (6th Cir. BAP 2012) (The action found by the bankruptcy court to violate the automatic stay was the Appellants' continuation of the state-court foreclosure proceeding after receiving notice of Debtor's chapter 13 filing. Property became property of the estate, even after *lis pendens*).

d. Evictions.

In re Humbert, 567 B.R. 512 (Bankr. N.D. Ohio Aug. 26, 2016) (failure to dismiss an eviction action).

In re Shrum, 597 B.R. 845 (Bankr.E.D.Mi. 2019)(Although the State Court had the jurisdiction to determine whether or not the automatic stay applied to the Landlord's acts to recover possession of the Property, it did not have the jurisdiction to lift or modify the automatic stay. Even the act of defending an appeal or motion for new trial may constitute an act against a

debtor or a debtor's property if the original proceeding was brought against a debtor or a debtor's property).

e. Incarceration.

Wohleber v. Skurko (In re Wohleber), 596 B.R. 554 (6th Cir. BAP 2019) (failure to prevent the incarceration after a contempt hearing for delinquent payments under domestic court orders).

f. Pending Motions in Domestic Court.

In re Dougherty-Kelsay, 601 B.R. 426 (Bankr. E.D.Ky. 2019) (failure to modify or withdraw a contempt motion in domestic proceedings after commencement of a bankruptcy).

g. Disconnecting telephone service and failing to return funds.

In re Smith, 170 B.R. 111 (Bankr. N.D. Ohio 1994) (Telephone company violated the automatic stay by intentionally disconnecting Debtors' telephone service after receiving notice that the bankruptcy code stayed its collection activities.)

7. Actions not in violation of the automatic stay.

a. Restriction on electronic banking privileges, including use of debit card, not a stay violation.

Spearman v. Commonwealth Credit Union Case No. 16-30772, A.P. 16-03010 (Bankr. W.D. Ky. Mar. 9, 2017)(Stout) Debtor also argued presentation of reaffirmation agreement was violation of 11 U.S.C. § 362(a)(6). Court held: "As stated above, the automatic stay precludes the creditor from seeking to obtain property of the estate or from assessing or collecting on a pre-petition claim against the debtor. 11 U.S.C. § 362(a)(3) and (6). The Sixth Circuit has held that § 362 is not automatically violated by sending a reaffirmation agreement to a debtor. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6 Cir. 2000), concurring with the Seventh Circuit in *In re Duke*, 79 F.3d 43, 45 (7th Cir. 1996). As the Circuit explained in *Pertuso*, "[s]omething more than mere contact must be alleged in order to state a claim under § 362." *Pertuso* at 423. A "course of conduct violates § 362(a)(6) if it "(1) could reasonably be expected to have a significant impact on the debtor's determination as to whether to repay, and (2) is contrary to what a reasonable person would consider to be fair under the circumstances." *Id.* quoting *In re Briggs*, 143 B.R. 438, 450-51 (Bankr. E.D. Mich. 1992).

b. Dismissing a foreclosure complaint

In re Palmer, Case No. 15 CV 323, Miami County, Ohio, Court of Common Pleas (Debtor bringing loan current during bankruptcy is not enough to allow creditor to dismiss the foreclosure complaint. Still need relief from stay.

8. Actions taken in violation of the stay

- a. 6th Circuit (minority): Acts in violation of the stay are voidable. *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905 (6th Cir. 1993); *In re Jones*, 63 F.3d 411 (5th Cir. 1995).
- b. Majority: Acts in violation of the co-debtor automatic stay are void. *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In re Vierkant*, 240 B.R. 317 (8th Cir. B.A.P. 1999); *In re Soares*, 107 F.3d 969 (1st Cir. 1997); *In re Holder*, 260 B.R. 571 (Bankr. M.D.Ga. 2001).

9. Retroactive Annulment of the Stay - Does Supreme Court’s Acevedo opinion preclude annulling the stay?

- a. A bankruptcy court may retroactively annul the automatic stay so as to validate actions taken before the order annulling the stay. This remains true even after *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* (2020) 140 S. Ct. 696.
- b. In *Merriman v. Fattorini* (*In re Merriman*), plaintiffs filed a wrongful death lawsuit against former NFL star Shawne Merriman in state court after Merriman filed for bankruptcy. Upon learning of Merriman’s bankruptcy, plaintiffs asked the bankruptcy court to retroactively annul the automatic stay to validate actions before learning about the bankruptcy case. The court found “cause” existed to lift the automatic stay retroactively. On appeal, the BAP concluded the bankruptcy court had sufficient evidence to grant plaintiffs’ motion. The BAP also acknowledged that during the pendency of the appeal, the Supreme Court issued its Acevedo decision holding that retroactive orders cannot create jurisdiction where none exists. After review of scope and reach of the Supreme Court’s ruling, however, the BAP concluded that the ruling does not prohibit a bankruptcy court’s power to retroactively annul the automatic stay because “it is absolutely clear that Congress expressly gave such power, including the power retroactively to grant relief, to bankruptcy courts.”

10. Settlements for violation of the automatic bankruptcy stay. Can Creditor settle stay violations directly with Debtor or Property of the estate?

- a. *In re Crouser*, 476 B.R. 340 (Bankr.S.D.Ga.2012), *aff’d*, 567 Fed. Appx. 902 (11th Cir. 2014) (damages for stay violation Debtor and mortgagor entered a settlement agreement for damages for stay violation, but the trustee argued that the proceeds of the settlement were property of the estate. The bankruptcy court agreed with the trustee. Because the plain text of section 1306(a)(1) establishes that proceeds of a settlement received by the debtor before the closure of his case are property of the estate, the court of appeals affirmed.

C. The Co-Debtor Stay

1. 11 U.S.C § 1301 - Stay of action against codebtor

(a) *Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any*

part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

- (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
 - (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.
- (b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.
- (c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—
- (1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;
 - (2) the plan filed by the debtor proposes not to pay such claim; or
 - (3) such creditor's interest would be irreparably harmed by continuation of such stay.
- (d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action

2. Damages for violating the codebtor stay

While § 362(k) imposes damages for any willful violation of the automatic stay, § 1301 does not contain a similar provision. However, some courts have imposed damages for willful violations of the co-debtor stay in reliance on § 1301's legislative history or 11 U.S.C. § 105(a), which states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio, April 23, 1992)(Judge Aug) (awarding damages to the debtors for the creditor's violation of the co-debtor stay because the legislative history of §1301 and § 362 make it clear that both provisions were enacted to protect the debtor)

D. Discharge Injunction

1. 11 U.S.C § 524 - Effect of discharge

(i) *The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.*

(j) *Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—*

- (1) *such creditor retains a security interest in real property that is the principal residence of the debtor;*

(2) such act is in the ordinary course of business between the creditor and the debtor; and
(3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

2. No Fair Ground of Doubt

Taggart v. Lorenzen, 139 S. Ct. 1795 (2019)

The Bankruptcy Court, in holding the creditor in civil contempt for discharge order violation, applied a standard that it described as akin to "strict liability." It held that civil contempt sanctions are permissible, irrespective of the creditor's beliefs, so long as the creditor was " 'aware of the discharge' " order and " 'intended the actions which violate[d]' " it. The Court of Appeals for the Ninth Circuit, however, disagreed with that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a "good faith belief" that the discharge order "does not apply to the creditor's claim." That is so, the Court of Appeals held, "even if the creditor's belief is unreasonable." The Supreme Court concluded that neither a standard akin to strict liability nor a purely subjective standard is appropriate. Rather, in their 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.

3. Private Right of Action.

- *In re Folden*, Case No. 00-36749, A.P. 12-3117 (Bankr. S.D. Ohio, Mar. 24, 2014)(Humphrey) ("Prior to the enactment of § 524(i), the Sixth Circuit held that there is no private right of action for a discharge violation. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422-23 (6th Cir. 2000). However, debtors may pursue a contempt proceeding for violations of the discharge order. *Id.* at 423 n. 1. This litigation is such a contempt action based on the discharge order and, more specifically, the order deeming the mortgage current, which may be raised pursuant to § 105."

4. Is a Billing Statement Disclaimer Enough to Avoid Contempt for Discharge Violation?

- *Roth v. Nationstar Mortgage, LLC (In re Roth)*, 935 F.3d 1270 (11th Cir. 2019) (An "Informational Statement" sent by the mortgage holder is not an unlawful debt collection in violation of 11 U.S.C. § 524 because it contained a bold disclaimer on the first page that the statement was for informational purposes only, and the included payment coupon was marked in large lettering as "voluntary.").

E. Duty to Mitigate

1. *In re Phillips*, No. 3:15-bk-30632-SHB (Bankr. E.D. Tenn. July 13, 2015)

Debtors sought actual and punitive damages and attorneys' fees against creditor for a willful violation of the automatic stay of 11 U.S.C. § 362(a) for post-petition contacts with Debtors

and their relatives to demand payment on a pre-petition debt. Because the court found “Debtors failed to carry their burden to prove actual damages caused by [creditors] stay violation and they did not attempt to mitigate any damage, the court need not reach the question of whether the automatic stay was willful and the related issue of whether the presumption of receipt of the Notice arises in this case. . . the court finds that the Motion could easily have been avoided had Debtors taken any action to mitigate their damages.”

2. *In re Crowder*, No. 16-20440-PRW (Bankr. W.D.N.Y. June 16, 2016)

Debtor filed a Motion for Sanctions and Attorneys’ Fees for Violation of the Automatic Stay based on Creditor’s post-petition written communication to Debtor, the subsequent repossession by the bank of a 2015 Dodge Ram 1500 truck—jointly owned by Debtor and his son, followed by another written communication to Debtor. The Court held the Debtor’s “motion must fail. No attempt was made by [Debtor] or his attorney to mitigate the potential for damage by contacting [Creditor] . . . and the most modest of efforts would probably have ended this yarn before it became legally interesting.”

3. *In re Witham*, 579 B.R. 787 (Bankr. E.D. Ky. 2017)(Judge Wise)(After considering the record in this case, the Court finds that Debtors appropriately attempted to mitigate their damages. Debtors took multiple steps to avoid this contested matter.).
4. *In re Mitchell*, 545 B.R. 209 (Bankr. N.D. Ohio 2016)(Harris)(Even damages that are actually suffered may not be recoverable as "debtors have an obligation to attempt to mitigate damages prior to seeking court intervention. . . . The duty to mitigate reflects the sound judicial policy that profit-making from violations of either the automatic stay or discharge injunction is "inherently improper.").
5. *In re Cousins*, 404 B.R. 281, (Bankr. S.D. Ohio 2009)(Considered whether the debtor or debtor’s counsel took reasonable actions to resolve the matter in a non-litigious manner prior to filing an action for violation of the automatic stay, especially when the immediate damage to the debtor is minimal and contacting the creditor would not be burdensome.).

F. Case Law

1. *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code).
2. *In re Puller*, 2007 Bankr. LEXIS 2017; 58 *Collier Bankr. Cas. 2d (MB)* 290 (Bankr. N.D. West Virginia, June 20, 2007)(Case summarizing Credit Reporting Decisions).
3. *In re Sommersdorf*, 139 B.R. 700 (Bankr. S.D. Ohio, April 23, 1992)(Judge Aug) (awarding damages to the debtors for the creditor's violation of the co-debtor stay because the legislative history of §1301 and § 362 make it clear that both provisions were enacted to protect the debtor).
4. *Merriman v. Fattorini (In re Merriman)*, 616 B.R. 381 (B.A.P. 9th Cir. 2020) (bankruptcy court had requisite jurisdiction and statutory authority to retroactively "annul" the automatic stay based upon the plain language of 11 U.S.C. § 362(d), and Supreme Court *Acevedo* decision does not pertain to such statutory authority of the bankruptcy court).

5. *In re Odell*, No. 17-8012 (B.A.P. 6th Cir. Jan. 30, 2018) (dismissing as moot the borrower's appeal of an order granting relief and abandonment to the creditor. Held the automatic stay as to property of the estate automatically terminates 30 days after the 341 meeting (or 30 days after filing an amended Schedule C) in the absence of an objection to exemption, when property is claimed as completely exempt by the debtor).
6. *In re Tapp*, Case No. 19-62481 (Bankr. N.D. Ohio, July 10, 2020)(Kendig)("Giving teeth to the automatic stay by awarding actual damages for willful violations of the stay serves to protect debtors and deter creditors. Such damages may at times include recovery for emotional loss or injury. Not all emotional distress is compensable and the burden of proof is demanding, in part because of the ease of manufacturing emotional injury. Debtor failed to meet his burden and is therefore unable to recover damages for emotional injury.>").
7. *In re Folden*, Case No. 00-36749, A.P. 12-3117 (Bankr. S.D. Ohio, Mar. 24, 2014)(Humphrey) ("Prior to the enactment of § 524(i), the Sixth Circuit held that there is no private right of action for a discharge violation. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422-23 (6th Cir. 2000). However, debtors may pursue a contempt proceeding for violations of the discharge order. *Id.* at 423 n. 1. This litigation is such a contempt action based on the discharge order and, more specifically, the order deeming the mortgage current, which may be raised pursuant to § 105.>").
8. *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019) (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).
9. *In re Laudato*, 2019 Bankr. LEXIS 2886, 2019 WL 4458368 (Bankr. N.D. Ohio Sept. 17, 2019)(County treasurer and Utility company did not violate the discharge injunction by posting online statements for unpaid prepetition water and sewer charges that had become a lien against the debtors' real property under Ohio law. The posting of the charges on the website coupled with the internal coding of the property noting the bankruptcy and lack of direct solicitation by the creditor to collect evidenced no intent to coerce or harass the debtors into paying the debt.).
10. *Ragone v. Pizza Pan Elyria, LLC (In re Ragone)*, 2020 Bankr. LEXIS 832, 2020 WL 1672539 (Bankr. N.D. Ohio March 31, 2020)(Bankruptcy court concluded it was objectively unreasonable for defendants to take no affirmative steps to end the garnishment of the debtor's wages upon learning from debtor's counsel that the debtor had received a bankruptcy discharge. The court concluded the debtor produced clear and convincing evidence showing that it was objectively unreasonable for defendants to hold onto garnished funds after having a week to investigate letter from Debtor's Counsel regarding discharge violation.).
11. *In re McCormick*, No. 17-8039 (B.A.P. 6th Cir. Dec. 26, 2018)([N]ot all communications from a creditor to a debtor are prohibited by § 362(a).).
12. *In re Witham*, 579 B.R. 787 (Bankr. E.D. Ky. 2017)(Judge Wise)(After considering the record in this case, the Court finds that Debtors appropriately attempted to mitigate their damages. Debtors took multiple steps to avoid this contested matter.) (failure to stop a post-petition bank account debit for a prepetition debt that was not child support related);
13. *In re Mitchell*, 545 B.R. 209 (Bankr. N.D. Ohio 2016)(Harris)(Even damages that are actually suffered may not be recoverable as "debtors have an obligation to attempt to mitigate damages prior to seeking court intervention. . . . The duty to mitigate reflects the sound judicial policy that profit-making from violations of either the automatic stay or discharge injunction is "inherently improper.").

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

14. *In re Cousins*, 404 B.R. 281, (Bankr. S.D. Ohio 2009)(Considered whether the debtor or debtor's counsel took reasonable actions to resolve the matter in a non-litigious manner prior to filing an action for violation of the automatic stay, especially when the immediate damage to the debtor is minimal and contacting the creditor would not be burdensome.).
15. *Roth v. Nationstar Mortgage, LLC (In re Roth)*, 935 F.3d 1270 (11th Cir. 2019) (Discharge Injunction: Is a Billing Statement Disclaimer Enough to Avoid Contempt? An "Informational Statement" sent by the mortgage holder is not an unlawful debt collection in violation of 11 U.S.C. § 524 because it contained a bold disclaimer on the first page that the statement was for informational purposes only, and the included payment coupon was marked in large lettering as "voluntary.").
16. *In re Palmer*, Case No. 15 CV 323, Miami County, Ohio, Court of Common Pleas (Debtor bringing loan current during bankruptcy is not enough to allow creditor to dismiss the foreclosure complaint. Still need relief from stay).
17. *In re Phillips*, No. 3:15-bk-30632-SHB (Bankr. E.D. Tenn. July 13, 2015).
18. *In re Crowder*, No. 16-20440-PRW (Bankr. W.D.N.Y. June 16, 2016).
19. *In re Humbert*, 567 B.R. 512 (Bankr. N.D. Ohio Aug. 26, 2016) (failure to dismiss an eviction action).
20. *In re Smith*, 170 B.R. 111 (Bankr. N.D. Ohio 1994) (failure to return funds coerced by improper disconnection of utilities);
21. *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485 (Bankr. S.D. Ohio 1989) (failure to prevent conclusion of foreclosure action);
22. *In re Dungey*, 99 B.R. 814 (Bankr. S.D. Ohio 1989) (failure to return improperly garnished wages).
23. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020)(Holding that adjudication of an order to grant relief from the automatic stay is a final, appealable order, while also noting generally that "[o]rders in bankruptcy cases qualify as 'final' when they definitively dispose of discrete disputes within the overarching bankruptcy case).
24. *In re Shrum*, 597 B.R. 845 (Bankr.E.D.Mi. 2019)(Although the State Court had the jurisdiction to determine whether or not the automatic stay applied to the Landlord's acts to recover possession of the Property, it did not have the jurisdiction to lift or modify the automatic stay. Even the act of defending an appeal or motion for new trial may constitute an act against a debtor or a debtor's property if the original proceeding was brought against a debtor or a debtor's property).

AMERICAN BANKRUPTCY INSTITUTE

RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19b0002p.06

BANKRUPTCY APPELLATE PANEL

OF THE SIXTH CIRCUIT

IN RE: LAWRENCE JAMES WOHLBER, JR., <i>Debtor.</i>	} No. 18-8008
<hr/> LAWRENCE JAMES WOHLBER, JR., <i>Plaintiff-Appellant,</i>	
v.	
JENNIFER SKURKO; LESLIE A. GENTILE, <i>Defendants-Appellees.</i>	

On Appeal from the United States Bankruptcy Court
for the Northern District of Ohio at Cleveland.
No. 14-11344—Jessica E. Price Smith, Judge.

Argued: November 14, 2018

Decided and Filed: March 4, 2019

Before: HARRISON, HUMPHREY, and OPPERMAN, Bankruptcy Appellate Panel Judges.

COUNSEL

ARGUED: Antoinette E. Freeburg, FREEBURG LAW FIRM, L.P.A., Mayfield Village, Ohio, for Appellant. Kenneth P. Frankel, SMITH & SMITH, Avon Lake, Ohio, for Appellee Skurko. Brian D. Sullivan, REMINGER CO., L.P.A., Cleveland, Ohio, for Appellee Gentile. **ON BRIEF:** Antoinette E. Freeburg, FREEBURG LAW FIRM, L.P.A., Mayfield Village, Ohio, for Appellant. Kenneth P. Frankel, SMITH & SMITH, Avon Lake, Ohio, for Appellee Skurko. Brian D. Sullivan, James O'Connor, REMINGER CO., L.P.A., Cleveland, Ohio, for Appellee Gentile.

OPINION

GUY R. HUMPHREY, Bankruptcy Appellate Panel Judge. The debtor appellant, Lawrence J. Wohleber (“Wohleber”), is appealing an order of the bankruptcy court for the Northern District of Ohio dismissing his complaint seeking damages under 11 U.S.C. § 362(k) for violations of the automatic stay by his former wife, appellee Jennifer Skurko (“Skurko”), and her attorney, appellee Leslie Gentile (“Gentile”). The adversary complaint alleged that Skurko and Gentile violated the stay by allowing the post-petition sentencing portion of a pre-petition contempt proceeding to continue despite their knowledge that the automatic stay was in effect. At sentencing, Wohleber was ordered confined to jail until he paid a property settlement previously ordered by the domestic relations court. Ruling from the bench on a motion for judgment on partial evidence at the conclusion of Wohleber’s case, the bankruptcy court found no violation of the automatic stay occurred because: a) the former wife and her counsel did not take affirmative action post-petition to try to collect the debt, such as trying to negotiate a settlement of the property settlement award; and b) there was no affirmative action they could take to prevent the domestic relations judge from jailing the debtor for nonpayment of the property settlement because the contempt motion was already ruled upon, and therefore could not be withdrawn, and all that was left was for the judge to “sentence” the debtor for his contempt of her order.

I. ISSUES ON APPEAL

Wohleber framed his only issue on appeal as “[w]hether the Bankruptcy Court erred in granting Judgment in favor of Defendants Gentile and Skurko.” To address Wohleber’s single assignment of error, the panel will address two underlying issues:

1. Is the continuation of a contempt proceeding against a debtor a violation of the automatic stay when the contempt was found pre-petition, but the “sentencing hearing” at which the court ordered the debtor jailed for failure to pay a property settlement was post-petition, and the only condition to purge the contempt was to pay the property settlement?

2. Does a creditor and her legal counsel violate the automatic stay when they take no action to stop a state court from proceeding with a contempt hearing, the stated purpose of which is to confine the debtor to jail for failure to pay a dischargeable property settlement, and in failing to act to prevent the state court from sentencing the debtor to jail under such circumstances?

II. JURISDICTION AND STANDARD OF REVIEW

The United States District Court for the Northern District of Ohio has authorized appeals to the Panel, and no party has timely filed to have this appeal heard by the district court. 28 U.S.C. §§ 158(b)(6), (c)(1). A final order of the bankruptcy court may be appealed as of right. 28 U.S.C. § 158(a)(1). For the purpose of an appeal, a final order is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Midland Asphalt Corp. v. U.S.*, 489 U.S. 794, 798, 109 S. Ct. 1494, 1497 (1989) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521, 108 S.Ct. 1945, 1949 (1988)) (internal quotation marks omitted). The order before the Panel grants a motion for a directed verdict to Skurko and Gentile and fully disposes of the adversary proceeding, making it a final order. *Geberegeorgis v. Gammarino (In re Geberegeorgis)*, 310 B.R. 61, 63 (B.A.P. 6th Cir. 2004) (citing *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 488 (6th Cir. 1996)) (“[A]n order that concludes a particular adversarial matter within the larger case should be deemed final and reviewable in a bankruptcy setting.”).

The Bankruptcy Court’s decision was rendered as a judgment on partial evidence at the conclusion of Wohleber’s presentation of evidence. Federal Rule of Bankruptcy Procedure 7052 makes Federal Rule of Civil Procedure 52 applicable to adversary proceedings. Rule 52(c) provides that in a bench trial, at the conclusion of a party’s presentation of evidence, “the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue,” but that judgment “must be supported by findings of fact and conclusions of law as required by Rule 52(a).” The judgment’s conclusions of law are reviewed de novo, and its findings of fact are reviewed for clear error. *Sharp ex rel. Estate of Sharp v. United States*, 401 F.3d 440, 442 (6th Cir. 2005).

“Under a de novo standard of review, the reviewing court decides an issue independently of, and without deference to, the trial court’s determination.” *Menninger v. Accredited Home*

Lenders (In re Morgeson), 371 B.R. 798, 800 (B.A.P. 6th Cir. 2007). Essentially, the reviewing court decides the issue “as if it had not been heard before.” *Mktg. & Creative Sols., Inc. v. Scripps Howard Broad. Co. (In re Mktg. & Creative Sols., Inc.)*, 338 B.R. 300, 302 (B.A.P. 6th Cir. 2006). “No deference is given to the trial court’s conclusions of law.” *Id.* A factual finding “is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Kraus Anderson Capital, Inc. v. Bradley (In re Bradley)*, 507 B.R. 192,196 (B.A.P. 6th Cir. 2014) (quoting *Riverview Trenton R.R. Co. v. DSC, Ltd. (In re DSC, Ltd.)*, 486 F.3d 940, 944 (6th Cir. 2007) (internal quotation mark omitted)).

III. FACTS

Since April 2004 Wohleber and Skurko have been involved in a protracted divorce and parentage proceeding. *See Wohleber v. Skurko*, Case No. 04DU063421, Common Pleas Court of Lorain County, Ohio, Domestic Relations Division. The state court granted their divorce and entered a property settlement in Skurko’s favor in 2006. On October 11, 2012, after several appeals and a rehearing on remand, the state court ordered Wohleber to pay Skurko \$36,459.33 for her share of the marital estate within 21 days (the “property settlement”). Over the next nine months the parties litigated and appealed several issues related to the property settlement. These issues were resolved by the state court in a hearing held on July 22, 2013 through which the court found Wohleber in contempt for failure to pay the property settlement, allowed him to purge his contempt by paying the property settlement in full by October 1, 2013, and set a sentencing hearing for October 8 in the event he did not pay the property settlement.

On October 4, 2013 Wohleber filed a Chapter 13 bankruptcy petition in the Northern District of Ohio, Bankruptcy case no. 13-17042, which fell between the October 1 deadline to purge his contempt¹ and the October 8 hearing to impose a sentence for contempt

¹Despite the October 1 deadline, the transcript of the Sentencing Hearing indicates that the State Court never foreclosed Wohleber’s opportunity to purge his contempt.

(the “sentencing hearing”).² A suggestion of bankruptcy was filed in the divorce proceeding on the same day.

Before the sentencing hearing on October 8, Judge Debra L. Boros met with counsel in chambers. This chambers meeting was not recorded in any fashion. Later, on the record, the judge indicated she met with counsel in her chambers to give both parties the opportunity to explain why the sentencing hearing was stayed by the bankruptcy petition, despite her research concluding otherwise. She also gave the parties one last opportunity to negotiate a compromise to purge the contempt. In a short hearing, Judge Boros concluded that since the \$36,458.33 had not been paid, nor a compromise reached, she had no choice but to sentence Wohleber to 30 days in jail. The relevant portion of the hearing is as follows:

The Court: We’re here for purposes of a sentencing. I did have an opportunity to speak with counsel prior to going forward and counsel took about 10 minutes to speak with each other and their clients. So how are we proceeding?

Mr. Lewis: There is no resolution.

The Court: Then we’re here for purposes of sentencing. Has your client met his purged amount?

Mr. Lewis: No.

The Court: No.

Ms. Gentile: That’s correct, Your Honor.

The Court: Then you leave me no choice but to sentence your client to 30 days to the Lorain County Jail, beginning today. We’ll bring the sheriff’s deputy up to transport.

Mr. Lewis: A couple different things, Your Honor, I would like to put on the record and request from you, if we could please, at this time?

The Court: And that would be what?

Mr. Lewis: Well, for the record, I would like to just note to the Court that a suggestion of bankruptcy was filed by another attorney. That court case number was, I believe the Court has that information.

²This hearing was not a “sentencing hearing” at which the state court reviewed and applied sentencing guidelines, statutes, or other criteria for imposing a sentence upon a criminal defendant on account of a conviction. Rather, it was a hearing which the state court set to sentence Wohleber to jail for not paying the property settlement. Nevertheless, since the state court, the bankruptcy court, and the parties all refer to this hearing as the “sentencing hearing,” we will also use this term.

The Court: I did. As a matter of fact, prior to going forward on the record, I brought both counsel back into my chambers. I indicated to counsel that I had researched the matter. That this Court, pursuant to the Ninth District Court of Appeals, the bankruptcy did not stay this particular proceeding. I offered to both counsel, including you, on behalf of your client, if there was any case law which you wished to present to me to read in the interim, before I took the bench to the contrary. None was provided. I've indicated what the law that the Court has found indicated.

So, although I appreciate you making the Court aware, I did receive a copy of that bankruptcy notice. And upon receiving it, the Court did its research to determine if, in fact, I was to continue this or not. And the Court's research indicated that we were to go forward and that there wasn't any stay in this proceeding. If there is any case law that you have, once again, I will say it on the record, that I said in chambers. And that was, if you have any case law to the contrary that you wish to provide to the Court at this time for purposes of my review, now would be the time.

Mr. Lewis: I understand that.

The Court: Do you have any case law?

Mr. Lewis: No, Your Honor, and I've indicated that in chambers. I want to bring it to the Court's attention and also place it on the record.

Secondly, Your Honor, we would like to make an oral motion for extension of time on this sentencing hearing for 30 days, in order to explore options of payment in another fashion.

The Court: And what I had indicated, when that was discussed amongst the attorneys, prior to going on the record, was, is that that was not for me to, I was not going to consider a continuance today, for the reason that both parties have had ample opportunity, being before this Court previously, to work out some arrangements. And quite honestly, that, in my impression, it has become very difficult, not only for the parties to communicate with each other, but for counsel to communicate with each other.

However, in a last ditch effort to get counsel to communicate with each other and the parties to communicate with each other, I gave additional time and indicated that whatever agreement the parties reached, that I would be happy to accept. However, if there wasn't an agreement reached, that I was going to go forward, because, at the very least, everybody deserves some finality to this.

So, I appreciate your argument on the record, but I had indicated to both counsel that it became very apparent in the hearing, in the status in my chambers, that counsel, neither were very receptive to speaking with each other regarding settlement, however, I felt it important to give you some additional 10 or 15 minutes to do that, outside of being in my chambers, but it appears that was for naught as well.

(Sentencing Hr'g Tr. 2:11–5:17.)³ The journal entry memorializing the result of the hearing stated that Wohleber's confinement remained contingent on purging the contempt.

The parties also stipulated that Wohleber's jail sentence included "a provision that he be released upon payment of the property settlement which is the basis for the contempt." (Joint Stipulation ¶ 6, Adv. P. 16-01106 ECF No. 122.) Wohleber spent the next 10 days in jail. Four days into his confinement, Wohleber's attorney filed an emergency motion to vacate his sentence. But because the motion was not filed in person, a same-day emergency hearing on the motion could not be held. A hearing on the motion to vacate was scheduled for the following week. On October 17 Wohleber was released by agreement of the parties and his contempt was held in abeyance until the completion of his bankruptcy.

BY AGREEMENT OF THE PARTIES, THE REMAINDER OF PLTF'S SENTENCE IMPOSED ON 10-8-13, AS A RESULT OF HIS FAILURE TO PURGE HIS CONTEMPT AS PREVIOUSLY ORDERED IS HEREBY HELD IN ABEYANCE PENDING RESOLUTION OF THE RELEVANT ISSUES IN PLTF'S CURRENTLY PENDING BANKRUPTCY MATTER. IT IS THEREFORE HEREBY ORDERED THAT PLTF BE IMMEDIATELY RELEASED FROM THE LORAIN COUNTY JAIL.

(Divorce Proceeding Docket 26, October 17, 2013.)⁴ There were no further hearings regarding his release.

After his release, Wohleber dismissed his bankruptcy case, later testifying that that he did so because he lost confidence in his attorney. Following the dismissal of the bankruptcy, Skurko filed a motion to reimpose the contempt sentence. On March 10, 2014 Wohleber filed a second bankruptcy case in which the underlying adversary proceeding was filed and the next day the divorce proceeding was again stayed pending the resolution of the second bankruptcy case.

³Defendant-Appellee Gentile filed a copy of this transcript as exhibit A-2 to her motion for summary judgment. (Mot. for Summary Judgment, Adv. P. 16-01106 ECF No. 84-3.) It will be cited as "Sentencing Hr'g Tr." in this opinion.

⁴Wohleber filed a copy of the docket in his Divorce/Parentage case in Court of Common Pleas for Lorain County, Case No. 04DU063421, as exhibit A-1 to his motion for summary judgment. (Mot. for Summary Judgment, Adv. P. 16-01106 ECF No. 87-2.) It will be cited as "Divorce Proceeding Docket". in this opinion.

IV. PROCEDURAL HISTORY

Nearly three years after his confinement, Wohleber initiated the adversary proceeding from which this appeal is taken. *Wohleber v. Skurko*, Adv. No. 16-01106 (the “Adversary Proceeding”).⁵ The complaint alleged violations of the automatic stay by Skurko, Gentile,⁶ and Judge Boros. Judge Boros successfully moved for dismissal of all claims against her under a claim of judicial immunity.⁷ Skurko and Gentile also moved to dismiss the claims against them, arguing that the court lacked jurisdiction to hear the stay violation claims because the alleged violations occurred in the first bankruptcy, and therefore the claims must proceed in that case. The bankruptcy court denied those motions.⁸

Skurko, Gentile, and Wohleber each moved for summary judgment and a hearing was held on those motions on November 8, 2017. The bankruptcy court denied all three motions for summary judgment. In each order, the bankruptcy court stated that it had provided its reasoning on the record on November 8, 2017. The transcript for that hearing does not appear in the record, nor on the adversary docket.

Prior to trial, the parties stipulated to the general timeline of events and the contingent nature of Wohleber’s jail sentence. The court bifurcated the liability and damage portions of the trial, with the trial proceeding first on the issue of liability and evidence then to be taken on damages only if Wohleber prevailed in establishing Skurko’s and Gentile’s liability. The parties

⁵There does not appear to be anything in the record explaining the three-year delay in filing the adversary proceeding.

⁶Attorneys may be held liable for violations of the automatic stay as a result of actions they have taken or omissions they have made in representation of their clients. *In re Timbs*, 178 B.R. 989, 995 (Bankr. E.D. Tenn. 1994); *In re McGinty*, 119 B.R. 290, 296 (Bankr. M.D. Fla. 1990) (attorney violated stay by seeking additional spousal support for client after receiving notice of bankruptcy).

⁷The state judge also argued that the bankruptcy court lacked jurisdiction over the adversary proceeding under the *Rooker-Feldman* doctrine, particularly as expressed by *Singleton v. Fifth Third Bank (In re Singleton)*, 230 B.R. 533 (6th Cir. B.A.P. 1999); however, the bankruptcy court did not address that argument.

⁸The bankruptcy court’s determination of this issue is consistent with other cases which have held that the stay violation may be pursued in the subsequent bankruptcy case and the prior case need not be reopened for that purpose. See *In re Braught*, 307 B.R. 399, 401 (Bankr. S.D.N.Y. 2004); *In re Prine*, 222 B.R. 610, 612 (Bankr. N.D. Iowa 1997); and *D’Alfonso v. A.R.E.I. Invest. Corp. (In re D’Alfonso)*, 211 B.R. 508, 513 (E.D. Pa. 1997).

entered two exhibits into evidence, the docket of the divorce proceeding and the transcript of the sentencing hearing. Wohleber was the only witness to testify.

Immediately after the conclusion of Wohleber's case on liability, Gentile moved for judgment on partial evidence.⁹ Her main argument was that in other bankruptcy cases when the petition date fell between a finding of contempt and sentencing on the contempt, the sentencing was deemed an act of the court and the creditor was determined to have no duty to take steps to attempt to prevent the enforcement of the contempt order.

After a short recess, the bankruptcy court ruled from the bench. The bankruptcy court's findings of fact and conclusions of law were organized around three inquiries: 1) whether a stay violation occurred, 2) whether Skurko and Gentile affirmatively violated the stay, and 3) whether Skurko and Gentile had a duty to stop the sentencing hearing from proceeding. The court considered three periods when a stay violation could have occurred: between the petition date and the sentencing hearing, at the time of Wohleber's release from jail, and the period between those dates.

Looking first at the time period between the filing of Wohleber's first bankruptcy and the sentencing hearing, the bankruptcy court held that neither Skurko nor Gentile "attempted to engage in settlement discussions with Mr. Wohleber in order to resolve the issue of the payment [of] the \$36,000 property settlement . . ." (Tr. of March 21, 2018 Hr'g ("Tr.") 44:12–15, Adv. No. 16-01106 ECF No. 154.) Because Skurko and Gentile made no attempt to negotiate with Wohleber, "their actions were not an attempt to collect payment. They were not attempting to negotiate. They were not trying to settle the matter. From what has been presented, they were silent on receiving or attempting to collect or receive payment." (Tr. 44:17–21.) The bankruptcy court noted that an "attempt to negotiate could have constituted a violation of the automatic stay, but there is no evidence that that happened, either in the testimony today or in the documents." (Tr. 45:20–23.)

⁹Gentile distributed a written motion to the parties, which does not appear in the record nor on the adversary proceeding docket.

Looking at whether the agreed order releasing Wohleber from confinement constituted a stay violation, the court found that the journal entry “indicates that the parties agreed to hold the sentence to purge contempt in abeyance in order to resolve pending bankruptcy issues.” (Tr. 47:2–5.) The court concluded that the order then “was not a resolution of the contempt, i.e., payment of the settlement or negotiation of the settlement, or determination of a sum certain, in order for him to get out, but rather the parties agreed to address that issue in the context of the bankruptcy.” (Tr. 47:7–12.) Therefore, the bankruptcy court held that there was neither Skurko nor Gentile “affirmatively attempted to collect the debt” (Tr. 48:4–5.)

Having found no evidence that Skurko or Gentile “affirmatively attempted to collect the debt,” the bankruptcy court then turned to the question of whether their inaction constituted a stay violation, i.e. “whether or not they had an affirmative duty to stop . . . what they put in motion. And the issue then is whether or not they actually had the ability to stop or if what was happening was what they put in motion.” (Tr. 44:23–45:1.) Without any analysis, the bankruptcy court appears to have implicitly made a finding that the contempt sentence was a stay violation and moved directly to the next question, “was there a point in time where there were actions that the Defendants could have or should have taken that would have alerted the Judge to the fact that this action was a violation of the automatic stay or that they didn’t want to proceed.” (Tr. 49:6–11.)

Wohleber argued that Skurko and Gentile should have withdrawn Skurko’s contempt motion. However, the bankruptcy court rejected this argument finding the court was acting on its own order and so there was no motion that could have been withdrawn to stop the sentencing hearing from proceeding. The bankruptcy court went on to consider if there was anything else that could have been done by Skurko and Gentile.

Short of at that hearing stating that they were waiving the obligation, I can’t see what else could have been done here. The Judge acknowledged the stay was in place. The Judge acknowledged that she had researched the issue of the stay and found that she did not believe that it was applicable in this instance.

The attorney for the Debtor spoke out. The Judge was fully aware of this issue. There is no requirement to waive your claim in order to protect yourself from being alleged to have violated the automatic stay. Similarly, as I indicated earlier, the transcript reflects that the counsel for the Defendant, who is also now a

Defendant, was not engaging in negotiations that and with respect to the release which occurred on October 17th, that was a release to address the payment and bankruptcy issues at a later point in time, not a resolution of that claim. And so there was no action there either.¹⁰

(Tr. 49:12–50:4.) With that, the bankruptcy court found that:

the plaintiff has not met their burden in demonstrating that there was a violation of the automatic stay, either affirmatively in attempting to collect, or in failing to stop proceedings to collect a debt, because what was happening here was after a determination of contempt had been found, the court was entering a sentence consistent with that order, notwithstanding the statement of the parties that the bankruptcy stay was in effect.

(Tr. 50:14–23.) Because the bankruptcy court did not find sufficient evidence that Skurko and Gentile violated the stay, the motion for judgment on the partial evidence was granted and the court did not receive evidence from Skurko and Gentile on liability, nor take evidence on damages.

V. DISCUSSION

A. Jurisdiction—the *Rooker-Feldman* Doctrine Does Not Preclude the Bankruptcy Court from Considering Whether a Stay Violation Occurred

Before she was dismissed from the case, Judge Boros argued that the *Rooker-Feldman* doctrine divested the bankruptcy court of jurisdiction to review her decision. Specifically, she argued that under *Singleton v. Fifth Third Bank (In re Singleton)* a state court determination that the automatic stay does not apply to its proceeding divests bankruptcy courts of jurisdiction to hear a stay violation claim arising out of the same matter. 230 B.R. 533, 538 (B.A.P. 6th Cir. 1999).

Though neither remaining party has argued that *Rooker-Feldman* deprives the bankruptcy court of jurisdiction to enforce the automatic stay, “every federal appellate court has a special obligation to ‘satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review’ . . .” *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct.

¹⁰The bankruptcy court did not explain why the October 17 agreement to deal with the payment terms through the bankruptcy was not something “else [that] could have been done” to prevent Wohleber’s confinement.

1326, 1331 (1986) (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S. Ct. 162, 165 (1934)). When a court lacks jurisdiction, the appellate court has “jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” *United States v. Corrick*, 298 U.S. 435, 440, 56 S. Ct. 829, 832 (1936). The bankruptcy court did not address this issue before dismissing Judge Boros from the case. In order satisfy our duty to confirm the jurisdiction of the bankruptcy court and the extent of our jurisdiction, we will address the issue now.

The *Rooker-Feldman* doctrine—derived from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149 (1923), and revived after 60 years of disuse by *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303 (1983)—“generally provides that lower federal courts may not engage in appellate review of state-court decisions.” *Isaacs v. DBI-ASG Coinvestor Fund, III, LLC (In re Isaacs)*, 895 F.3d 904, 912 (6th Cir. 2018) (citing *Hall v. Callahan*, 727 F.3d 450, 453 (6th Cir. 2013)). “[T]he *Rooker-Feldman* doctrine has been applied by [the] Court only twice, i.e., only in the two cases from which the doctrine takes its name” *Skinner v. Switzer*, 562 U.S. 521, 531, 131 S. Ct. 1289, 1297 (2011). Despite this, the Court has since noted that “lower federal courts have variously interpreted the *Rooker-Feldman* doctrine to extend far beyond the contours of the *Rooker* and *Feldman* cases,” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283, 125 S. Ct. 1517, 1521 (2005). Consequently, the Court has frequently returned to this issue to reiterate the narrow scope of the doctrine. *Id.*; *Lance v. Dennis*, 546 U.S. 459, 126 S. Ct. 1198 (2006); *Skinner*, 562 U.S. at 531.

Singleton was decided prior to *Exxon*. *Exxon* and its progeny clarified that the doctrine does not incorporate preclusion law. “When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court[.]” *Exxon*, 544 U.S. at 292, because neither of the parent cases “supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court.” *Id.* In this situation, *Exxon* found that “there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.” *Id.* at 293. The Court further explained that even without concurrent proceedings, such as when “a party attempts to litigate in federal court a matter previously litigated in state

court[.]” *Rooker-Feldman* does not apply when the plaintiff in federal court “present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party” *Id.*

Because the state court and bankruptcy proceedings are proceeding in parallel, *Rooker-Feldman* does not apply, and the bankruptcy court has jurisdiction to adjudicate the stay violation claim.¹¹

B. Proceeding with the Sentencing Hearing and Confining Wohleber Violated the Automatic Stay

1. The Automatic Stay

The filing of a bankruptcy petition “operates as a stay, applicable to all entities, of the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title” § 362(a)(1). As frequently noted:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure 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.

Fed. Land Bank of Louisville v. Glenn (In re Glenn), 760 F.2d 1428, 1435 (6th Cir. 1985) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6296–97); *United States v. Robinson (In re Robinson)*, 764 F.3d 554,

¹¹Skurko and Gentile have not argued that the adversary proceeding was barred by issue or claim preclusion and, therefore, the panel will not address that issue. Res judicata, at least in the Sixth Circuit, incorporates both issue and claim preclusion, and is an affirmative defense that is generally waived if not raised. See *Wilkins v. Jakeway*, 183 F.3d 528, 532 (6th Cir. 1999); and *Lattanzio v. Ackerman*, 682 F. Supp. 2d 781, 787 (E.D. Ky. 2010) (res judicata incorporates issue preclusion and claim preclusion); and Federal Rule of Bankruptcy Procedure 7008, incorporating Federal Rule of Civil Procedure 8, providing under Rule 8(c) that res judicata is an affirmative defense. Further, as an affirmative defense, it is not jurisdictional like the *Rooker-Feldman* doctrine. See *Hutcherson v. Lauderdale County*, 326 F.3d 747, 755 (6th Cir. 2003) (“*Rooker-Feldman* should be considered first since its application strips federal courts of jurisdiction and the ability to hear a res judicata, or other affirmative defense.” (citations omitted)); *Neff v. Flagstar Bank, FSB*, 520 F. App’x. 323, 326 (6th Cir. 2014) (“Unlike res judicata, the conceptually related *Rooker-Feldman* doctrine is jurisdictional and therefore may properly be raised by the court sua sponte.”); and *Whittaker v. Deutsche Bank Nat’l Trust Co.*, 605 F. Supp. 2d 914, 923 (N.D. Ohio 2009) (“Res judicata is an affirmative defense and not jurisdictional.”).

558 (6th Cir. 2014). However, not only does it provide those important safeguards to debtors like Wohleber, but it also serves to protect creditors:

The purpose of the automatic stay is to protect creditors in a manner consistent with the bankruptcy goal of equal treatment. The stay of pre-petition proceedings enables the bankruptcy court to decide whether it will exercise its power under § 502(b) of the Bankruptcy Code to establish the validity and amount of claims against the debtor or allow another court to do so. . . .” *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986) (footnotes omitted). The stay helps “preserve what remains of the debtor’s insolvent estate and . . . provide a systematic equitable liquidation procedure for all creditors, secured as well as unsecured, thereby preventing a ‘chaotic and uncontrolled scramble for the debtor’s assets in a variety of uncoordinated proceedings in different courts.’” *Holtkamp v. Littlefield*, 669 F.2d 505, 508 (7th Cir. 1982).

Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 382–83 (6th Cir. 2001).

Like all general rules, there are exceptions to the automatic stay. “[T]he automatic stay protection does not apply in all cases; there are statutory exemptions, and there are non-statutory exceptions.” *Dominic’s Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012) (citing *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir.1986)). When the automatic stay is implicated two determinations are necessary: a) first, is the matter something which would be stayed absent an exception to the stay; and b) if the matter would be stayed, does an exception under § 362(b) or other applicable law apply?

2. *The Collection of the Property Settlement Was Stayed by the Automatic Stay*

A property division awarded in a domestic relations case prior to the filing of a bankruptcy petition is a debt of the debtor. *Towne v. Towne (In re Towne)*, Adv. No. 08–5106, 2009 Bankr. LEXIS 278, at *5 (Bankr. D. Kan. Feb. 3, 2009); *Cantor v. Lever (In re Lever)*, 137 B.R. 243, 246 (Bankr. N.D. Ohio 1992); 11 U.S.C. § 101(5) & (12). Thus, absent an applicable exception to the automatic stay, the commencement or continuation of a proceeding to collect a property division award of a domestic relations court is stayed. See *In re Jones*, 556 B.R. 219, 223 (Bankr. E.D.N.C. 2016) (“the only exceptions to the stay with regard to collection [of domestic relation debts] involve domestic support obligations.”); and *In re Coats*, 509 B.R. 836, 841 (Bankr. W.D. Mich. 2014) (“nothing in that exception authorizes any entity to ‘determine the division of property that is property of the estate’ or provide for the collection of

any claim . . . that does not fall within the federal definition of ‘domestic support obligation.’”). Skurko and Gentile agree that this matter involves a property division debt and have not asserted that an exception relating to a domestic support obligation under § 362(b)(2) applies. In a Chapter 7 bankruptcy case, such a debt is not dischargeable pursuant to 11 U.S.C. § 523(a)(15). *Floyd v. Floyd (In re Floyd)*, Adv. P. No. 17–80043, 2017 Bankr. LEXIS 3266, at *9 (Bankr. N.D. Ala. Sept. 27, 2017). However, by virtue of 11 U.S.C. § 1328(a)(2), such a debt is dischargeable in a Chapter 13 case, assuming the debtor successfully completes the payments under his Chapter 13 plan or obtains a “hardship” discharge under § 1328(b). *Id.* at *9–10. Such a debt may be provided for and paid and discharged through a Chapter 13 debtor’s payment plan. *Coon v. Henderson (In re Coon)*, 522 B.R. 357, 361 (Bankr. M.D. Ala. 2014) (Under Chapter 13 of the Bankruptcy Code “debts owing to a former spouse that are not domestic support obligations . . . are dischargeable under § 1328(a)(2).”).

3. *The Sentencing Hearing and Wohleber’s Confinement Is Not Excepted From the Automatic Stay*

The issue then becomes, was the sentencing hearing on October 8, 2013 and Wohleber’s confinement through that hearing excepted from the stay under an exception provided by § 362(b) or under other applicable law? The state court did not provide on the record, in a decision, or in an order the exception to the automatic stay which permitted it to proceed with the sentencing hearing.¹² Skurko and Gentile have suggested that the state court applied either

¹²The closest the state court came to offering legal support for the determination that the sentencing hearing was not stayed is this statement: “I indicated to counsel that I had researched the matter. That this Court, pursuant to the Ninth District Court of Appeals, the bankruptcy did not stay this particular proceeding.” (Sentencing Hr’g Tr. 2.) The state court did not provide any reference to the case to which she was referring. Nor has Skurko and Gentile provided such information. The only Ohio Ninth District Court of Appeals cases which the Panel found which appeared relevant were *Davenport v. Davenport*, C.A. NO. 11713, 1984 Ohio App. LEXIS 12239 (Ohio Ct. App. Dec. 5, 1984) and *Humiston v. Humiston*, No. 04CA0076-M, 2005 Ohio App. LEXIS 3963 (Ohio Ct. App. Aug. 24, 2005). In *Davenport* the state domestic relations court proceeded with a contempt hearing despite the respondent’s contention that she had filed bankruptcy. In affirming the domestic relations court, the state court of appeals held that “[i]n the absence of proof that a petition had been filed in bankruptcy, the lower court was correct in proceeding with the case.” The court noted that “[t]he record does not contain a copy of Betty’s petition in bankruptcy or any other evidence to substantiate her claim that she filed such a petition.” *Davenport*, 1984 Ohio App. LEXIS 12239, at *3–5. However, in this case, Wohleber’s counsel filed a notice or suggestion of bankruptcy and there was no dispute with the parties, nor doubt raised by the state court, that Wohleber filed a bankruptcy case. The state court did not indicate, at least on the record, that she was proceeding because Wohleber did not provide adequate evidence that he filed bankruptcy. Nevertheless, as discussed below, under such circumstances the court and counsel proceed at their own risk in the event a stay violation is later found to have been committed.

§ 362(b)(1)'s exception for a “criminal action or proceeding against the debtor” or a court-made exception for contempt orders intended to “preserve the dignity of the court.” *Dominic’s*, 683 F.3d at 760–61. However, neither of those exceptions are applicable.

Section 362(b)(1) provides that the filing of a bankruptcy petition “does not operate as a stay . . . of the commencement or continuation of a criminal action or proceeding against the debtor” However, there does not appear to be “any mandatory authority in this Circuit regarding the appropriate method of evaluating whether a particular proceeding falls within the meaning of § 362(b)(1).” *In re Thompson*, 562 B.R. 907, 911 (Bankr. S.D. Ohio 2017).

Thompson identified two tests to determine whether a proceeding falls within the exception for criminal actions provided by § 362(b)(1): a narrow test—the “proceeding must be brought to enforce criminal law,” *Id.* at 910 (citing *In re Dervaes*, 81 B.R. 127, 129 (Bankr. S.D. Fla. 1987))—and a broad test applied by the majority of courts—“the circumstances surrounding the contempt [proceeding] . . . determine whether it is criminal or civil in nature.” *Id.* (citing *In re Burgess*, 503 B.R. 154, 156 (Bankr. M.D. Fla. 2014)). Section 362(b)(1) does not except the sentencing hearing from the stay under either test.

The narrow *Dervaes* test only applies § 362(b)(1)'s exception to proceedings “brought to enforce criminal law.” It defines criminal law as “(a) a legislative enactment (b) applicable to at least a class (c) prohibiting specified conduct and (d) providing punishment by fine payable to, or imprisonment by, the state (e) upon the state’s complaint.” *Thompson*, 562 B.R. at 911 (quoting *Dervaes*, 81 B.R. at 129). *Thompson* and *Dervaes* both distinguished this definition from a criminal or civil contempt proceeding:

A contempt order on the other hand, is a judicial act to enforce a judicial directive or preserve the court’s dignity. Typically the state is not a party in a contempt proceeding. It is applicable only to specified individuals. It involves no legislative determination. It resembles a criminal action only to the extent it employs the sanction of either a fine or imprisonment. It is a civil procedure, not a criminal action or proceeding.

In *Humiston*, the domestic relations court stayed its proceedings in response to the debtor’s bankruptcy filing and only proceeded after the bankruptcy case concluded and the debtor received his discharge.

Id. (quoting *Dervaes*, 81 B.R. at 129). Similarly, the sentencing hearing would fail to meet the requirements of the narrow *Dervaes* test.

Under the broader test, civil contempt proceedings are subject to the automatic stay, while criminal contempt proceedings are not, and courts may look beyond the label applied to the contempt proceeding to “the circumstances surrounding the contempt [proceeding] to determine whether it is criminal or civil in nature.” *Burgess*, 503 B.R. at 156 (footnote omitted).

The contempt order required Wohleber to pay the property settlement previously ordered by the state court. The contempt order does not contemplate a monetary penalty beyond compliance with the property settlement and only threatened confinement subject to immediate release upon compliance with the contempt order. The rule regarding whether such a sanction is civil or criminal in nature is simple: “any [prison] sentence ‘must be viewed as remedial,’ and hence civil in nature, ‘if the court conditions release upon the contemnor’s willingness to [comply with the order].’ By the same token, in a civil proceeding the court ‘may also impose a determinate sentence which includes a purge clause.’” *Hicks v. Feiock*, 485 U.S. 624, 634, 108 S. Ct. 1423, 1431 (1988) (second alteration in original) (citations omitted) (quoting *Shillitani v. United States*, 384 U.S. 364, 370, 360 n.6, 86 S. Ct. 1531, 1536, 1637 n.6 (1966); see also *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1400 (6th Cir. 1991) (“As used in the civil context, however, incarceration must be conditional. That is, once the defendant performs the act required by the court, he must be released.”). See also *Moore v. Nunnari (In re Moore)*, Adv. No. 08–1139, 2009 Bankr. LEXIS 4544, at *11 (Bankr. N.D. Ohio March 20, 2009) (internal quotation mark omitted) (“[T]he order of contempt appears to be civil in nature, in that the debtor may purge himself of contempt by paying in full, the total arrearage for the spousal support and child support . . .”). Since Wohleber’s contempt could be purged at any time, the contempt proceeding was civil in nature and subject to the automatic stay.

Skurko and Gentile cite *Rook v. Rook (In re Rook)* to argue that the contempt order was converted into a criminal contempt order when the date the court set to purge the contempt passed, one week before the sentencing hearing. 102 B.R. 490, 494 (Bankr. E.D. Va. 1989), *aff’d*, 929 F.2d 694 (4th Cir. 1991). However, *Rook* recognized the distinction between civil

contempt and criminal contempt which the Supreme Court described in *Hicks* and the Sixth Circuit applied in *Bayshore Assocs.* and therefore does not change our analysis.

In *Rook*, the state court entered two contempt orders: the first was entered pre-petition, and found Rook in contempt of a prior order, prescribed a jail term, suspended the jail term pending payment of all sums due, and gave Rook 60 days to comply with the order or punishment would be determined by the court. The second order was entered post-petition six years later and could not be purged because the debtor “had the power to comply with [the pre-petition contempt order] and the Property Settlement Agreement, and that he failed to do so and should be punished accordingly.” *Id.*

The *Rook* court held that because the pre-petition contempt order could be purged at any time, it “must be construed as an attempt to exact certain behavior from the debtor, specifically the payment of sums due his former spouse, to which the stay would have applied to prevent the coerced dilution of the estate.” *Id.* at 494. However, because the second order, the post-petition order, did not allow the debtor to purge his contempt, the court found that order was calculated to punish the debtor for non-compliance, rather than coerce compliance and therefore was not subject to the automatic stay. *Id.* at 494–95.

In this appeal, the state court allowed Wohleber to purge his contempt any time before or after the sentencing hearing. Nothing in the record established that the court was punishing Wohleber, nor terminated his ability to purge his contempt by paying the property settlement. Thus, the contempt proceeding was civil in nature and merely an attempt to coerce Wohleber to make a payment to Skurko, and was not calculated to punish Wohleber for failing to comply with the contempt order. Therefore, the contempt proceeding was not excepted from the automatic stay by § 362(b)(1).

In addition to the 28 exceptions to the automatic stay codified in § 362(b), the Sixth Circuit has found some court-made exceptions to the stay.

The automatic bankruptcy stay “protects interests in a debtor’s property, not tortious uses of that property by the debtor.” *Larami Ltd. v. Yes! Entm’t Corp.*, 244 B.R. 56, 60 (D.N.J. 2000) (quotation and citation omitted). The automatic stay provision “was intended to prevent interference with a bankruptcy

court's orderly disposition of the property of the estate, it was not intended to preclude post-petition suits to enjoin unlawful conduct. If this section were read to prevent the injunctive relief [against mark infringement] sought here, bankrupt businesses which operated post-petition could violate [plaintiffs'] rights with impunity." *Id.*; see also *Seiko Epson Corp. v. Nu-Kote Int'l, Inc.*, 190 F.3d 1360, 1364 (Fed. Cir. 1999) ("[T]he statutory stay of proceedings as to [defendant] did not free [defendant] of the contempt orders and the injunctions upon which the contempt was based, all of which were entered before [defendant] suggested bankruptcy.").

Put another way:

It is within a court's inherent power to take whatever steps [are] necessary to ensure those persons within its power comply with its orders. [We] cannot conceive that Congress intended to strip [a] court of this power, and instead permit a party to blatantly violate direct orders of the court and then seek shelter from a bankruptcy judge. If this were so, the court's orders could be rendered almost meaningless.

Dominic's, 683 F.3d 757, 760–61 (alterations in original) (quoting *Rook*, 102 B.R. at 493). In *Dominic's*, the district court and the Sixth Circuit found that the automatic stay did not preclude the district court from continuing with a contempt proceeding and enjoining the defendant debtor from tortiously using his restaurant to infringe the plaintiff's trademarks. Thus, despite the lack of an applicable statutory exception, the courts held that the automatic stay was not so broad as to preclude a court from proceeding under those circumstances.

In this case, Skurko and Gentile argue that a court-made exception concerning the upholding of the dignity of the court applied to the sentencing hearing. Thus, they argue that "Judge Boros's order was designed to uphold the dignity of the court." (Br. of Def.-Appellee Gentile ("Gentile Br.") 14, BAP Case No. 18-8008 ECF No. 15. See also Br. of Def.-Appellee Skurko ("Skurko Br.") 12–13, BAP Case No. 18-8008 ECF No. 13.) However, nowhere in the record is there any evidence that the purpose of the confinement was to uphold the court's dignity. Rather, the evidence points to the fact that the purpose of the sentencing hearing and Wohleber's confinement was to coerce him into paying the property settlement. As noted in the factual description, at the commencement of the sentencing hearing the state court inquired whether there was any resolution between the parties as to the property settlement and upon being advised that no settlement had been reached, she advised the parties that she had no choice

but to proceed with sentencing Wohleber to jail. (*See* Sentencing Hr’g Tr. 2:24–3:2.) Later the court denied a request from Wohleber’s counsel to continue the matter “in order to explore options of payment in another fashion.” (Sentencing Hr’g Tr. 4:16–17.) In rejecting this request, the court stated “I was not going to consider a continuance today, for the reason that both parties have had ample opportunity, being before this court previously, to work out some arrangements” (Sentencing Hr’g Tr. 4:21–24.) Thus, the only “indignity” or transgression Wohleber was accused of was not paying the property settlement or not otherwise reaching a settlement with Skurko.

Given the existence of the court-made exceptions, we must determine the extent of such court-made exceptions. The Sixth Circuit has consistently held that “[t]he court in which the judicial proceeding is pending . . . has jurisdiction to decide whether the proceeding is subject to the stay.” *Dominic’s*, 683 F.3d. at 760 (citing *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 939 (6th Cir. 1986)), but, when the stay would otherwise apply, bankruptcy courts have the exclusive jurisdiction to grant relief from the stay. *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983) (“The legislative history of § 362(d) unambiguously identifies the *bankruptcy* court as the exclusive authority to grant relief from the stay.”); *cf. Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 383 (6th Cir. 2001) (“[I]f the stay applies to an action directed at the debtor or its property, jurisdiction is exclusive in the bankruptcy court.”). However, even the broadest reading of the *Dominic’s* exception, or any exception to permit a court to protect its integrity, would not allow a state court to except itself from the stay to enforce a dischargeable money judgment against an eligible debtor. Such an exception would swallow the rule and would transform the automatic stay from an injunction staying the commencement and continuation of judicial proceedings against a debtor, to a discretionary standard incapable of being strictly enforced. And, of course, confinement of a debtor solely for failing to pay a dischargeable money judgment is nothing short of the use of debtor’s prison. Accordingly, the Panel finds that proceeding with the sentencing hearing and confinement of Wohleber did not meet a court-made exception to the automatic stay.

For these reasons, the Panel finds that the sentencing hearing was a continuation of a judicial proceeding against the debtor to recover a pre-petition debt of the debtor and further, that

no statutory or court-made exceptions apply. Therefore, the sentencing hearing and confinement of Wohleber were stay violations. The panel now turns to the issue of whether Skurko and Gentile are liable for these violations.

C. Skurko and Gentile Had a Duty to Take Action to Prevent the Sentencing Hearing and Wohleber's confinement from Occurring

As a general matter, the responsibility to enforce the automatic stay is placed on creditors because “[t]o place the onus on the debtor, . . . to take affirmative legal steps to recover property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory.” *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (alterations in original) (quoting *Miller v. Sav. Bank of Balt. (In re Miller)*, 22 B.R. 479, 481 (D. Md. 1982)) (internal quotation marks omitted).

[It is] incumbent upon creditors to take the necessary steps to halt or reverse any pending State Court actions or other collection efforts commenced prior to the filing of a bankruptcy petition, including garnishment of wages, repossession of automobile, foreclosure of a mortgage or a judgment lien and, thereby, maintain, or restore, the status quo as it existed at the time of the filing of the bankruptcy petition.

In re Webb, 472 B.R. 665 (B.A.P. 6th Cir. 2012) (alteration in original) (quoting *In re Banks*, 253 B.R. 25, 30 (Bankr. E.D. Mich. 2000)).

Skurko and Gentile are attempting to flip the burden imposed upon creditors to enforce the automatic stay on its head. Upon being advised of the bankruptcy filing by Wohleber's divorce counsel at the sentencing hearing, the state court advised counsel at the sentencing hearing that she researched the issue of the stay and concluded that she could proceed. She invited counsel to provide her with case law to the contrary and particularly placed the onus on Wohleber's divorce counsel to come up with such case law. There is nothing in the record to suggest that Skurko and Gentile tried to convince the state court that it should not proceed with the sentencing hearing and Wohleber's confinement. Relying on Judge Boros' statements made at the sentencing hearing, Skurko and Gentile now argue that Wohleber's divorce counsel had the burden of convincing Judge Boros not to proceed, and is to blame for not convincing her:

Simply stated, Ms. Gentile had no duty to prevent the domestic relations court from seeking to enforce violation of its prior contempt order. In fact, the evidence demonstrated that Judge Boros was responsible for proceeding with the sentencing . . . Further, Judge Boros gave Mr. Wohleber's counsel the opportunity to present any law contrary to her decision to proceed with the contempt sentencing. **And he failed to do so.**

(Gentile Br. 12–13) (citations omitted.) Skurko argues the same:

Wohleber asserts that Skurko had a duty to prevent Judge Boros from sentencing Wohleber. Ironically, Wohleber himself did nothing to prevent Judge Boros from sentencing him. At the sentencing hearing after Judge Boros indicated to Wohleber's attorney that she researched the issue and determined that the automatic stay did not apply, Judge Boros gave Wohleber's attorney the opportunity to provide any authority contradicting Judge Boros determination that the stay did not apply. Wohleber's attorney failed to provide any such authority.

(Skurko Br. 9–10) (citations omitted.)¹³

Skurko and Gentile argue that they had no duty to prevent the sentencing hearing from proceeding because by the time Wohleber's bankruptcy was filed, their involvement in the matter had ended, and what remained was a matter between the state court and Wohleber. Skurko and Gentile support this argument by citing *Rogers v. Overstreet (In re Rogers)*, 164 B.R. 382 (Bankr. N.D. Ga. 1994). In *Rogers*, as in the present case, prior to the filing of a bankruptcy case a domestic relations court found the debtor to be in contempt of its orders, but issued an arrest warrant and imprisoned the debtor after he filed the petition. The debtor in that case sought damages under § 363(k) for his imprisonment, which was denied by the bankruptcy court.

The *Rogers* court acknowledged that “‘a refusal or failure to take action is an act’ within the meaning of § 362(a)” but held that that rule “applies only in cases where there is a duty to act in the first place.” *Id.* at 391 (quoting *In re Dembek*, 64 B.R. 745, 750 (Bankr. N.D. Ohio 1986)). *Rogers* held that the defendants had no duty to act because “[t]he Defendants’ involvement in the state court action was at an end” after the debtor had been found in contempt,

¹³Skurko and Gentile argue that only the state court could have violated the stay. This argument supports another policy reason for imposing the burden on creditors to prevent violations of the stay. As proved out in this case, courts are immune from liability for such determinations. Thus, the duty to protect debtors under such circumstances is appropriately placed on creditors.

therefore, “[t]he incarceration that occurred on the date the Debtor filed his petition was an act of the state court trying to enforce its judgment, and it was not an act of the Defendants.” *Id.* at 391. While facts in *Rogers* are similar to the facts in this case, the applicability of *Rogers* ends there.

Unlike the present case, *Rogers* involved the enforcement of child support. Enforcement of child support and spousal support are not stayed by the automatic stay unless the collection is being sought from property of the estate. 11 U.S.C. § 362(b)(2). See *In re Bezosa*, 271 B.R. 46 (Bankr. S.D.N.Y. 2002) (use of contempt proceeding to collect support obligations from non-estate property is permissible). Further, such debts are not dischargeable in any form of bankruptcy. 11 U.S.C. § 523(a)(5).

Further as the *Rogers* court noted:

The troubles the Debtor has experienced have been brought on by himself. He has disregarded the authority of the state courts on repeated occasions by failing to pay his child support obligations. In fact, the state court has found him to be in contempt on three separate occasions over a period of less than two years. Ironically, it is the Debtor now who is complaining that the Defendants are disregarding the authority of the bankruptcy court.

The Debtor has attempted to entangle the bankruptcy courts with his state law domestic relations dispute. This Court wishes to make it clear that it will not serve as a haven for debtors who wish to escape their alimony, maintenance or support obligations. Such conduct by a debtor is contrary to the purposes underlying the Bankruptcy Code and is repugnant to the interests of justice. Had a party filed a timely motion early on in this case, the Court likely would have dismissed the Debtor’s petition as a bad faith filing based upon the facts currently before it.

164 B.R. at 390. In *Rogers* the defendants “did take steps to try to prevent the Debtor’s incarceration,” in contrast to Skurko and Gentile who took no actions to prevent the incarceration. *Id.* at 391. Moreover, the evidence did not suggest that Wohleber has disregarded the authority of the state court to the extent *Rogers* did. Finally, Wohleber is not using bankruptcy “as a haven to avoid paying his alimony, maintenance or support obligations,” but is paying the property settlement along with his other unsecured debts in a fair and orderly manner under his chapter 13 plan.

Finally, while there is no question that *Rogers* is not binding precedent in this circuit, it appears that *Rogers* may no longer be good law in the Eleventh Circuit either. In *Russell v. Caffey* (*In re Caffey*), an unreported Eleventh Circuit decision, a state court found the debtor to be in contempt for failing to make back child support payments just prior to a bankruptcy filing and was arrested just after the bankruptcy filing. 384 F. App'x 882, 884 (11th Cir. 2010) (*per curium*). There, as here, the creditor argued that once the debtor had been found in contempt, “she had no affirmative duty to delay the contempt order and arrest warrant because they materialized after her involvement in the proceedings ceased.” *Id.* at 886. However, the Eleventh Circuit disagreed:

We are doubtful of Russell’s legal assertion about her responsibilities. See 11 U.S.C. § 362(a)(1) (prohibiting “the commencement or continuation” of judicial process to recover a debt); *In re Scroggin*, 364 B.R. 772, 781 (10th B.A.P. Cir. 2007) (holding that a “refusal to take affirmative action to get the garnishment stopped” is a willful violation of the automatic stay); *In re Johnston*, 321 B.R. 262, 282–86 (D. Ariz. 2005) (holding that creditor had affirmative duty to move to vacate state court contempt and arrest orders that were not themselves issued in violation of the automatic stay); 2 Alan N. Resnick & Henry J. Sommer, *Collier Bankruptcy Manual* ¶ 362.03[4] (3d ed. 2009) (“[L]evy of execution, restraining orders, civil arrest orders and exercise of any other postjudgment remedies are stayed.”).

Id. at 887. The Eleventh Circuit held that the creditor “violated the stay by failing to vacate the state court orders”¹⁴ *Id.*

The Eleventh Circuit is not alone in its holding that a finding of civil contempt does not relieve creditors of their duty to enforce the stay. More recent cases in other districts appear to be uniform in holding that creditors have a duty to stay the post-petition enforcement of pre-petition civil contempt orders issued by state courts. See *In re Johnston*, 321 B.R. 262, 282–86 (D. Ariz. 2005); *Siskin v. Complete Aircraft Servs., Inc. (In re Siskin)*, 231 B.R. 514, 520 (Bankr. E.D.N.Y. 1999) (“defendants had an affirmative obligation to ensure that the outstanding Warrant of Arrest was not enforced.”); *Goodman v. Albany Realty Co. (In re Goodman)*, 277 B.R. 839, 842 (Bankr. M.D. Ga. 2001) (“even if the warrant were based on Debtor’s

¹⁴The Eleventh Circuit also held that the creditor violated the automatic stay “by extracting payments from [the debtor] in exchange for his release.” *Id.* Wohleber did not present any evidence that Skurko and Gentile attempted to extract such a payment in exchange for his release.

disrespect for the superior court, it is still being used as a collection device. As a result . . . the arrest warrant is covered by the automatic stay.”). For these reasons, Skurko and Gentile had a duty to take affirmative action to prevent the use of the sentencing hearing and Wohleber’s confinement to coerce payment of the dischargeable property settlement.

D. The Matter is Remanded for a Determination of Whether Skurko and Gentile Breached Their Duty to Take Affirmative Action to Prevent the Collection Activity on the Property Settlement and, If They Did, for a Determination of Damages

Having determined that Skurko and Gentile had an affirmative duty to prevent the collection activity, our analysis turns to whether they breached that duty. At trial, Skurko and Gentile failed to present evidence that they attempted to stop the sentencing hearing and Wohleber’s confinement. Instead, they argued that if they did have a duty to stop the collection action, there was nothing they could do. Skurko and Gentile argue that the state court judge did her own research, made up her own mind that she had could proceed, and gave them no opportunity to argue otherwise. The bankruptcy court agreed with Skurko and Gentile stating that “[s]hort of at that hearing stating that they were waiving the obligation, I can’t see what else could have been done here.” (Tr. 49:12–14.)

However, there were multiple options available to Skurko and Gentile to satisfy their duty. They could have filed a motion for relief from the stay with the bankruptcy court and requested the state court to stay its contempt proceeding pending disposition of the stay motion. If time did not permit, the other option was to first request the state court to stay its contempt proceeding until a motion for relief from the stay could be adjudicated. Such an option would have permitted the bankruptcy court, which is the court with the most expertise as to the automatic stay, to determine the applicability of the stay in the first instance. Skurko and Gentile could have also filed a motion to vacate the contempt order in light of the bankruptcy proceeding. They also could have submitted an agreed order to hold the enforcement of the contempt order in abeyance so the underlying issues could be resolved in the bankruptcy court, which is exactly what Skurko and Gentile did, but only after Wohleber had spent nearly two weeks in jail. Finally, perhaps the least appropriate and effective course of action would have been to obtain a determination after the sentencing hearing as to the effect of the stay on the

contempt proceeding. At that time the bankruptcy court could have decided whether the sentencing hearing and confinement were void or voidable. *See Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910 (6th Cir. 1993).

Because the responsibility to prohibit violations of the stay is placed on creditors, not debtors, Wohleber's counsel's failure to prevent the stay from being violated is not relevant to the determination of liability. However, Skurko's and Gentile's conduct is relevant. There is no evidence in the record that Skurko took any of the available steps to prevent the sentencing hearing from proceeding and Wohleber's confinement in violation of the automatic stay. When asked at oral argument what steps Skurko and Gentile took to prevent the sentencing hearing from proceeding, counsel only pointed to the notice of bankruptcy filing filed by Wohleber's counsel. They did not refer to any action they took to prevent the sentencing hearing and Wohleber's confinement from occurring.

As discussed, courts have jurisdiction to determine whether their own proceedings are subject to the automatic stay; but, litigants proceeding in this way "proceed[] at [their] own risk." *Edward Cooper Painting, Inc.*, 804 F.2d at 940. When courts proceed in error, actions violating the stay are invalid; resources spent there are likely wasted¹⁵; and sanctions may be assessed. That risk is increased in cases like this, when the state court determination is made sua sponte, without express findings and conclusions, and with no opportunity to argue the matter. *See also Hamilton v. Herr (In re Hamilton)*, 540 F.3d 367, 375 (6th Cir. 2008) ("state courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order."); and *Moore v. Nunnari (In re Moore)*, 2009 Bankr. LEXIS 4544, at *13 (Bankr. N.D. Ohio March 20, 2009) ("[W]hen a state court incorrectly decides that the automatic stay does not apply to the proceeding before it, . . . any action taken by the state court in violation of the automatic stay is void *ab initio*").

In sum, the Panel finds that Wohleber did present sufficient evidence to overcome the motion for judgment on partial evidence. However, because Skurko and Gentile did not have an

¹⁵In *Pettibone*, the Sixth Circuit noted that only in "limited equitable circumstances" would actions violating the stay not be voided. 990 F.2d at 911.

opportunity to present evidence to the bankruptcy court, they are entitled to present evidence on whether they took affirmative action to prevent the sentencing hearing and Wohleber's confinement from occurring. If the bankruptcy court finds that they did not meet their duty to take such affirmative action to prevent the violation of the automatic stay, the bankruptcy court shall determine damages in accordance with § 362(k).

VI. CONCLUSION

Upon the filing of Wohleber's bankruptcy, it was incumbent upon Gentile and Skurko to seek relief from the stay or to obtain a determination from the bankruptcy court that the stay did not apply. A creditor cannot sit idly by, appear at a collection proceeding, and allow the debtor to be jailed because he did not pay the judgment creditor's dischargeable debt. The burden was on the creditor and her legal counsel to stop the collection proceeding once the bankruptcy was filed. Absent evidence presented on remand by Skurko and Gentile during the completion of the liability portion of the trial of demonstrable efforts they made to prevent the sentencing hearing and Wohleber's confinement from occurring, the bankruptcy court shall determine Wohleber's damages in accordance with § 362(k).

For the for reasons stated, the decision of the bankruptcy court is reversed and the order finding no stay violation occurred is vacated. The cause is remanded for further proceedings consistent with this decision.

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

United States Bankruptcy Court
Northern District of Ohio

In re:
Susan A. Addleman
Debtor

Case No. 17-16032-aih
Chapter 7

CERTIFICATE OF NOTICE

District/off: 0647-1

User: ejone
Form ID: pdf977

Page 1 of 1
Total Noticed: 6

Date Rcvd: Nov 02, 2018

Notice by first class mail was sent to the following persons/entities by the Bankruptcy Noticing Center on Nov 04, 2018.

db +Susan A. Addleman, 21268 Sheldon Rd., Brookpark, OH 44142-1265
+Gregory D. Loudon, 2425 West State Street, Alliance, OH 44601-5602
+Loudon Motor Sales LLC, c/o Walter Loudon, PO Box 374, Minerva, OH 44657-0374
+Walter Loudon, PO Box 374, Minverva, OH 44657-0374

Notice by electronic transmission was sent to the following persons/entities by the Bankruptcy Noticing Center.

ust +E-mail/Text: ustpreion09.cl.ecf@usdoj.gov Nov 02 2018 22:50:38 Cynthia J. Thayer,
US Department of Justice, 201 Superior Avenue, Suite 441, Cleveland, OH 44114-1234
cr +E-mail/PDF: PRA_BK2_CASE_UPDATE@portfoliorecovery.com Nov 02 2018 23:07:16
PRA Receivables Management, LLC, PO Box 41021, Norfolk, VA 23541-1021

TOTAL: 2

***** BYPASSED RECIPIENTS (undeliverable, * duplicate) *****

cr Loudon motors

TOTALS: 1, * 0, ## 0

Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP. USPS regulations require that automation-compatible mail display the correct ZIP.

Transmission times for electronic delivery are Eastern Time zone.

I, Joseph Speetjens, declare under the penalty of perjury that I have sent the attached document to the above listed entities in the manner shown, and prepared the Certificate of Notice and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 309): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Nov 04, 2018

Signature: /s/Joseph Speetjens

CM/ECF NOTICE OF ELECTRONIC FILING

The following persons/entities were sent notice through the court's CM/ECF electronic mail (Email) system on November 2, 2018 at the address(es) listed below:

Ken Rubenstein on behalf of Creditor Loudon motors rubamatic@roadrunner.com,
lloveman@windstream.net
Kenneth R. Hurley on behalf of Debtor Susan A. Addleman royaltonlaw@aol.com
Sheldon Stein ssteindocs@gmail.com,
sstein@ecf.epiqsystems.com;sheldon@steintrustee.com;kristine@steintrustee.com

TOTAL: 3

AMERICAN BANKRUPTCY INSTITUTE

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on November 2, 2018, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: November 2, 2018




ARTHUR I. HARRIS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 17-16032
)
SUSAN ADDLEMAN,) Chapter 7
)
Debtor.) Judge Arthur I. Harris

MEMORANDUM OF OPINION¹

Susan Addleman filed bankruptcy to get back the car she desperately needed. But the used car dealer, Loudon Motor Sales, LLC (“Loudon Motor”), refused to return her car and later sold it to a third party. For the reasons that follow, the Court finds that Loudon Motor willfully violated the automatic stay and orders Loudon Motor to pay the debtor \$18,603 in actual damages, including \$2,625 in attorney’s fees, plus \$25,000 in punitive damages by **November 30, 2018.**

¹ This Opinion is not intended for official publication.

JURISDICTION

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order 2012-7 of the United States District Court for the Northern District of Ohio.

PROCEDURAL HISTORY

The procedural history of the debtor's bankruptcy is intertwined with the relevant facts needed to resolve this contested matter. Therefore, the Court will recount the procedural history as part of a chronological recitation of the facts below.

FINDINGS OF FACT

The findings of fact contained in this memorandum of opinion reflect the Court's weighing of the evidence, including the credibility of the debtor, the only witness who testified at the evidentiary hearing held on October 4, 2018. Although the attorney of record for Loudon Motor appeared at the evidentiary hearing, he put on no witnesses and offered no exhibits. Even if not specifically mentioned in this decision, the Court considered the testimony of the witness, exhibits admitted into evidence, and any stipulations. Unless otherwise indicated, the following facts were established at the hearing by a preponderance of the evidence.

In the summer of 2015, the debtor needed a car because her current lease was ending. The debtor had poor credit so her boss, attorney Patrick O'Malley, introduced her to Walter Loudon of Loudon Motor to help her get a replacement car despite her financial history. On the same day they were introduced, the debtor entered into an agreement with Loudon Motor to purchase a 2007 Ford Mustang. The debtor agreed to pay \$2,000 down and \$318.62 per month for 36 months. The certificate of title issued on June 24, 2015, indicates a purchase price of \$9,750 and tax of \$780. It identifies the owner as Susan A. Addleman and the previous owner as Loudon Motor Sales, LLC.

A few months after the debtor purchased her car from Loudon Motor, the employment relationship between the debtor and attorney O'Malley ended. For reasons unknown to the Court, when the employment relationship ended, attorney O'Malley told the debtor that she must return her car to Loudon Motor; however, Walter Loudon told the debtor that she could keep her car, as she was current on her payments. Nevertheless, in September 2015, after the debtor was three days late in making a payment, Loudon Motor repossessed the debtor's car for the first time. The debtor paid \$2,500 to Loudon Motor to get her car back.

The debtor continued to make regular payments to Loudon Motor through the summer of 2017. Loudon Motor never sent the debtor any written statements indicating the balance remaining on her car loan. On several occasions, the debtor

did receive a balance figure by text message from Walter Loudon in response to her many requests. At all times, the debtor dealt with Walter Loudon on behalf of Loudon Motor. In the summer of 2017, Walter Loudon informed the debtor that \$122 was the remaining balance owed on her car. Although Walter Loudon disagreed at his deposition that the balance due was only \$122, asserting that the amount in his text message was in error, Loudon Motor failed to offer any evidence of its own at the evidentiary hearing. Therefore, the Court finds by a preponderance of the evidence that the balance remaining as of October 11, 2017, was \$122.

For whatever reason, Loudon Motor repossessed the debtor's car for a second time on Saturday, October 7, 2017. On Monday, October 9, 2017, the debtor offered to pay \$900 to regain possession of her car; however, Walter Loudon refused to speak with her.

The time of the second repossession was a particularly difficult time for the debtor. The debtor's teenage son had been physically attacked and threatened, and was dealing with serious mental health issues as a result. Although the debtor had previously shared a home with her boyfriend, the debtor moved out of the boyfriend's home after he failed to be supportive of her son. The debtor and her son began staying with friends or the debtor's daughter. If the debtor could not find a place for her and her son to stay at night, she would insist that her son stay

with his father while the debtor slept at a hotel, a homeless shelter, or in her car. Although she was temporarily staying with her daughter to help her daughter recover from surgery, the debtor was primarily living out of her car when it was repossessed for the second time. The debtor's car contained many of the debtor's personal belongings, including license plates, clothes, a fax machine, phones, and important documents such as her birth certificate and social security card.

The debtor filed bankruptcy on Wednesday, October 11, 2017, four days after the second repossession. On the same day that she filed bankruptcy, the debtor texted both Walter Loudon and attorney O'Malley to notify them of her bankruptcy filing. The debtor's text to Walter Loudon stated:

Hi mr. Loudon this is Susan addleman I have filed bankruptcy and named you as a creditor the case number is 17-16032 a relief ordered you are being instructed not to dispose of the car or any of the belongings contents in the car if you do you will be held in contempt of a federal court order I have also forwarded your attorney Patrick O'Malley who will not speak to me

Walter Loudon admitted in his deposition that he received this text. Attorney O'Malley sent the debtor the following text message in response:

I have kindly asked you not to text me or my client. I will only talk with an attorney who is representing you. If you keep this up I will file a telecommunications harassment complaint

The debtor continued her own unsuccessful efforts to get the car back, including repeatedly calling and texting attorney O'Malley.

During the two months after filing the debtor's bankruptcy, the debtor's attorney did not contact Loudon Motor or attorney O'Malley or file a motion seeking assistance from the Court. On December 13, 2017, the debtor's attorney filed a motion to return possession of the debtor's car, which was set for a hearing on January 9, 2018. On January 2, 2018, the debtor's attorney also filed a motion to redeem the car, but he later withdrew this motion.

On January 9, 2018, the Court marked the debtor's motion for an order to return the debtor's car as "no response, granted," but the debtor's attorney did not submit an acceptable proposed order until January 30, 2018. The Court signed and entered the order on February 1, 2018.

On February 2, 2018, the debtor took a certified copy of the Court's order to the Canton used car location of Loudon Motor, 2001 Whipple Avenue NW, Canton, Ohio 44708. The local police also arrived at the location with the debtor. While there, someone pulled a car up to the side door that the debtor believed was her car; however, she was not allowed to get close enough to read the vehicle identification number. Someone on the lot then referred her to another Loudon used car lot in Alliance, Ohio.

While taking an Uber to the used car lot in Alliance, the debtor attempted to contact Walter Loudon. Walter Loudon answered his phone and demanded to know how much money the debtor had to pay him. After the debtor stated she

only owed \$122 and reminded him that she had offered to pay him \$900 on the Monday following the repossession, Walter Loudon hung up the phone.

The debtor arrived at the used car lot in Alliance and similarly requested the presence of the Alliance police. The debtor's car was not at the used car lot in Alliance, and a police officer unsuccessfully attempted to contact Walter Loudon. A few days later, the police officer informed the debtor that Loudon Motor had sold her car.

On January 27, 2018, a related Loudon entity owned by Walter Loudon's son, Gregory D. Loudon, signed a contract to sell the 2007 Ford Mustang to a third party for \$6,244.97. The contract appears to have been signed by Gregory D. Loudon. As of the date of this contract, the 2007 Ford Mustang was still titled in the debtor's name. It is unclear when the third party took possession of the 2007 Ford Mustang; however, neither Loudon Motor nor anyone acting on behalf of Loudon Motor ever released the lien on the debtor's certificate of title or obtained a new certificate of title in its own name to the 2007 Ford Mustang until March 13, 2018. Also on March 13, 2018, someone transferred title of the 2007 Ford Mustang from Loudon Motor to the third party purchaser. In other words, on January 27, 2018, the related Loudon entity sold a car for which it held no certificate of title. On March 13, 2018, that same related entity then transferred title from the debtor to a third party with actual knowledge of both the debtor's

pending bankruptcy and the Court's February 1, 2018, order to return the debtor's car, based on the debtor's visit to the Loudon used car lot in Alliance on February 2, 2018.

On March 9, 2018, the debtor filed a motion requesting that the Court order Loudon Motor to show cause for violating the automatic stay and failing to obey the Court's order to return the debtor's car. An initial hearing was set for April 10, 2018. On April 2, 2018, an attorney for Loudon Motor filed a brief in opposition to the motion to show cause. At the request of the attorneys for both parties, the initial hearing set for April 10, 2018, was not held. The Court adjourned the hearing to May 8, 2018.

In May of 2018, the debtor found new housing with her son in Brook Park, Ohio. The debtor found new jobs, including one that she can walk to since she has yet to obtain a new car.

On May 7, 2018, the attorneys for both parties requested that the hearing set for the next day be rescheduled, and the Court adjourned the hearing to June 5, 2018. On June 4, 2018, the attorneys for both parties again requested that a hearing set for the next day be rescheduled, and the Court adjourned the hearing to July 24, 2018.

On July 24, 2018, the Court heard oral argument on the debtor's motion. The debtor's attorney and Loudon Motor's attorney, Gordon Woolbert, appeared

and agreed to the Court scheduling an evidentiary hearing no earlier than September 4, 2018. On July 25, 2018, the Court issued a scheduling order setting an evidentiary hearing for September 6, 2018.

On August 20, 2018, Loudon Motor obtained new counsel, attorney Ken Rubenstein. On August 21, 2018, the attorneys for both parties asked to postpone the evidentiary hearing. On August 30, 2018, the Court rescheduled the evidentiary hearing for September 20, 2018. On September 10, 2018, the debtor's attorney again asked for a new evidentiary hearing date. On September 14, 2018, the Court held a conference call with the attorneys for both parties, who agreed to a new evidentiary hearing date of October 4, 2018.

On October 4, 2018, the Court held the evidentiary hearing. Only the debtor testified. The attorney for Loudon Motor put on no witnesses and offered no exhibits. Debtor's exhibits 1, 7, 10, 11, 12, and 13 were received without objection. During the trial, the debtor also sought to admit the transcript of the deposition of Walter Loudon taken in connection with this matter on September 20, 2018. Loudon Motor objected. The Court took the request under advisement because the Court was concerned that the debtor had failed to subpoena Walter Loudon, raising questions about his unavailability as a witness.

Upon further review, the Court concludes that, regardless of Walter Loudon's availability as a witness, the deposition transcript is admissible under

Civil Rule 32, made applicable under Bankruptcy Rules 9014 and 7032, and Evidence Rule 801(d)(2)(D). Civil Rule 32 provides in pertinent part:

(a) USING DEPOSITIONS.

(1) *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

In addition, Rule 32(a)(3) provides:

(3) *Deposition of a Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

In the present case, the deposition transcript of Walter Loudon meets all three requirements of Rule 32(a)(1). First, Loudon Motor was represented at the taking of the deposition. Second, the statements would be admissible under Evidence Rule 801(d)(2)(D) if Walter Loudon were present and testified at the hearing because the statements were offered against Loudon Motor and because Walter Loudon was an agent or employee of Loudon Motor. And, third, the deposition may be used under Rule 32(a)(3) because, at the time of the deposition, Walter Loudon was Loudon Motor's officer, director, or managing agent. *See Carter v. Univ. of Toledo*, 349 F.3d 269, 275–76 (6th Cir. 2003) (statement by vice provost of defendant university in deposition offered by plaintiff was admissible as

nonhearsay); *see also Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999) (“neither Rule 801(d)(2) nor Rule 32(a)(1) require a showing of unavailability for admissions of party-opponents”). Therefore, the Court will admit as substantive evidence the deposition transcript of Walter Loudon.

Without objection, the Court also takes judicial notice under Evidence Rule 201 of the title information maintained by the Ohio Bureau of Motor Vehicles’ online website pertaining to the debtor’s 2007 Ford Mustang with the vehicle identification number 1ZVFT80N275307496, at least as to the dates of transfer and release of liens. *See Order Regarding Court’s Intent to Take Judicial Notice of Certain Information Available on the Ohio Bureau of Motor Vehicles’ Online Website*, October 10, 2018 (Docket No. 77).

DISCUSSION

The Court may impose damages for violations of the automatic stay under 11 U.S.C. § 362. The filing of a bankruptcy petition gives rise to the automatic stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3). Subsection 362(k)(1) (formerly subsection 362(h) prior to the 2005 bankruptcy amendments) provides:

. . . an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

A creditor willfully violates the stay if the creditor knows of the stay and violates the stay with an intentional act. *See Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687–88 (B.A.P. 6th Cir. 1999) (upholding a bankruptcy court’s imposition of damages against a creditor that refused to return a repossessed car postpetition); *see also Grine v. Chambers (In re Grine)*, 439 B.R. 461, 466 (Bankr. N.D. Ohio 2010). “A ‘willful violation’ does not require proof of a specific intent to violate the stay, but rather ‘an intentional violation by a party aware of the bankruptcy filing.’” *Baer v. HSBC Auto a/k/a/ Santander USA Consumer USA (In re Baer)*, No. 10-2062, 2011 WL 3667511, at *4 (Bankr. E.D. Ky. Aug. 22, 2011) (quoting *In re Sharon*, 234 B.R. at 687).

Under 11 U.S.C. § 362(k)(1), the individual seeking damages has the burden of establishing three elements by a preponderance of the evidence: (1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages. *Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 220 (Bankr. N.D. Ohio 2016). Under § 362(k), damages must be proven with reasonable certainty and cannot be based on conjecture or speculation. *See Archer v. Macomb Cnty. Bank (In re Archer)*, 853 F.2d 497, 499–500 (6th Cir. 1988). As the party seeking damages, the debtor has the burden of proving entitlement to damages. *In re Sharon*, 234 B.R. at 687.

The Court must decide: (1) whether the creditor's actions constitute a violation of section 362; (2) if the creditor violated section 362, whether such violation was "willful"; and (3) whether the debtor is entitled to damages, including attorney's fees, and punitive damages.

LOUDON MOTOR VIOLATED THE AUTOMATIC STAY UNDER 11 U.S.C. §362 BY FAILING TO RETURN AND THEN SELLING OR ARRANGING TO SELL THE DEBTOR'S CAR AFTER THE BANKRUPTCY CASE WAS FILED

The Court's first inquiry is whether Loudon Motor's actions violated the automatic stay. The filing of the debtor's voluntary petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

The debtor filed for bankruptcy on October 11, 2017. The automatic stay came into effect as soon as the bankruptcy case was filed. Loudon Motor failed to return the car to the debtor and then sold or arranged to sell the debtor's car to a third-party purchaser without first obtaining relief from stay from the bankruptcy court. Therefore, the debtor has shown by a preponderance of the evidence that Loudon Motor violated the automatic stay.

THE VIOLATION OF THE STAY WAS "WILLFUL"

A creditor's "violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act." *In re Sharon*, 234 B.R. at 688. "As used in [current subsection 362(k)], 'willful,' unlike many

other contexts, does not require any specific intent.” *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004); *see In re Sharon*, 234 B.R. at 687–88 (creditor’s belief that its actions would not violate the stay does not preclude a finding that creditor’s action was “willful” within meaning of section 362(k)); *see also Johnston Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 618 (9th Cir. 1993); *Lansdale Family Rests., Inc. v. Weis Food Serv. (In re Lansdale Family Rests., Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992). The debtor bears the burden of establishing by a preponderance of the evidence that the violation of the automatic stay was willful. *See Johnson v. Smith (In re Johnson)*, 501 F.3d 1163, 1172 (10th Cir. 2007).

Loudon Motor repossessed the debtor’s car on October 7, 2018. At that time, the automatic stay was not in effect, as the debtor had not yet filed bankruptcy. On the same day as the filing, the debtor immediately contacted Walter Loudon and attorney O’Malley. In her text message to Walter Loudon, the debtor stated that she had filed bankruptcy, provided the case number, and informed Walter Loudon not to dispose of her car or any of her belongings. From that point forward, despite the informality of a text message as a medium, Loudon Motor had knowledge of the debtor’s bankruptcy case. Notice of a debtor’s bankruptcy filing “does not need to be formal, so long as the facts would cause a reasonably prudent person to make additional inquiry.” *In re Swartzentruber*, No. 13-61147, 2014 WL 2930450, at *2 (Bankr. N.D. Ohio June 27, 2014)

(quoting *In re Stewart*, 499 B.R. 557, 571 (Bankr. E.D. Mich. 2013)). Receiving a text message with a bankruptcy case number as well as a warning not to dispose of the debtor's car or her belongings would, at a minimum, have caused a reasonably prudent person to further investigate the information included in the debtor's text. Therefore, Loudon Motor had notice of the debtor's bankruptcy as of October 11, 2017, the day the debtor filed her bankruptcy case.

“To avoid violating § 362(a), a creditor is not only required to refrain from certain activity, but may be required to take affirmative action.” *In re Horace*, No. 14-30103, 2015 WL 5145576, at *4 (Bankr. N.D. Ohio Aug. 28, 2015); *see also In re Sharon*, 234 B.R. 676 (creditor willfully violated the automatic stay by failing to return the debtor's car that it repossessed prepetition). Once the creditor learns that a bankruptcy petition has been filed, the creditor has an affirmative duty to return the property to the debtor and restore the status quo. *In re Webb*, 472 B.R. 665, at *14 (B.A.P. 6th Cir. 2012); *In re Clark*, 60 B.R. 13, 14 (Bankr. N.D. Ohio 1986) (creditor had not known of debtor's filing at the time of repossession but was, nonetheless, required to return vehicle); *Dawson v. J & B Detail, L.L.C. (In re Dawson)*, No. 05-1463, 2006 WL 2372821, at *8 (Bankr. N.D. Ohio July 28, 2006) (“While the Court does not expect instantaneous compliance with section 362 upon receipt of notice [of the bankruptcy], the Court

does expect those acts which violate the automatic stay to be stopped and/or corrected within a reasonable time.”).

Having been notified by text message of the debtor’s bankruptcy, it was incumbent upon Loudon Motor to restore the status quo by returning the debtor’s car. Instead, even after being informed of the bankruptcy, Loudon Motor refused to return it. When the debtor went to Loudon Motor’s Canton location to attempt to reclaim her car, the debtor was not allowed to inspect what she believed to be her own car. Ultimately, despite knowing of the bankruptcy petition and the debtor’s desire to regain possession and redeem her car, Loudon Motor refused to return her car. It then sold or arranged to sell her car to a third party without obtaining relief from the automatic stay. Accordingly, the Court concludes that the creditor’s violation of the automatic stay was willful.

DAMAGES

The Court has the authority to award actual and, if appropriate, punitive damages for willful violations of the automatic stay. An award of actual damages is mandatory if the stay violation is willful. *In re Bivens*, 324 B.R. at 42; *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D. Ohio 2000); *see United States v. Harchar*, 331 B.R. 720 (N.D. Ohio 2005) (costs and attorney’s fees are regularly awarded as actual damages for violation of the stay); *In re Sharon*, 234 B.R. at 687–88 (upholding a bankruptcy court’s imposition of damages against a creditor

for violation of the automatic stay). Punitive damages may also be appropriate in certain circumstances. An award of damages must be reasonable and supported by evidence. *In re Archer*, 853 F.2d at 499. Under § 362(k), damages must be proven with reasonable certainty and cannot be based on conjecture or speculation. *Id.* As the party seeking damages, the debtor has the burden of proving entitlement to damages. *In re Sharon*, 234 B.R. at 687.

In the present case, Loudon Motor willfully violated the automatic stay when it refused to return the debtor's car and then sold or arranged to sell the debtor's car, knowing that the debtor had filed a Chapter 7 bankruptcy petition. Thus, the debtor is entitled to actual damages, including costs and attorney's fees, resulting from Loudon Motor's willful violation of the automatic stay.

The debtor seeks actual damages as follows:

- (1) Lost wages in the amount of \$11,200 from eight months of unemployment due to the lack of a car;
- (2) \$700 spent to obtain alternative rides from friends and Uber;
- (3) \$200 for personal belongings that Loudon Motor never returned;
- (4) \$10,794 for the amount she paid Loudon Motor for her car; and
- (5) \$4,060 in attorney's fees.

The Court will address damages in three sections: actual damages (items 1 through 4), attorney's fees (item 5), and punitive damages.

*Actual Damages: Lost Wages, Alternative Rides, Personal Belongings,
and Car Payments*

The debtor seeks \$11,200 in lost wages for the eight months when the debtor was unable to get to work without a car. The Court believes the debtor is entitled to these lost wages. When Loudon Motor failed to return the debtor's car after having notice of the bankruptcy and sold or arranged to sell the debtor's car to a third party in violation of the automatic stay, it was foreseeable that the debtor would lose her job due to lack of transportation. Had Loudon Motor properly fulfilled its affirmative duty to restore the status quo, the debtor would have had her car back, thus ensuring her ability to have proper transportation to get to work. The debtor seeks an amount equal to three shifts per week as a waitress at \$100 per shift for eight months. The Court awards the debtor \$11,200 for lost wages.

The debtor also seeks \$700 for the costs she incurred finding alternative rides through other people and Uber while attempting to secure work and caring for her children. The debtor testified that although she lost track of the costs associated with finding alternative rides, she had \$700 in her bank account that she used solely for these rides. She testified that the money in this account has since been depleted. Had Loudon Motor properly restored the status quo, the debtor would have had possession of her car and therefore would have had no need to find alternative transportation. The Court awards the debtor \$700 for the cost of alternative rides.

The debtor seeks \$200 for the value of unreturned personal items that were in her car at the time Loudon Motor repossessed it. The debtor testified that although some of her personal items were returned, other items were never returned including her license plates, two phones, some clothes, and a fax machine. The debtor valued the fax machine at \$80 and the entirety of the unreturned personal items at \$200. Loudon Motor should have returned all of her personal items, as a creditor has a duty to surrender the personal property it caused to be removed from the debtor. *See Kaiser v. Leader Fed. Bank for Sav. (In re Kaiser)*, 158 B.R. 808, 812 (Bankr. D. Neb. 1993) (finding that the creditor's "failure to surrender and turnover the personal property it caused to be removed" violated the automatic stay). The Court awards the debtor \$200 for the personal items that Loudon Motor never returned.

The debtor seeks \$10,794 for the amount that she paid Loudon Motor for her car. The Court accepts as true that the debtor paid this amount to Loudon Motor. However, the debtor indicated in her bankruptcy schedules A/B and C, filed under penalty of perjury, that her 2007 Mustang had a value of \$4,000 (Docket No. 1 at page 3). The debtor also used a \$4,000 value in a motion to redeem the vehicle under 11 U.S.C. § 722 (Docket No. 39), which was later withdrawn (Docket No. 51). Section 722 of the Bankruptcy Code allows an individual chapter 7

debtor to redeem personal property by paying the lienholder the lesser of the allowed secured claim or the value of the collateral.

Under the principle of judicial estoppel, the debtor cannot assert that her car's value for exemption purposes is just \$4,000, but is something higher when determining stay violation damages under 11 U.S.C. § 362(k). *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (discussing principle of judicial estoppel). The Court will therefore limit the value of the debtor's car to \$4,000. Given that the debtor still owed \$122 on her car, Loudon Motor's actions prevented the debtor from redeeming her \$4,000 car for \$122, resulting in \$3,878 in damages for the net value of her car that was never returned.

To summarize so far, the Court awards the debtor \$11,200 for lost wages, \$700 for the cost of alternative rides, \$200 for her lost personal items, and \$3,878 for the net value of her car, totaling \$15,978.

Attorney's Fees

Section 362(k) authorizes an award of attorney's fees reasonably incurred to remedy a stay violation, including fees incurred in prosecuting the damages action that § 362(k) authorizes. *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1097 (9th Cir. 2015) (en banc); *Young v. Repine (In re Repine)*, 536 F.3d 512, 522 (5th Cir. 2008); *Duby v. United States (In re Duby)*, 451 B.R. 664, 674–77 (B.A.P. 1st Cir. 2011). “The amount of attorneys’

fees a ‘party seeks to recover under § 362(k) must be reasonable,’ and ‘courts generally apply the “lodestar” method when determining the reasonableness of attorney’s fees.’ ” *In re Johnson*, 580 B.R. 766, 796 (Bankr. S.D. Ohio 2018) (quoting *In re Webb*, No. 11–8016, 2012 WL 2329051, at *16 (B.A.P 6th Cir. Apr. 9, 2012)); *see also In re Boddy*, 950 F.2d 334, 338 (6th Cir. 1991) (“[B]ankruptcy courts must expressly calculate the lodestar amount when determining reasonable attorney’s fees.”). In addition to the lodestar method, a court may exercise its discretion to consider other factors, including the results obtained. *Id.*

The debtor seeks attorney’s fees in the amount of \$4,060 (20.3 hours at an hourly rate of \$200) stemming from meetings with the debtor, the preparation and filing of a motion to return possession of the car, preparation and filing of a motion to redeem, preparation and filing of a show cause order upon Loudon Motor, and costs associated with the evidentiary hearing. The billing time includes a total of 12.6 hours for work identified on Exhibit 12, plus 0.2 hours for the conference call with the Court on September 14, 2018, 4.0 hours for the deposition of Walter Loudon on September 20, 2018, and 3.5 hours to attend the hearing on October 4, 2018, including travel time. Loudon Motor did not object to the amount of attorney’s fees sought by the debtor, including the hours billed or her attorney’s billing rate of \$200 per hour.

The Court has conducted its own review of the fees requested. The Court will not award attorney's fees for 0.8 hours spent preparing the motion to redeem since the motion was withdrawn. Nor will the Court award attorney's fees for the time to travel to and from the hearings on July 24, 2018, and October 4, 2018. Under the Guidelines for Compensation and Expense Reimbursement for Professionals adopted under Local Bankruptcy Rule 2016-1, travel time of one hour or less round-trip is not compensable. Accordingly, the Court will reduce the hours requested for July 24, 2018, and October 4, 2018, by one hour for each day. This results in a reduction of 2.8 hours from the total of 20.3 hours requested, or 17.5 hours. When multiplied by the hourly rate, the total lodestar amount is \$3,500.

In appropriate circumstances, the Court may adjust the lodestar amount to consider other factors. *See In re Boddy*, 950 F.2d at 338. The Court is concerned that the debtor's attorney, while well-meaning, failed to give his client's bankruptcy case the proper attention and sense of urgency that were warranted under the circumstances. In a situation like the present case, when the debtor's car had been repossessed and getting the car back was the principal purpose for filing bankruptcy, it is incumbent upon the debtor's attorney to (1) take the initiative and notify the affected creditor of the debtor's bankruptcy filing himself, (2) deal directly with the creditor or its attorney, and (3) promptly move the Court for relief

if his own efforts to get the car returned without assistance of the Court proved unsuccessful.

A bankruptcy filing is a stressful and emotional event for an individual debtor. Part of why a debtor pays for a skilled bankruptcy professional is so that the attorney can handle the critical task of notifying creditors who are likely to take imminent action against the debtor or the debtor's property before receiving formal notice of the bankruptcy filing from the Court. As this case unfortunately demonstrates, a debtor informing a creditor on her own that a bankruptcy case was filed may not carry the same weight as an attorney informing a creditor or the creditor's attorney of the bankruptcy filing. It may even be counterproductive. Moreover, once the debtor received a text message from Loudon Motor's attorney insisting that all communications come from her attorney, the debtor's attorney should have taken over the effort to get the debtor's car returned.

In addition, the debtor's attorney was presumably aware of the urgency with which the debtor needed her car back. Yet, the attorney's own time records do not include any time spent contacting Loudon Motor or its attorney during the first two months of the debtor's bankruptcy. The debtor's attorney eventually filed a motion seeking turnover of the debtor's car on December 13, 2017, two months after filing the debtor's bankruptcy case. The Court is always willing to consider motions on an expedited basis when appropriate, but the debtor's attorney never made such a

request. Once the Court ordered the debtor's car to be returned, the debtor's attorney again could have taken the initiative in contacting Loudon Motor or its attorney to arrange the car's return. The record also reflects that the debtor's attorney either requested or acquiesced in numerous postponements in his efforts to have the Court resolve the debtor's motions seeking relief due to Loudon Motor's continued violation of the automatic stay. More than a year has passed since the debtor filed for bankruptcy primarily to get her car back, and the debtor has been without a car or an award of damages the entire time.

The Court recognizes that this is not the first time it has seen a skilled bankruptcy attorney fail to take the initiative in dealing directly with a creditor when time is of the essence, leaving a client to deal with a recalcitrant creditor on his or her own. Unfortunately, the work done in this case, while not necessarily unreasonable, does not reflect all that could have been done or the urgency with which it should have been done. Under these circumstances, the Court believes it is appropriate to reduce the award of attorney's fees by 25 percent to \$2,625. This reduction reflects the Court's belief, for the reasons stated above, that the value or quality of the attorney's services was not worth the full amount reflected under the initial lodestar analysis. *See In re Boddy*, 950 F.2d at 338 (when appropriate, bankruptcy court may adjust lodestar amount to consider other factors, including results obtained); *see also Gonter v. Hunt Value Co.*, 510 F.3d 610, 616 (noting

that any justifiable upward or downward departure from lodestar calculation deserves substantial deference when the trial court provides clear and concise explanation of its reasons).

The Court also directs that the debtor's attorney not attempt to collect any additional attorney's fees from the debtor absent further order of the Court. Should the debtor's attorney seek to recover additional fees or any portion of the damages awarded to the debtor, other than the \$2,625 in attorney's fees, the attorney must file a detailed fee application that includes a copy of a written fee agreement with the debtor.

The Court awards \$2,625 in attorney's fees to the debtor.

Punitive Damages

A party injured by a willful violation of the automatic stay may recover punitive damages in appropriate circumstances. The debtor must show that the "creditor's conduct was 'egregious, vindictive, or intentionally malicious.'" *Bankers Healthcare Grp., Inc. v. Bilfield (In re Bilfield)*, 494 B.R. 292, 304 (Bankr. N.D. Ohio 2013) (quoting *In re Bivens*, 324 B.R. at 42); *see also Weary v. Poteat*, 627 F. App'x 475, 477 (6th Cir. 2015) ("[t]his, frankly, is the most egregious automatic stay case that I've heard since I've been on the bench and I've been on the bench a long time") (quoting the bankruptcy court transcript at page 15–16). "While proof of an overt wrongful intent is not required, it must be shown

that the creditor acted in bad faith or otherwise undertook its actions in reckless disregard of the law.” *In re Bilfield*, 494 B.R. at 304. An award of punitive damages is within the bankruptcy court’s discretion where actual damages are an insufficient deterrent to further violations. *In re Archer*, 853 F.2d at 500. The primary purpose of awarding punitive damages for a willful automatic stay violation is “to cause a change in the creditor’s behavior,” and “the prospect of such change is relevant to the amount of punitive damages to be awarded.” *In re Mocella*, 552 B.R. 706, 731 (Bankr. N.D. Ohio 2016) (quoting *In re Riddick*, 231 B.R. 265, 269 (Bankr. N.D. Ohio 1999)).

Loudon Motor’s conduct in this case was egregious, vindictive, and intentionally malicious. As discussed above, although the repossession of the debtor’s car was done prepetition, Loudon Motor’s failure to restore the status quo by returning her car after having notice of her bankruptcy filing was wrongful. Loudon Motor refused to return the debtor’s car, with knowledge of the debtor’s bankruptcy and desperate situation. Loudon Motor then sold or arranged for the sale of the debtor’s car, again with knowledge of the debtor’s bankruptcy and her desperate situation.

These events, viewed in the aggregate, demonstrate acts by Loudon Motor that are egregious, vindictive, and intentionally malicious. Loudon Motor took advantage of the debtor for reasons that the Court can only speculate—she was a

woman, she was in a desperate situation, her employment relationship with attorney O'Malley ended poorly, or some other reason. Regardless of the reasoning, just as the bankruptcy judge in *Weary v. Poteat* observed in the case before him, the violation of the automatic stay in this case is the most egregious automatic stay violation that the undersigned judge has witnessed in more than sixteen years as a bankruptcy judge. The Court therefore believes punitive damages are appropriate.

The Supreme Court has found various awards to be grossly excessive and thus contrary to due process. *See, e.g., BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). To ensure that a punitive damages award comports with due process, the Supreme Court has set forth three factors for courts to consider:

- (1) the degree of reprehensibility of the defendant's misconduct;
- (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
- (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

State Farm Mut. Auto. Ins. Co., 538 U.S. at 418. Despite these factors, “[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Id.* at 419. Courts have considered various factors to determine the appropriate amount of damages based on the reprehensibility of the conduct, such as whether the target of the conduct

had financial vulnerability, whether the conduct involved repeated actions, and whether the harm was the result of intentional malice. *Id.* at 419; *see also Gibson v. Moskowitz*, 523 F.3d 657, 664–65 (6th Cir. 2008) (applying guideposts identified by the Supreme Court). Although the Supreme Court has yet to set a constitutional limit on the ratio of punitive damages to compensatory damages, the Court appears to favor single-digit ratios. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425 (stating that although the ratios the Supreme Court has upheld are not binding, such “single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios of 500 to 1 . . . or . . . 145 to 1”).

In this case, the Court finds an award for punitive damages of \$25,000, a less than 2 to 1 ratio to the compensatory damages, is reasonable and appropriate to achieve both punishment and deterrence. In considering the factors as stated by the Supreme Court, Loudon Motor’s conduct was reprehensible. Loudon Motor refused to return the debtor’s car despite knowledge of her bankruptcy filing and her desperate situation. It then sold or arranged to sell her car without obtaining relief from stay. Loudon Motor also transferred the title or arranged for the transfer of title of the debtor’s car from the debtor to a third party on March 13, 2018, with actual knowledge of both the debtor’s pending bankruptcy and the Court’s February 1, 2018, order to return the debtor’s car. Loudon Motor

knew of the debtor's financial vulnerability, as the debtor originally purchased her car after attorney O'Malley connected them to get her a car despite her poor credit history. Walter Loudon also conceded that it appeared the debtor was living out of her car when Loudon Motor repossessed it.

As noted earlier, the amount of punitive damages is less than double the actual damages suffered. Plus, other courts have awarded punitive damages of similar amounts for automatic stay violations. *Crow v. Ocwen Loan Servicing, LLC. (In re Crow)*, No. 13-3012, 2013 WL 4668558, at *10 (Bankr. N.D. Ohio Aug. 30, 2013) (finding an award of punitive damages in the amount of \$11,000 appropriate); *Cox v. PNC Fin. Grp., Inc. (In re Cox)*, No. 10-3191, 2010 Bankr. LEXIS 6525, at *12 (Bankr. N.D. Ohio Oct. 15, 2010) (finding an award equal to three times the actual damages for a value of \$8,349 as appropriate to achieve punishment and deterrence); *In re Kortz*, 283 B.R. 706, 714 (Bankr. N.D. Ohio 2002) (awarding \$51,500 in punitive damages for repeated violations of the automatic stay).

The Court awards the debtor \$25,000 in punitive damages.

ENSURING TIMELY PAYMENT

The Court intends this award of damages under 11 U.S.C. § 362(k) to be a final appealable order. *See* 28 U.S.C. § 158; *Ritzen Grp., Inc. v. Jackson Masonry, LLC (In re Jackson Masonry, LLC)*, ___ F.3d ___, No. 18-5161, 2018 WL 4997779

(6th Cir. Oct. 4, 2018). In other words, this decision finally resolves a discrete claim for relief—namely, the debtor’s motion for an award of damages for Loudon Motor’s willful violation of the automatic stay. Nevertheless, the Court recognizes that this remedy will prove meaningless if Loudon Motor refuses to pay promptly the damages awarded. The Court therefore indicates its intention to commence a new proceeding to use its civil contempt powers to compel compliance with its order should Loudon Motor fail to pay the amount awarded by

November 30, 2018.

[C]ivil contempt sanctions, or those penalties designed to compel future compliance with a court order, are considered to be coercive and avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.

Int’l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 (1994).

“Contempt proceedings enforce the message that court orders and judgments are to be complied with in a prompt manner.” *Elec. Workers Pension Trust Fund of Local Union #58, IBEW v. Gary’s Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003).

These civil contempt powers include the imposition of per day penalties against Loudon Motor and/or anyone in a position to ensure that Loudon Motor makes this payment.

A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they,

apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

Gary's Elec. Serv. Co., 340 F.3d at 380 (quoting *Wilson v. United States*, 221 U.S. 361, 376 (1911)). Corporate officers can be held in contempt for the actions and inactions of their corporation because of their relationship to the corporation. See *Gary's Elec. Serv. Co.*, 340 F.3d at 380; *United States v. Hochschild*, 977 F.2d 208, 213 (6th Cir. 1992). Whether the corporate officer is a named party in the action is not controlling on the court's contempt powers. See *Gary's Elec. Serv. Co.*, 340 F.3d at 382 (relying on *Wilson* and *Hochschild*). This would presumably include Walter Loudon, the statutory agent of Loudon Motor Sales, LLC, and/or Gregory D. Loudon, who appears to be the sole member of Loudon Motor Sales, LLC. *Ohio Secretary of State, Business Search*, <https://businesssearch.sos.state.oh.us/#busDialog> (last visited Nov. 2, 2018).

These civil contempt powers also include incarceration of anyone in a position to ensure that Loudon Motor makes this payment as a means of compelling compliance.

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order “to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.” . . . In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an

affirmative act, and thus “ ‘carries the keys of his prison in his own pocket.’ ”

See United Mine Workers v. Bagwell, 512 U.S. at 828 (quoting *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 442 (1911)) (citations omitted). The Court recognizes that Loudon Motor has a right to challenge this Court’s decision on appeal; however, the filing of an appeal will not stay Loudon Motor’s obligation to pay this damage award absent the posting of a supersedeas bond or other appropriate security under Bankruptcy Rule 8007. Should the damage award not be paid by November 30, 2018, the Court intends to issue an appropriate order to show cause directed at Loudon Motor, Walter Loudon, and Gregory D. Loudon, with a hearing on the Court’s order to show cause to be set for **10:00 A.M. on December 18, 2018**, in Courtroom 1A of the Howard M. Metzenbaum U.S. Courthouse, 201 Superior Avenue, Cleveland, Ohio 44114.

CONCLUSION

For the reasons stated above, creditor Loudon Motor Sales, LLC willfully violated the stay by failing to promptly return the debtor’s car after receiving notice of the debtor’s bankruptcy and a request to return the debtor’s car. The debtor, Susan Addleman, is awarded actual damages in the amount of \$18,603, including \$2,625 in attorney’s fees, and punitive damages in the amount of \$25,000 pursuant to 11 U.S.C. § 362(k)(1). Loudon Motor must pay \$43,603 to Susan Addleman through the debtor’s attorney, Kenneth Hurley, 6058 Royalton

AMERICAN BANKRUPTCY INSTITUTE

Road, North Royalton, Ohio 44133, by **November 30, 2018**. If Loudon Motor fails to pay this amount by November 30, 2018, the Court intends to issue an appropriate order to show cause, directed at Loudon Motor, Walter Loudon, and Gregory D. Loudon, with a hearing on the Court's order to show cause to be set for **10:00 A.M. on December 18, 2018**, in Courtroom 1A of the Howard M. Metzenbaum U.S. Courthouse, 201 Superior Avenue, Cleveland, Ohio 44114.

IT IS SO ORDERED.

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION**

IN RE

MICHELLE DOUGHERTY-KELSAY

**CASE NO. 18-20085
CHAPTER 13**

DEBTOR

**MEMORANDUM OPINION AND ORDER REGARDING
DEBTOR'S STAY VIOLATION MOTION, ATTORNEYS' FEES,
CONFIRMATION, AND CASE DISPOSITION**

This matter is before the Court on Debtor's Motion for an Order Finding Creditor Michael Stephen Kelsay in Violation of the Automatic Stay [ECF No. 26 ("Stay Violation Motion")], Creditor's Objection thereto [ECF No. 35], and Debtor's Response [ECF No. 110]. Pursuant to § 362(k),¹ Debtor seeks a ruling that Creditor (Debtor's former husband) violated the automatic stay when he participated in and failed to stop a pre-petition contempt action against her in state family court from proceeding post-petition, among other things. She requests actual and punitive damages. The parties filed joint stipulations of fact [ECF Nos. 131, 164, 180], and the Court held an evidentiary hearing on March 12, 2019. Confirmation of Debtor's Amended Chapter 13 Plan [ECF Nos. 179, 183] and Debtor's Application to Allow Debtor's Attorneys' Fees [ECF No. 168], which relates only to attorneys' fees incurred in connection with the Stay Violation Motion, are also before the Court. The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

FINDINGS OF FACT

A. The Family Court Action

Debtor and Creditor were married in 2001 and have three children. Their divorce proceedings began in July 2007, and a Decree of Dissolution was entered on July 9, 2008. For the decade following, the parties continued to litigate domestic support and child custody issues, and their divorce case remains pending in Kenton County (Ky.) Family Court (“Family Court”), Case No. 14-CI-0769 (“Family Court Action”). For nine years (until 2017), Debtor received domestic support from Creditor.

B. Mr. Kelsay Gets Custody, Seeks Child Support from Debtor, and Moves for a Finding of Contempt against Debtor for her Failure to Reimburse Child Support Expenses (Contempt Motion 1)

Eventually, Creditor obtained primary custody of the children. In May 2017, he filed a Motion for Child Support and Motion for Contempt in the Family Court Action, which sought an “[o]rder establishing a sum of child support to be paid by [Debtor] to [Creditor] for the parties’ three minor children.” [ECF No. 137-2 at 1.] In August 2017, the Family Court issued an Order (“August 2017 Order”) setting \$617.60 as the amount of Debtor’s monthly child support obligation to Creditor and ordering that sum to be paid by wage assignment. The August 2017 Order also directed that “[a]ny medical, dental, pharmaceutical and extracurricular activity costs incurred on behalf of the children shall be paid 68% by [Creditor] and 32% by [Debtor].” [ECF No. 132, Joint Stipulations (“JS”) at ¶ 9.] That Order further required the parties to follow the “30/30 rule” for reimbursement of said expenses, which the parties stipulated requires that “the party incurring the expense must provide to the other an invoice for the expense; the recipient of the invoice would then have 30 days to pay for, or 30 days to object to the expense.” [*Id.*] The

Family Court “tabled” Creditor’s requests for an order of contempt and for \$750 of attorney’s fees pending a further hearing scheduled for September 14, 2017. [JS at ¶ 10.]

C. The September 2017 Hearing and Order

Attorney Shannon Tomlinson (“Tomlinson”) assumed representation of Debtor in the Family Court Action on September 13, 2017. During its scheduled hearing the next day, the Family Court made an oral ruling regarding the child support expenses Debtor owed Creditor in arrears. The Family Court “ordered Creditor . . . to transmit to Debtor the child support related expenses within 24 hours of the hearing and ordered Debtor to either dispute or pay the expenses by October 6, 2017.” [JS at ¶ 12.] This ruling, which was not set out in a contemporaneous written order, is hereinafter referred to as the “September 2017 Order.”

D. Mr. Kelsay Files a Motion for Contempt Against Debtor for Violating the September 2017 Order (Contempt Motion 2)

Creditor filed another Motion for Contempt [ECF No. 137-3 (“Contempt Motion 2”)] in the Family Court Action on October 31, 2017. That Motion sought an “[o]rder requiring [Debtor] to show cause, if any, why she should not be in contempt for violating this Court’s [September 2017 Order].” [*Id.* at 1.] It does not request any other specific relief, monetary or otherwise, and does not mention Debtor’s incarceration as a possible remedy. Its basis is that Creditor complied with the September 2017 Order by timely providing copies of invoices to Debtor’s counsel, but Debtor failed to object to or reimburse Creditor for her portion of same by the court-ordered deadline. An evidentiary hearing on Contempt Motion 2 was scheduled for February 19, 2018.

E. Debtor Files for Bankruptcy

Debtor filed this chapter 13 bankruptcy case on January 25, 2018. Debtor’s initial bankruptcy petition did not list Mr. Kelsay or his attorney. It did list attorney Debra Pleatman

(“Pleatman”), the Guardian Ad Litem assigned to the Family Court Action. On February 13, 2018, Debtor amended her schedules to add Mr. Kelsay as a creditor and add his Family Court counsel, Holly Daugherty (“Daugherty”), as an additional notice party. The next day, Tomlinson filed a “Suggestion of Bankruptcy” in the Family Court Action on Debtor’s behalf. As the parties stipulated, this “alerted all parties to the proceedings of Debtor’s bankruptcy case” and cited the § 362(a) automatic stay protections. [JS at ¶ 24.] Pleatman emailed Debtor’s bankruptcy counsel, J. Christian A. Dennery (“Dennery”), that same day, asserting that her guardian ad litem fees were considered domestic support obligations under the Bankruptcy Code and copying Daugherty, Tomlinson, and Pleatman’s bankruptcy counsel, Michael L. Baker.

Two days later, on February 16, 2018, Dennery emailed Pleatman, Daugherty, and Tomlinson “that, in his opinion, the automatic stay ‘stops the continuation of any proceeding to collect pre-petition DSO from the Debtor or from the property of the estate, unless the creditor first obtains relief from stay.’” [JS at ¶ 25; *see also* ECF No. 137-7.] Dennery cited case law and sought feedback on his position from counsel. Daugherty testified that she reviewed the cited cases but neither responded to the email nor sought the advice of other bankruptcy counsel regarding the matter. Instead, Daugherty testified that she sought the Family Court’s opinion regarding the applicability of the automatic stay.

F. The Post-Petition Family Court Hearing (February 19, 2018) and Judgment

Creditor did not modify or withdraw Contempt Motion 2 after Debtor filed bankruptcy. Instead, he testified that he moved forward with the hearing on Contempt Motion 2 based on his counsel’s advice that he was permitted to proceed. As scheduled pre-petition, the Family Court held the hearing on February 19, 2018. Tomlinson objected to the hearing on Contempt Motion 2 on Debtor’s behalf, asserting that Debtor was protected by the automatic stay. Daugherty

responded on Creditor's behalf "by asserting something to the effect of: 'this is a domestic support obligation, and under the bankruptcy code, we can go forward. The automatic stay does not apply to the enforcement of domestic support orders.'" [JS at ¶ 26.] The Family Court held the hearing. The hearing also concerned Debtor's motion seeking to hold Creditor in contempt for various actions relating to the parties' co-parenting relationship, which Debtor filed pre-petition in September 2017.

Three days later, on February 22, 2018, the Family Court entered its Findings of Fact, Conclusions of Law, Judgment and Orders [ECF No. 137-9 ("Judgment")]. The Family Court ruled that "[t]he Suggestion of Bankruptcy filed by [Debtor] does not operate as a stay of the pending motions, which relate to domestic support obligations, pursuant to 11 U.S. Code 362 (b)." [Judgment at 3.] The Judgment addressed a variety of issues. First, Debtor's contempt motion was denied in its entirety. Second, the Judgment made multiple findings and rulings regarding the parties' visitation arrangement. Third, though the Family Court found Debtor to be in contempt of the September 2017 Order, it "reserve[d] on sanctioning [Debtor] for her contempt." [*Id.*] Instead, the Judgment focused in large part on child-support expenses that Debtor owed Creditor.

The Family Court found that Creditor complied with the September 2017 Order when Daugherty emailed Tomlinson a list of expenses totaling \$692.80 that Debtor owed Creditor on September 15, 2017, but Debtor neither objected to same nor paid the expenses by the October 6, 2017 deadline. The Family Court also determined that Creditor incurred additional medical, dental, pharmaceutical, and extracurricular expenses on the children's behalf after September 15, 2017, and that Debtor's portion of these expenses amounted to \$577.66. Accordingly, the Judgment granted Creditor a monetary judgment against Debtor for \$1,270.66 which accrued

interest at the legal rate.² The parties stipulated in this proceeding that all expenses included in the Judgment amount were incurred pre-petition.

The Judgment specified how the \$1,270.66 was to be paid. It required Debtor to deliver an initial \$50 payment via check to the supervisor at her supervised visitation, who would deliver it to Creditor (hereinafter, the “\$50 Award”). The remaining balance was to be paid in monthly installments via an amended child support wage garnishment order. While Contempt Motion 2 did not expressly request payments on the pre-petition arrearage, Daugherty testified that “that’s what the judge decided.” [Hr’g Audio, ECF No. 173, at 45:31.]

Daugherty further testified that Creditor did not seek guidance from the Family Court on the issue of collection of the \$50 Award from non-estate property via a post-petition amended motion or otherwise, nor did he request that the \$50 Award payment to the visitation supervisor be part of Debtor’s wage garnishment. Instead, as Daugherty put it, “the judge issues orders; we don’t then argue; we just – we do what the court tells us to do.” [Hr’g Audio, ECF No. 173, at 44:09.] While Daugherty was not aware whether family courts generally make *sua sponte* decisions about withholding in response to a motion for contempt, she testified that “this judge did it in this case.” [*Id.* at 49:24.]

Daugherty also testified about her knowledge of the Kentucky Cabinet for Health and Family Services’ (“CHFS”) tax refund intercepts to collect child support. When asked generally whether an order of contempt could lead to a tax intercept, Daugherty explained that “it doesn’t even have to be an order for contempt; they have records of if someone’s behind – that flags the record, and then they do the intercept as part of the service of the child support office.” [Hr’g

² When combined, the two expense amounts total \$1,270.46. This Court assumes that the Judgment’s use of \$1,270.66 was inadvertent.

Audio, ECF No. 173, at 50:04.] When asked whether she took steps to prevent an intercept in this case, Daugherty stated that “wasn’t on [her] radar” as she did not have any knowledge of Debtor’s potential tax refund. [*Id.* at 50:27.]

On March 5, 2018, Dennery sent Daugherty a letter regarding the Judgment. In the letter, Dennery asserted that the automatic stay stops the continuation of proceedings to collect pre-petition domestic support obligations. Citing case law, Dennery opined that a creditor has an affirmative duty to ensure that it discontinues collection activities after receiving notice of a bankruptcy. Dennery stated that he would be amending Debtor’s chapter 13 plan to account for “any amounts” owed to Creditor, who “will be paid through the plan.” [ECF No. 137-10 at 3.] In the meantime, the letter notified Daugherty that Dennery advised Debtor “not to make any payments to unsecured creditors, unless and until such claims have been allowed by the court or payment of the claims are provided for under the chapter 13 plan.” [*Id.*] Dennery “urge[d] [Daugherty] and [Creditor] to exercise restraint by ceasing the continuation of any actions geared toward collecting on the” Judgment. [*Id.*]

Although she was no longer representing Debtor,³ on March 7, 2018, Tomlinson emailed Debtor to forward an invoice for guardian ad litem fees that Pleatman had sent Tomlinson that morning. In her email, Tomlinson stated:

It would appear that both [Pleatman] and [Daugherty] are going to seek contempt and enforcement orders. Judge Mehling made clear that he was not going to honor the bankruptcy proceeding as an excuse for non-payment. This time you will go to jail. I have not seen any order from the bankruptcy court that would stop the contempt process in your family court proceeding. Probably motions will be filed by them today. You need to make these payments or an order needs to be obtained from the bankruptcy court ASAP.

³ Debtor testified that Tomlinson withdrew as her counsel in the Family Court Action in June or July 2018. Darrell Cox has represented Debtor in the Family Court Action since September 2018.

[ECF No. 137-12 at 1.] Debtor testified that she took that email to mean that she “was going to jail.” [Hr’g Audio, ECF No. 174, at 1:19:20.] To Debtor, the connection between contempt and jail was that if she was found guilty of contempt, she would go to jail, lose her job and be unemployable in the medical field, and not be able to see her children. Debtor’s testimony confirmed that her impression was based on Tomlinson’s advice, but she also testified that the Family Court threatened to incarcerate her during a child support hearing in 2017 and during the February 2018 hearing, although she was unsure about the February hearing. While Debtor had never been sentenced or incarcerated, she testified that when Tomlinson said that she had seen Family Court Judge Mehling put people in jail several times, she took it seriously. In contrast to Debtor’s statements, Daugherty testified that Judge Mehling did not threaten Debtor with incarceration at the February 2018 hearing. Daugherty was unaware of any threats of incarceration made between that hearing and entry of the Judgment.

G. Other Post-Petition Actions Claimed to Violate the Automatic Stay

1. Creditor Attempts to Collect the \$50 Award

Once on March 10 and again on March 11, 2018, Creditor contacted Debtor via text message to request that she make the initial \$50 Award payment by bringing a check to her March 11 visitation. Debtor did not do so.

On March 13, 2018, CHFS issued an amended Income Withholding for Support Order that increased the monthly amount deducted from Debtor’s paycheck by \$50. Two days later, Creditor filed a third Motion for Contempt and Motion to Reduce Respondent’s Parenting Time [ECF No. 137-15 (“Contempt Motion 3”)] in the Family Court Action, which requested “a hearing to require [Debtor] to show cause why she should not be held in contempt for violating the Court’s Orders,” including the Judgment requiring Debtor “to deliver a check for \$50 as first

payment in an envelope to the visitation supervisor at her supervised visitation time.” [Contempt Motion 3 at 1.] Contempt Motion 3 contends that Debtor “continues to refuse to pay her share of co-payments for the children as previously ordered and confirmed at the February 19, 2018 hearing” and “continues to hide behind her bankruptcy attorney and claims her bankruptcy attorney and/or her divorce attorney have advised her not to pay anything toward the children’s expenses.” [*Id.* at 1-2.] Contempt Motion 3 also discusses various child custody and visitation issues and requests that the Family Court order Debtor to pay \$750 in attorney’s fees that Creditor incurred in filing it.

Dennery emailed a second letter to Daugherty on March 20, 2018, addressing Contempt Motion 3 and Creditor’s payment demands to Debtor. Dennery asserted that both actions “will likely be construed as willful violations of the bankruptcy stay, pursuant to 11 USC §362(k),” which “could result in liability, including actual damages, reasonable attorney fees, and punitive damages.” [ECF No. 137-16 at 5.] He stated that Debtor directed him to pursue an action against Creditor for violations that had already occurred, but she was willing to find an out-of-court resolution if Creditor withdrew Contempt Motion 3 by March 21, 2018. Daugherty responded that she was out of town and would call Dennery upon her return.

Creditor did not withdraw Contempt Motion 3 by Debtor’s March 21, 2018 deadline. On March 22, 2018, Debtor filed “Debtor’s Motion (A) to Shorten the Time to Respond to Debtor’s Motion for a Temporary Restraining Order; (B) for the Issuance of an Order Temporarily Restraining Creditor Michael Steven Kelsay from Prosecuting his Motion for Contempt Against Debtor; and (C) for an Order Finding Creditor [in] Violation of the Automatic Stay” [ECF No. 22] in this bankruptcy case. Debtor withdrew that Motion the next day and then filed the Stay

Violation Motion that is the subject of this Opinion on March 25, 2018. On Daugherty's advice, Creditor withdrew Contempt Motion 3 two days later on March 27, 2018.

2. CHFS and U.S. Department of the Treasury Intercept Debtor's Tax Refunds

On March 26, 2018, CHFS notified Debtor that her \$274 Kentucky state tax refund had been transferred to the Department for Income Support/Child Support to be applied to her \$4,417 child support arrearage. The following day, March 27, 2018, the U.S. Department of the Treasury notified Debtor that her federal tax refund of \$4,306 had been applied to her child support debt through CHFS.

On April 5, 2018, the Kenton County Child Support Department issued two payments to Creditor in the amounts of \$1,270.66 and \$2,887.60 from Debtor's tax refunds. Creditor filed Proof of Claim No. 6 in Debtor's bankruptcy case for \$1,270.66 that same day, and Debtor objected to that claim several months later in October. Creditor ultimately withdrew Claim No. 6 in December 2018. Debtor originally did not list her state or federal tax refunds as assets on her Schedule A/B or claim an exemption in same. She amended her Schedule A/B in October 2018 to add the following asset valued at \$1,270.66: "Portion of 2017 Tax Return withheld [*sic*] by Creditor Steve Kelsay pursuant to post-petition state court order entered in violation of automatic stay [*sic*]." [ECF No. 80 at 5.] She also amended Schedule C to claim an exemption in that asset. [*Id.* at 7.] Debtor again amended Schedule C in January 2019 to remove that claimed exemption, but she did not remove the asset from Schedule A/B.

3. Creditor Attempts to Collect \$112 Portion of Child Support Expense from Debtor

Creditor asserts that Debtor owes him post-petition domestic support obligations totaling \$1,046.37 through October 31, 2018, which remained unpaid as of March 11, 2019. However, the parties dispute whether \$112 of that amount relating to a medical bill from St. Elizabeth

Healthcare is a pre- or post-petition debt. They stipulated that the \$112 was not part of the \$1,270.66 in pre-petition expenses awarded under the Judgment.

Pre-petition, the parties' son suffered an injury during a wrestling match on January 7, 2018, and Creditor took him to the emergency room. That afternoon, Creditor notified Debtor of the emergency room visit via two separate emails. In the first, Creditor stated, "Please be prepared to pay your portion of the co pay." [ECF No. 137-6 at 2.] In the second, just over an hour later, Creditor stated, "ER copay is 350 so please be prepared to pay your part." [*Id.* at 1.] Creditor received an invoice for \$350 from the hospital dated January 30, 2018, and on February 6, 2018, he emailed a copy of it to Debtor and requested that she pay her \$112 portion.⁴

Creditor emailed Debtor at least seven times between February 6 and March 28, 2018, post-petition, requesting that she pay her \$112 portion. In response to an email dated March 6, 2018, Debtor stated that Creditor and Daugherty "are both aware of my Chp 13 Bankruptcy." [ECF No. 137-11 at 1.] Creditor replied, "We are fully aware of your filing and the judge ruled that taking care of your kids just [*sic*] covered." [*Id.*] Creditor testified that making multiple demands is not his typical collection procedure. He said that "once something gets this close to hitting my credit again, that's when the action typically ramped up." [Hr'g Audio, ECF No. 174, at 17:34.] In this instance, Creditor stated that he was acting on Daugherty's advice, on Judge Mehling's directive that Creditor "make sure [he] stayed on top of these so that it didn't hit his credit again," and an unspecified prior "order." [*Id.* at 15:30.]

⁴ Under the Family Court's August 2017 Order, Creditor owed 68% of the \$350 (\$238), and Debtor owed 32% (\$112).

H. Damages and Mitigation

As actual damages, Debtor seeks the portion of her intercepted tax refunds that was paid to Creditor, \$1,270.66, as well as the attorneys' fees she incurred because of Creditor's alleged stay violations. Debtor also seeks punitive damages in such amount as the Court deems appropriate. While Debtor originally sought emotional distress damages, she withdrew that request during the evidentiary hearing.

The parties stipulated to facts about their settlement negotiations regarding Debtor's Stay Violation Motion. Notably, there is no evidence that Creditor attempted to address Debtor's stay violation issues until after the Stay Violation Motion was filed. On April 3, 2018, Creditor offered to pay \$1,000 in full settlement of the Motion, and Debtor declined. Creditor offered \$2,500 in full settlement on April 13, 2018 and withdrew that offer four days later. Creditor's counsel emailed Debtor's counsel to inquire about the April 13 offer on April 23, 2018. Debtor countered with a \$15,000 settlement demand two days later, and Creditor declined on May 3, 2018. Seven months later, in December 2018, Creditor offered \$5,000 in full settlement. The same day, Debtor declined and again countered with a \$15,000 demand.

Debtor incurred attorneys' fees directly related to the filing and prosecution of the Stay Violation Motion. In his purported Affidavit filed on January 3, 2019, as Debtor's Exhibit 27,⁵ Dennery stated that his law firm (Dennery, PLLC) and Debtor entered into a contingency fee agreement related to the Stay Violation Motion, under which "any attorney fees for work related to the Debtor's motion would be paid on a contingency basis out of the proceeds of any awards."

⁵ This Affidavit was the second of two affidavits that Debtor filed, and it purports to correct the prior incomplete affidavit filed at ECF No. 137-24. Creditor objected to the admission of Exhibit 27 into evidence because it lacked a jurat by a notary, lacked a proper evidentiary foundation, and constituted inadmissible hearsay. In the Order Admitting Exhibit [ECF No. 192] entered contemporaneously herewith, the Court overruled Creditor's objections and admitted Exhibit 27 into evidence.

[ECF No. 146 at ¶ 6.] The day before the evidentiary hearing, Dennery filed a Fee Application [ECF No. 168] on behalf of Dennery, PLLC, to which a billing statement was attached. For the period from February 16, 2018 through March 10, 2019, the Application states that the firm seeks compensation of the greater of \$16,743.75 or 40% of all amounts awarded to Debtor pursuant to the Stay Violation Motion. Debtor testified that she reviewed the Fee Application and believed the hours billed by her two lawyers at Dennery, PLLC to be very reasonable.

Debtor's testimony painted a bleak picture of her financial status. She currently works two jobs, and her net pay is approximately \$1,100 to \$1,200 per month after approximately \$617 is withdrawn for child support. Debtor is required to pay \$100 monthly to the Guardian Ad Litem, \$40 in weekly supervised visitation fees, and \$75 for biweekly family therapy sessions. In addition, she must pay her regular living expenses. She testified that she filed bankruptcy to save her home and car, not to avoid her domestic support obligations, yet she is unable to make either her car or house payments. She has surrendered her house, will surrender her car, and anticipates moving in with her parents and taking the bus or driving a parent's vehicle.

Debtor testified that she expected that bankruptcy would allow her to "stretch out" her \$1,270.66 pre-petition domestic support obligation arrearage and pay it off through her chapter 13 plan. [Hr'g Audio, ECF No. 174, at 1:12:14.] Stated differently, Debtor expected "that the pre-petition expenses would be rolled into [her] bankruptcy, and that her bankruptcy couldn't be brought into the state court . . . and that . . . they [Creditor] would be getting their money . . . through the payments that went to [her] bankruptcy plan." [*Id.* at 1:24:20.] Although Debtor knew that she would be required to pay her post-petition domestic support obligations going forward, she did not have a plan for paying them. She mentioned pre-petition medical diagnoses

related to stress from her finances and family court matters in her testimony, but she did not testify about or present evidence of any post-petition diagnosis.

Debtor testified that she owes Tomlinson \$6,000 in fees for her representation in the Family Court Action. Tomlinson continued to represent Debtor in that Action for a month or two after the tax intercepts, but she ultimately withdrew due to non-payment. Debtor stated that she intended to use the \$1,270.66 intercepted from her tax refund to pay Tomlinson for “legal fees so that I can fight in family court . . . to have a leg to stand on.” [Hr’g Audio, ECF No. 175, at 38:35.] Debtor was unrepresented in the Family Court Action from July to September 2018, when Darrell Cox became her attorney. Although Debtor expressed dissatisfaction with Mr. Cox in her testimony, she stated that he continues to represent her and will do so regardless of the outcome of Debtor’s Stay Violation Motion. She has an agreement to pay Mr. Cox “after everything was said and done in the court.” [Hr’g Audio, ECF No. 174, at 1:10:51.]

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter. 28 U.S.C. § 1334(b). Venue is proper in this District. 28 U.S.C. §§ 1408 and 1409. This is a core proceeding, and the Court is authorized to enter a final order adjudicating this matter. 28 U.S.C. § 157(b)(2)(A), (L), and (O).

“As a general rule, the filing of a bankruptcy petition operates to stay, among other things, the continuation of a judicial proceeding against the debtor that was commenced before the petition.” *Dominic’s Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir. 2012) (citing 11 U.S.C. § 362(a)(1); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 901 n.5 (6th Cir. 2009)). “But the automatic stay protection does not apply in all cases; there are statutory exemptions and there are non-statutory exceptions.” *Id.* Thus, “[w]hen the automatic stay is implicated two determinations are necessary: a) first, is the matter something which

would be stayed absent an exception to the stay; and b) if the matter would be stayed, does an exception under § 362(b) or other applicable law apply?” *Wohleber v. Skurko, et al. (In re Wohleber)*, 596 B.R. 554, 567 (B.A.P. 6th Cir. 2019). In the context of this § 362(k) action, Debtor bears the burden of proving that Creditor violated the stay. *Collett v. Lee Oil Co., Inc. (In re Collett)*, No. 13-8033, 2014 WL 2111309, at *4 (B.A.P. 6th Cir. May 21, 2014) (citations omitted).

If the stay applies to a creditor’s action and the action does not fall within an exception, the creditor has violated the stay. “[A]ctions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances.” *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). The Sixth Circuit noted such limited circumstances are present “only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result.” *Id.* If a stay violation was “willful,” § 362(k) provides a remedy: “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1).

Debtor contends that the automatic stay applied, without exception, to Creditor’s post-petition actions to: (a) move forward with the February 19, 2018 hearing on Contempt Motion 2 and enforce the subsequent Judgment; (b) pursue collection of \$112 from Debtor for her portion of her son’s hospital bill; and (c) file Contempt Motion 3 in the Family Court Action. In opposition, Creditor argues that his actions either were not subject to the automatic stay or fell

within the stay exceptions pertaining to domestic support matters in § 362(b)(2)(A)(ii), (A)(iii), (B), (C), and (F) (collectively, the “DSO Exceptions”), which provide:

(b) The filing of a petition . . . does not operate as a stay--

....

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding--

....

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

....

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

....

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law

11 U.S.C. § 362(b). The Court addresses each of Creditor’s challenged actions in turn.

I. Holding the Contempt Hearing, Entry of the Judgment, and Post-Judgment Collection Efforts

A. The Family Court had jurisdiction to hold the February 19, 2018 hearing and enter the subsequent Judgment on any matter to which the automatic stay did not apply.

The parties do not dispute that the February 19, 2018 hearing on Contempt Motion 2 in the Family Court is a matter that would be stayed, absent an exception, as the “continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy] case” 11 U.S.C. § 362(a)(1). The parties’ initial dispute is over whether the DSO Exceptions applied to give the Family Court jurisdiction to hold the hearing on Contempt Motion 2 and, subsequently, to enter the Judgment. Debtor contends

that the Family Court lacked jurisdiction to hold the hearing because the stay applied, without exception, to preclude Contempt Motion 2 from proceeding, and this Court had not granted stay relief. As a result, Debtor argues that the Family Court's entry of the Judgment was void *ab initio* because it violated the stay. Creditor responds that the Family Court had jurisdiction to hold the hearing and enter the Judgment because the matters at issue fell within the DSO Exceptions.

The Sixth Circuit explained the concurrent jurisdiction relationship between bankruptcy courts and other courts over matters subject to the automatic stay:

Once a bankruptcy proceeding begins in one court, the concurrent jurisdiction of other courts is partially stripped. In addition to exclusive jurisdiction over the bankruptcy proceeding itself, the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. However, the exclusivity of the bankruptcy court's jurisdiction reaches only as far as the automatic stay provisions of 11 U.S.C. § 362. That is, if the automatic stay applies to an action directed at the debtor or its property, jurisdiction is exclusive in the bankruptcy court. If the automatic stay does not apply—e.g., if an exception to the stay covers the action in question—the bankruptcy court's jurisdiction is concurrent with that of any other court of competent jurisdiction. And if the bankruptcy court grants relief from the stay with respect to certain property or claims . . . the bankruptcy court retains jurisdiction over those matters, although its jurisdiction is concurrent with that of other courts of competent jurisdiction.

Chao v. Hosp. Staffing Servs., Inc., 270 F.3d 374, 383–84 (6th Cir. 2001) (internal citations and quotation marks omitted).

In this case, the Family Court's jurisdiction to hold the February 19, 2018 hearing on Contempt Motion 2 and to enter the Judgment turns on whether those matters fell within exceptions to the automatic stay. The Family Court expressly found that it could proceed pursuant to the DSO Exceptions: "The Suggestion of Bankruptcy filed by [Debtor] does not operate as a stay of the pending motions, which relate to domestic support obligations, pursuant

to 11 U.S. Code 362 (b).” [Judgment at 3.] But the Family Court’s conclusion, in and of itself, does not resolve this issue. “[C]ourts have uniformly held that when a party seeks to commence or continue proceedings in one court against a debtor or property that is protected by the stay automatically imposed upon the filing of a bankruptcy petition, the non-bankruptcy court properly responds to the filing by determining whether the automatic stay applies to (i.e., stays) the proceedings.” *Chao*, 270 F.3d at 384 (citation omitted). “Assuming its jurisdiction is otherwise sound, the non-bankruptcy court may enter orders not inconsistent with the terms of the stay and any orders entered by the bankruptcy court respecting the stay.” *Id.* (citation omitted). However, “[i]f the non-bankruptcy court’s initial jurisdictional determination is erroneous, the parties run the risk that the entire action later will be declared void *ab initio*.” *Id.* (citations omitted). “If a state court and the bankruptcy court reach differing conclusions as to whether the automatic stay bars maintenance of a suit in the non-bankruptcy forum, the bankruptcy forum’s resolution has been held determinative, presumably pursuant to the Supremacy Clause.” *Id.* (citation omitted).

Because Contempt Motion 2 was filed pre-petition, the filing of that Motion itself did not violate the automatic stay. Rather, the occurrence of the hearing on Contempt Motion 2 and the resulting Judgment are at issue. Although Creditor did not modify Contempt Motion 2 to narrow its scope to matters falling within the DSO Exceptions after Debtor filed bankruptcy, the testimony and Judgment reflect that the Family Court tailored the hearing and Judgment to conform to the DSO Exceptions. As explained below, the hearing and Judgment fell within the § 362(b)(2) parameters with two exceptions.

B. The Family Court’s establishment of Debtor’s pre-petition child support arrearage in the Judgment did not violate the automatic stay.

The Family Court granted Creditor a judgment against Debtor for \$1,270.66 on account of unpaid, pre-petition child support expenses that the parties do not dispute are “domestic support obligations” as defined in § 101(14A). Though entry of that Judgment was subject to the automatic stay under § 362(a)(1), Creditor argues that the § 362(b)(2)(A)(ii) stay exception permitted the Family Court to find that Debtor owed that amount and grant Creditor a judgment for same because doing so was part of the “establishment or modification of an order for domestic support obligations.” 11 U.S.C. § 362(b)(2)(A)(ii). This Court agrees.

Statutory interpretation “begin[s] with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there.’” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). “Unless they are otherwise defined, the words in a statute ‘will be interpreted as taking their ordinary, contemporary, common meaning.’” *Deutsche Bank Nat. Tr. Co. v. Tucker*, 621 F.3d 460, 462 (6th Cir. 2010) (quoting *U.S. v. Plavcak*, 411 F.3d 655, 620 (6th Cir. 2005)). “When the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Hartford*, 530 U.S. at 6 (citations and internal quotations omitted).

The Bankruptcy Code does not define the operative word “establishment” in § 362(b)(2)(A)(ii). Those words are commonly used, and the brevity of that subsection does not lend itself to ambiguity. Black’s Law Dictionary defines “establish” as “[t]o settle, make, or fix firmly; to enact permanently,” or “[t]o make or form; to bring about into existence,” or “[t]o prove; to convince.” *Establish*, BLACK’S LAW DICTIONARY (10th ed. 2014). Under these common meanings, this Court finds that the Family Court “established” Debtor’s domestic

support obligation when it determined that Debtor owed Creditor \$1,270.66 in unpaid child support expenses under the prior September 2017 Order and granted Creditor a judgment for same. By doing so, the Family Court fixed (established) the amount that Debtor owed Creditor and settled the parties' dispute over the amount of Debtor's domestic support obligation arrearage.

It is well settled that “[e]xceptions to the stay should be read narrowly.” 3 COLLIER ON BANKRUPTCY ¶ 362.05 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2019) (citation omitted). However, it would be an absurd result to read § 362(b)(2)(A)(ii) so narrowly that it does not permit a family court to determine or “establish” the amount of a debtor's domestic support obligation arrearage. To hold otherwise would be to nullify that exception in all situations where a parent/debtor is ordered to pay child support expenses within certain categories, rather than to pay a set dollar amount, and a family court's categorization of pre-petition, disputed expenses is needed while the debtor is in bankruptcy. The Bankruptcy Code defines “domestic support obligations” broadly to include debts that accrue “*before, on, or after the date of the order for relief.*” 11 U.S.C. § 101(14A) (emphasis added). The plain language of § 362(b)(2)(A)(ii) allows family courts to review pre-petition domestic support obligation arrearages and establish the amount due post-petition, just as the Family Court did in this case in the Judgment.

- C. **The Family Court's ruling that a wage deduction order be entered did not violate the automatic stay; however, the Family Court's ruling that Debtor pay the \$50 Award directly to the visitation supervisor violated the stay and is void.**

To satisfy the \$1,270.66 Judgment amount, the Family Court ordered: “An Amended Child Support Order shall be entered to provide this amount be included in [Debtor's] wage garnishment paid through the child support office. [Debtor] shall deliver a check for \$50.00 as

the first payment in an envelope to the visitation supervisor at her supervised visitation time.”

[Judgment at 3.] Absent an applicable exception, both rulings would violate the automatic stay in § 362(a)(1). One ruling fits squarely within a stay exception; the other does not.

Section 362(b)(2)(C) specifically excepts “withholding of income that is property of the estate *or property of the debtor* for payment of a domestic support obligation under a judicial . . . order” from the automatic stay. 11 U.S.C. § 362(b)(2)(C) (emphasis added). Collection of a domestic support obligation outside the wage withholding process, however, is stayed except where it is “from property that *is not property of the estate.*” 11 U.S.C. § 362(b)(2)(B) (emphasis added). Read together, the two exceptions make clear that the collection of a domestic support obligation from property of a debtor’s estate only may be accomplished through a wage garnishment order; otherwise, it violates the automatic stay.

The Judgment’s collection provisions do not distinguish between collection of the \$1,270.66 from property of the Debtor or property of her bankruptcy estate. That does not impact the Family Court’s ruling regarding the amended wage garnishment order because it is explicitly permitted by § 362(b)(2)(C), regardless of whether the garnished wages are Debtor’s property or her estate’s. For that reason, the Court finds that this portion of the Judgment did not violate the automatic stay. *See, e.g., In re Gellington*, 363 B.R. 497, 501 (Bankr. N.D. Tex. 2007) (recognizing that § 362(b)(2)(C) created a stay exception for “withholding of [a debtor’s income that is estate property] for payment of a domestic support obligation under a judicial or administrative order or a statute”); *Peterson v. Peterson (In re Peterson)*, 410 B.R. 133, 136 (Bankr. D. Conn. 2009) (interpreting § 362(b)(2)(C) to permit a non-debtor spouse to seek a state

court order for domestic support obligations “with respect to the withholding of income” from debtor).⁶

In contrast, the Family Court’s ruling that Debtor pay the \$50 Award directly to the supervisor does not fall within the § 362(b)(2)(B) exception because the Judgment does not provide that the \$50 Award shall be paid from non-estate property. For the § 362(b)(2)(B) exception to apply, the Family Court must have either made a finding that there were non-estate assets from which Debtor could make the \$50 payment or ordered the payment to be made only from non-estate assets. *See, e.g., Gazzo v. Ruff, et al. (In re Gazzo)*, 505 B.R. 28, 42 (Bankr. D. Colo. 2014) (citing *In re Weiss*, 232 P.2d 789, 796 (Colo. 2010)) (holding that for § 362(b)(2)(B) to apply, the trial court must find that non-estate funds or assets exist from which debtor is to pay the domestic support obligation that the trial court is imposing). The Family Court did not do so. Therefore, the portion of the Judgment requiring Debtor’s direct payment of the \$50 Award violated the automatic stay and is void. *Easley*, 990 F.2d at 911.

D. Neither the interception of Debtor’s tax refunds nor Creditor’s retention of the funds violated the automatic stay.

Without Creditor’s intervention, the U.S. Department of the Treasury and CHFS intercepted Debtor’s respective federal and state tax refunds to apply those amounts to Debtor’s child support arrearage. Creditor subsequently received payments of \$1,270.66 and \$2,887.60 from those intercepted funds, the former presumably because of the Judgment. Debtor challenges the interception of the \$1,270.66 and Creditor’s retention of that sum. She argues that

⁶ *Gellington* and other cases examining whether the DSO Exceptions apply to a creditor’s challenged action have done so in the context of a confirmed chapter 13 plan and found that the plan terms control a creditor’s post-confirmation ability to collect, even where a stay exception otherwise permits collection. That is not the situation in this case, which has been pending for fourteen months without a confirmed plan.

the entire Judgment was void *ab initio* because it was entered in violation of the automatic stay and that any acts stemming from entry of the Judgment are likewise void.

As discussed above, the Judgment's establishment of Debtor's \$1,270.66 domestic support obligation arrearage did not violate the stay. Recognizing that tax refund intercepts are common methods for collecting unpaid support, § 362(b)(2)(F) specifically excepts "the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law," from the automatic stay.⁷ 11 U.S.C. § 362(b)(2)(F). Unlike other stay exceptions, § 362(b)(2)(F) does not limit its applicability to non-estate property. The tax refund intercepts did not violate the stay.

Debtor contends that Creditor's failure to turn over the funds he received from the tax intercepts to either the Chapter 13 Trustee or Debtor herself is a separate stay violation. In support, Debtor relies solely on the Sixth Circuit's statement that "[w]ithholding possession of property of the bankruptcy estate constitutes 'the exercise [of] control over property of the estate' for purposes of the automatic stay in 11 U.S.C. § 362(a)(3)." *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999). That statement is correct,⁸ but it does not end the inquiry. Debtor's argument fails to address the second step of the *Wohleber* analysis: whether Creditor's retention falls within a stay exception. Even under a narrow construction, it would be an absurd result to interpret the § 362(b)(2)(F) exception to allow interception of Debtor's tax refund to collect her delinquent support but not allow the party to whom the support is owed, Creditor, to retain the intercepted funds. *See Good v. Tex. (In re Good)*, No. 08-40955,

⁷ The cited portions of the Social Security Act, codified in 42 U.S.C. §§ 664 and 666, contemplate federal and state agencies' interception of refunds to collect support obligations.

⁸ Although Debtor claimed an exemption in \$1,270.66 of the intercepted funds in her October 2018 amendment to Schedule C, she amended Schedule C again in January 2019 to remove that exemption. It is undisputed that Debtor's tax refunds were property of her estate at the time they were intercepted.

2013 WL 5230027, at *4 (Bankr. E.D. Tex. Sept. 17, 2013) (rejecting the argument that § 362(b)(2)(F) should be read so narrowly that it only allows interception of a refund when it is not estate property). Creditor's retention of the intercepted \$1,270.66 did not violate the automatic stay.

E. The Judgment's finding that Debtor was in contempt violates the automatic stay and is void.

The Judgment includes two references to Debtor's contempt. The Family Court found "that [Debtor] is in contempt of this court's order of September 14, 2017 and reserves on the sanction for said contempt." [Judgment at 1.] The Family Court then ruled that it "reserves on sanctioning [Debtor] for her contempt of court." [*Id.* at 3.] Both rulings were subject to the § 362(a)(1) automatic stay of the continuation of a judicial proceeding against Debtor that was commenced prior to her bankruptcy case. The Family Court apparently recognized that limitation, but it determined that the hearing and subsequent Judgment were not stayed because the matters at issue "relate to domestic support obligations, pursuant to 11 U.S. Code 362 (b)." [*Id.*]

As discussed above, the Family Court was correct that many rulings in the Judgment related to domestic support obligations and that various portions of § 362(b)(2) excepted them from the automatic stay. However, no stay exception permits a court to find a debtor in civil contempt for non-payment of a pre-petition domestic support obligation or to issue contempt sanctions to coerce a debtor into paying that debt. A finding of contempt is not "the establishment or modification of an order for domestic support obligations" under § 362(b)(2)(A)(ii), and, under the facts of this case, it does not relate to "the collection of a domestic support obligation" from non-estate property under § 362(b)(2)(B). Rather, it was an effort to coerce Debtor into paying a pre-petition debt in violation of the automatic stay.

The Court draws a distinction between (i) holding a hearing on a pre-petition request to establish, modify, or otherwise order permissible domestic support obligation collections, even if cast as a civil contempt motion, and (ii) a ruling holding a debtor in contempt that yields the possibility of incarceration. The former is permissible. The latter violates the stay; there is no exception for the continuation of a judicial proceeding for incarceration or other impermissible collection activities as a result of a finding of civil contempt—even if it relates to a domestic support obligation exception. It is in this regard that the exceptions to the automatic stay should be narrowly drawn. *See, e.g., Grinspan v. Grinspan, et al. (In re Grinspan)*, Adv. Pro. No. 14-8116, 2019 WL 522479, at *6-*12 (Bankr. E.D.N.Y. Feb. 8, 2019) (recognizing that creditors’ post-petition prosecution of a state court contempt motion filed against debtor pre-petition violated the stay and did not fall within the § 362(b)(2)(B) exception, in which the word “collection” must be interpreted narrowly).⁹ Debtor testified about her stress and fear of being sent to jail as a result of the contempt finding. And, notwithstanding that the Family Court withheld issuing sanctions for Debtor’s adjudicated contempt, it was without authority to hold Debtor in contempt post-petition for a failure to pay pre-petition domestic support obligations. Therefore, the Family Court’s contempt findings violated the stay and are void. *Easley*, 990 F.2d at 911.

II. Creditor’s three actions to collect the \$50 award in the judgment violated the automatic stay.

On three separate occasions, Creditor attempted to collect the \$50 Award that the Family Court ordered Debtor to pay the visitation supervisor, which order is now void for reasons

⁹ Some courts have construed “collection” in § 362(b)(2)(B) as including “enforcement.” *See, e.g., In re Angelo*, 480 B.R. 70, 90 (Bankr. D. Mass. 2012) (“hold[ing] that Congress understood ‘collection’ to include enforcement of a judgment by contempt and that, in § 362(b)(2)(B), Congress created an exception from the entirety of the stay to permit that to occur”). The Court is not persuaded that the analysis undertaken in *Angelo* applies to the facts of this case.

discussed above. Once on March 10, 2018, and again on March 11, 2018, Creditor contacted Debtor via text message to request that Debtor make the \$50 payment during her March 11, 2018 visitation. On March 15, 2018, Creditor filed Contempt Motion 3, requesting that the Family Court “require [Debtor] to show cause why she should not be held in contempt for violating the Court’s Orders,” including the Judgment’s directive that Debtor pay \$50 to the visitation supervisor and a prior order that Debtor not have unsupervised visitation with the parties’ children. [ECF No. 137-15 at 1.] Contempt Motion 3 further requested that the Family Court suspend Debtor’s weekly visits with the children and relieve Creditor from an obligation to allow Debtor to make up a missed visit, as well as order Debtor to pay the \$750 of attorney’s fees Creditor incurred in filing that Motion.

Section 362(a)(6) imposes the automatic stay on “any act to collect . . . or recover a claim against the debtor that arose before the commencement of the case under this title.” 11 U.S.C. § 362(a)(6). Creditor’s March 10, 2018 text message to Debtor said, “Michelle, since we couldn’t do dinner Tuesday, please bring my check tomorrow to ur [*sic*] visit. Thanks.” [ECF No. 137-13.] Creditor’s March 11, 2018 message to her said, “Just a reminder to please bring a check to your visitation today.” [*Id.*] Creditor testified that those messages were sent regarding Debtor’s initial \$50 Award payment under the Judgment. Both messages seek impermissibly to collect a pre-petition debt from Debtor. Creditor offered no argument that those messages fell within any stay exception. Creditor violated the automatic stay by sending the two text messages.

Sections 362(a)(1) and (6) both impose the stay on Creditor’s filing of Contempt Motion 3, because doing so continued a judicial proceeding against Debtor that began before the commencement of her bankruptcy case and was an act to collect a pre-petition debt. While

§ 362(b)(2)(A)(iii) excepts Creditor's requests in Contempt Motion 3 regarding visitation from the stay, no exception applies to Creditor's request that Debtor be held in contempt for her failure to pay the \$50 Award. Contempt Motion 3 neither requested that the Family Court "establish[] or modif[y] an order for domestic support obligations," nor sought collection specifically from non-estate assets. 11 U.S.C. § 362(b)(2)(A)(ii), (b)(2)(B). Creditor could have tailored his requests to fit within the DSO Exceptions rather than asking the Family Court to hold Debtor in contempt for noncompliance. He did not do so. The Court finds that Creditor's filing of Contempt Motion 3 violated the automatic stay to the extent that it sought to hold Debtor in contempt for failing to pay the \$50 Award.

III. Creditor's actions to collect Debtor's \$112 portion of their son's hospital bill did not violate the automatic stay.

The parties dispute whether Debtor's obligation to pay \$112 of their son's hospital bill is a pre- or post-petition debt. Debtor argues that it is a pre-petition debt because Creditor notified her about it in emails sent pre-petition on January 6, 2018, and she filed bankruptcy on January 25, 2018. She contends that Creditor's multiple emails to her regarding the \$112 debt between February 6 and March 28, 2018, violated the automatic stay as post-petition attempts to collect a pre-petition debt. In opposition, Creditor contends that the debt is a post-petition obligation because Creditor sent Debtor the invoice for same on February 6, 2018, and his emails to Debtor were not attempts to collect a pre-petition debt in violation of the stay.

The parties do not dispute that the "30/30" rule imposed by the Family Court dictates the parties' respective obligations to pay this bill. They stipulated that the 30/30 rule requires the party incurring the expense to provide the other party an invoice for the expense, and "the recipient of the invoice would then have 30 days to pay for, or 30 days to object to the expense." [JS at ¶ 9.] Applying the 30/30 rule, the Court finds that Debtor's obligation to pay the \$112

portion of the bill accrued post-petition on February 6, 2018, when Creditor emailed her a copy of the post-petition, January 30, 2018 invoice. Creditor's emails in connection with the \$112 bill were not actions to collect a pre-petition debt within the meaning of § 362(a)(6). In fact, as a domestic support obligation which "first became payable" after the petition date, the debt was required to be paid as a condition of confirmation. 11 U.S.C. § 1325(a)(8).

IV. Creditor's stay violations were "willful" under § 362(k)(1).

As the individual seeking damages under § 362(k), Debtor bears "the burden of establishing three elements by a preponderance of the evidence: (1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages." *Collett v. Lee Oil Co., Inc. (In re Collett)*, No. 13-8033, 2014 WL 2111309, at *4 (B.A.P. 6th Cir. May 21, 2014) (citations omitted). As discussed above, Creditor violated the automatic stay in three instances: by sending two text messages to collect the \$50 Award and by filing Contempt Motion 3, which requests that the Family Court hold Debtor in contempt for failing to pay the \$50 Award.

Debtor argues that the stay violations were "willful" within the meaning of § 362(k)(1).

As this Court recognized:

A "willful violation" does not require proof of a specific intent to violate the stay. Rather, "[a] violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act." *TranSouth Financial Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999) (citations omitted). "Indeed, 'where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate.'" [*Grine v. Chambers (In re Grine)*, 439 B.R. 461, 466 (Bankr. N.D. Ohio 2010)] (quoting *Fleet Mortg. Group, Inc. v. Kaneb (In re Kaneb)*, 196 F.3d 265, 269 (1st Cir. 1999)). Conversely, even if it is questionable whether a creditor knew of a debtor's bankruptcy at the time of the alleged stay violation, if the creditor "thereafter acquire[s] actual knowledge of the debtor's] bankruptcy and fail[s] to take steps to undo and correct the . . . result," that constitutes willful conduct by the creditor. *Bunch v. NCNB South Carolina (In re Bunch)*, 119 B.R. 77, 80 (Bankr. D.S.C. 1990); see also *In re Pulliam*, 262 B.R. 539, 543 (Bankr. D. Kan.

2001) (“A creditor who has initiated collection efforts without knowledge of a bankruptcy petition has an affirmative duty to restore the status quo without the debtor having to seek relief from the Bankruptcy Court.”) (citing *In re Miller*, 10 B.R. 778, 780 (Bankr. D. Md. 1981), *aff’d* 22 B.R. 479 (D. Md. 1982)).

In re Witham, 579 B.R. 787, 793 (Bankr. E.D. Ky. 2017).

There is no question that Creditor knew of the bankruptcy and the automatic stay at the time of each violation. Before Creditor took the three challenged actions, Creditor, through attorney Daugherty, had received numerous notices from Debtor’s counsel that the Judgment’s entry violated the stay and that attempts to enforce the Judgment would likewise be violations. Despite receiving these communications, Creditor did not seek stay relief or cease his collection efforts. In fact, Creditor failed to withdraw Contempt Motion 3 until *after* the Stay Violation Motion was filed.

Creditor cannot rely on the Family Court’s rulings or the advice of his counsel regarding same to shield himself from liability for “willful” violations under § 362(k). As the Sixth Circuit explained in *Chao*, by not seeking stay relief from this Court before acting to collect pre-petition debts from Debtor, Creditor risked that the Family Court’s Judgment could be voided. *Chao*, 270 F.3d at 384. Creditor knew that Debtor vehemently contended that the stay precluded Creditor’s collection efforts, and he chose to pursue collection anyway via contempt threats over a \$50 payment. The burden is on Creditor to breathe vitality into the automatic stay; otherwise, “[t]o place the onus on the debtor, . . . to take affirmative legal steps to recover property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory.” *Wohleber*, 596 B.R. at 572 (quoting *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (internal citation omitted)). The Court therefore finds that Creditor’s actions to collect the \$50 Award were willful stay violations.

This conclusion may cause creditors to wonder what options they have when a family court finds that the automatic stay does not apply to a proceeding or ruling. The Sixth Circuit Bankruptcy Appellate Panel recently answered that question in *Wohleber*. “Upon the filing of [a] bankruptcy, it [is] incumbent upon [creditors] to seek relief from the stay or to obtain a determination from the bankruptcy court that the stay [does] not apply.” *Wohleber*, 596 B.R. at 576. Creditors “cannot sit idly by.” *Id.* In this case, had Creditor timely sought a ruling regarding the impact of the automatic stay from this Court, he could have avoided being subject to a § 362(k) action.

V. Damages

Debtor seeks actual damages, attorneys’ fees, and punitive damages from Creditor pursuant to § 362(k)(1).¹⁰ “Once a court determines that a party has willfully violated the automatic stay, the court is required by § 362(k)(1) to impose sanctions in an amount equal to the [d]ebtor’s actual damages.” *In re Webb*, 472 B.R. 665 (unpublished table decision), available at 2012 WL 2329051, at *17 (B.A.P. 6th Cir. Apr. 9, 2012). Debtor bears the burden of proving by a preponderance of the evidence that her “damages were ‘proximately caused by and reasonably incurred as a result of the violation of the automatic stay.’” *In re Baer*, No. 11-8062, 2012 WL 2368698, at *10 (B.A.P. 6th Cir. June 22, 2012) (quoting *Grine v. Chambers (In re Grine)*, 439 B.R. 461, 471 (Bankr. N.D. Ohio 2010)). She “must be able to demonstrate the amount of damages incurred with a reasonable degree of certainty and must support this claim with evidence.” *Id.* (citing, *inter alia*, *In re Perrin*, 361 B.R. 853 (B.A.P. 6th Cir. 2007)).

Debtor seeks actual damages of \$1,270.66, the amount of her intercepted tax refunds. As discussed above, the Family Court’s entry of that portion of the Judgment did not violate the stay

¹⁰ During the evidentiary hearing, Debtor withdrew her original request for emotional distress damages.

because it fell within the § 362(b)(2)(A)(ii) exception, and § 362(b)(2)(F) specifically excepted the interception of Debtor's tax refund to collect unpaid support from stay. Debtor's request for damages in the amount of the tax intercept is denied.

Debtor also seeks an award of attorneys' fees totaling either \$16,743.75 or 40% of any actual damage award to Debtor, whichever is greater, as actual damages. This Court has previously examined the standard for awarding attorney's fees as damages under § 362(k)(1):

Section 362(k)(1) does not specify a standard by which attorney's fees and costs are to be evaluated, but it is generally accepted that "fees must be reasonable" and "should bear a reasonable relationship to the amount in controversy." *In re Russell*, 441 B.R. 859, 863 (Bankr. N.D. Ohio 2010) (citations omitted). "Those fees can include fees incurred out of court, as when a debtor retains an attorney to call or write a creditor to demand that it end its actions violating the stay." *Springer v. RNBj RTO LLC (In re Springer)*, No. 16-3007, 2017 WL 3575859, at *5 (Bankr. W.D. Ky. Aug. 16, 2017). "If those efforts fail, a debtor can also incur attorney's fees in court by pursuing an action to end a stay violation and to recover damages." *Id.* (citing *In re Schwartz-Tallard*, 803 F.3d 1095, 1099 (9th Cir. 2015)).

Witham, 579 B.R. at 794.

Creditor bore the burden to stop collection proceedings once Debtor's bankruptcy was filed. *Wohleber*, 596 B.R. at 576. That said, this Court has previously ruled in the stay violation context that "[d]ebtors must be mindful of their duty to mitigate their damages because 'claims for fees incurred in the prosecution of an unnecessary motions [sic] are not recoverable.'"

Witham, 579 B.R. at 794 (quoting *Springer*, 2017 WL 3575859, at *3 (internal citation omitted)); see also *Clay v. Credit Acceptance Corp. (In re Clay)*, No. 10-53848, 2011 WL 2312334, at *2 (Bankr. E.D. Ky. June 10, 2011) ("A substantial award of damages in the form of attorney fees and costs is not proper where a debtor makes no effort to resolve the matter before filing the complaint.") (citing *In re Newell*, 117 B.R. 323, 326 (Bankr. S.D. Ohio 1990). In assessing

damages, the Court must therefore balance Creditor's burden described in *Wohleber* against Debtor's duty to mitigate.

The damage claim is elusive in this case. From the outset, Creditor was fanatically focused on badgering Debtor for \$50. On the other hand, Debtor litigated her Stay Violation Motion over the \$50 (and arguably the \$1,270.66) at great expense in terms of legal fees, but more significantly at great expense to her fresh start. As found above, Debtor has insufficient income to meet her minimal living expenses and child support obligations. She has lost her home, is living with her parents, and is about to lose her car. Her chapter 13 plan(s) have not been confirmable at any time during the past fourteen months in part because of feasibility, but, more clearly, because she has not paid her post-petition domestic support obligations as required by § 1325(a)(8), including \$1,330 of post-petition Guardian Ad Litem fees that Pleatman asserts were owed as of January 7, 2019.¹¹ Debtor states that she is in a chapter 13 proceeding to address her domestic support obligations because she fears going to jail, losing her job, and losing the ability to see her children. Debtor was visibly under great duress at the evidentiary hearing, yet her claim for emotional distress was inexplicably withdrawn at that hearing.

The finding of contempt and the \$50 Award violating the stay were entered in February 2018. Creditor engaged in collection efforts violating the stay until after Debtor filed her Stay Violation Motion the next month. There were no further violative actions by Creditor after Contempt Motion 3 was withdrawn. Debtor's attorneys' fees incurred to that point were \$4,313.75, an amount the Court finds reasonable. Within two weeks, Creditor offered \$2,500 to

¹¹ Debtor and Pleatman stipulated that, "[a]s of January 7, 2019, Creditor Pleatman asserts that the Debtor owes \$1,330.00 in post petition domestic support obligations." [ECF No. 164.] They further stipulated to their agreement that Debtor had not paid anything toward that balance as of the March 11, 2019 stipulation date.

resolve the matter. Debtor countered at \$15,000 and never moved from that demand. Instead, Debtor continued to litigate, increasing her legal fees to more than \$16,000.

Any award for attorney's fees must be proportional to the damages claimed. *Russell*, 441 B.R. at 863. Debtor did not reasonably attempt to mitigate her damages after Creditor ceased his stay violation conduct. The maximum amount in controversy was less than \$1,325 when the Stay Violation Motion was filed. Debtor's claimed attorneys' fees are more than 1100% higher than her claimed actual damages. An award of attorneys' fees that so greatly exceeds the amount in controversy would be "far outside the bounds of reasonableness." *Clay*, 2011 WL 2312334, at *2 (finding that an award of attorney's fees almost 100% greater than the amount in controversy was not reasonable). The Court will award Debtor \$4,313.75 in attorneys' fees.

Debtor also seeks an award of punitive damages in such amount as the Court deems appropriate. "In addition to actual damages, a court has the discretion to award punitive damages under § 362(k)(1) if it determines that a creditor willfully violated the automatic stay." *Witham*, 579 B.R. at 795. As the party seeking punitive damages, Debtor bears the burden of demonstrating that Creditor's "conduct was 'egregious, vindictive, or intentionally malicious.'" *Baer*, 2012 WL 2368698, at *10 (quoting *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004)). "[A] high level of culpable intent is not necessarily a pre-requisite to an award of punitive damages." *Henderson v. Auto Barn Atlanta, Inc., et al. (In re Henderson)*, No. 09-5114, 2011 WL 1838777, at *8 (Bankr. E.D. Ky. May 13, 2011) (citing *Bivens*, 324 B.R. at 42).

Creditor's action to pursue \$50 in the face of Debtor's bankruptcy and Debtor's counsel's vehement opposition, particularly by seeking contempt, and Creditor's failure to cease his unlawful conduct until after the Stay Violation Motion was filed, both support a finding of

AMERICAN BANKRUPTCY INSTITUTE

egregious, vindictive, or malicious conduct. The Court will exercise its discretion and award Debtor \$1,000 in punitive damages.

CONCLUSION

Based on the foregoing, IT IS ORDERED as follows:

1. The Stay Violation Motion [ECF No. 26] is granted in part. Debtor is awarded attorneys' fees as actual damages in the amount of \$4,313.75 and punitive damages in the amount of \$1,000.00.
2. Confirmation of Debtor's Amended Chapter 13 Plan [ECF No. 183] is DENIED, and Debtor shall have fourteen days from the entry of this Opinion within which to convert this case to a chapter 7 proceeding or the case will be dismissed without further notice or hearing. [ECF No. 179.]
3. The Application to Allow Debtor's Attorneys' Fees [ECF No. 168] is DENIED as moot pursuant to the Court's award of actual damages in paragraph 1 hereof.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Tracey N. Wise
Bankruptcy Judge
Dated: Tuesday, April 23, 2019
(tnw)

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

IN RE

STACEY M. VAN PELT

CASE NO. 12-52572

DEBTOR

**MEMORANDUM OPINION AND
ORDER HOLDING CHASE IN CONTEMPT**

This matter is before the Court on the Debtor’s Motion to Enforce Discharge Injunction Against JP Morgan Chase Bank, N.A. and for an Award of Actual Damages, Mild Non-Compensatory Damages, and Reasonable Attorneys’ Fees [ECF No. 52] and related briefing [ECF Nos. 57 & 58]. A hearing was held on March 7, 2019. [ECF Nos. 59-61.] The matter was taken under submission. For the reasons stated herein, the Debtor’s Motion is granted.

I. FACTS.

The Debtor filed a chapter 13 petition on October 3, 2012. She scheduled a one-half interest in a house and lot at 1274 High Bridge Road, Lancaster, Kentucky (“Real Property”). [ECF No. 1, Sch. A.] She also listed a secured debt of \$124,000.00 owed to Chase Home Mortgage. [ECF No. 1, Sch D.]

JP Morgan Chase Bank, N.A. (“Chase”) filed Proof of Claim No. 8-1 on February 5, 2013, in the amount of \$121,797.28. The debt is secured by a mortgage on the Real Property and includes a prepetition arrearage claim of \$2,084.31.

The Debtor filed her chapter 13 plan with the petition on October 3, 2012. [ECF No. 2.] Section II.C of the Plan, titled “Surrender of Property”, listed Chase. No objections were filed and the plan was confirmed on December 27, 2012. [ECF No. 19.]

The Trustee filed her Notice of Allowance of Claims on September 26, 2013. [ECF No. 28.] The Trustee's Notice "gives notice to the creditors listed below ... of the allowance of claims as follows." [Id.] Chase is a listed creditor with a mortgage and a prepetition arrearage claim. The Trustee's Notice also indicates "Surrendered" for the Chase obligation.

The Trustee's Notice was developed years ago in this district to give creditors a chance to raise any issues with the Trustee's plans to carry out the terms of a chapter 13 plan. The Notice tells the creditors listed:

To the extent the allowance of claims contradicts the treatment of any claim in the confirmed plan, this Notice shall constitute a modification of the plan pursuant to 11 U.S.C. 1329. Any objection must be filed within 30 days from the date of this Notice, served on the trustee, and set for hearing.

[Id.] No party objected to the Trustee's Notice.

Approximately 2 years later, Chase filed a Motion for Approval of Loan Modification Agreement.¹ [ECF No. 37.] The Modification Motion sought permission to "enter into a Loan Modification with the Debtor." The Modification Motion then represented that Chase had approved the Debtor for a loan modification that would recapitalize the loan, lower the monthly payments, and eliminate arrearage payments by the Trustee. The Modification Motion further indicated the Debtor could file an amended plan and/or a motion to modify the plan, if necessary.

The Modification Motion attaches a Loan Modification Agreement dated April 22, 2014, between Chase and Robert Van Pelt. [ECF No. 37-1.] The Debtor is not a party to the Loan Modification Agreement. Robert is the Debtor's ex-husband who was a co-obligor on the Chase debt when the Debtor filed her petition. Robert did not file bankruptcy with the Debtor.

¹ Lenders routinely file modification motions in this district on a notice and opportunity basis to avoid a claim that they are violating the automatic stay or other applicable law.

No objection to the Modification Motion was filed, so an order granting the relief was entered on October 10, 2014. [ECF No. 38.] The Modification Order contains the terms reflected in the Modification Motion. [*Id.*] The Debtor did not file an amended plan or a motion to modify the plan as allowed in the Modification Order.

The Trustee filed her Plan Completion Report on March 18, 2015 [ECF No. 45], and her Chapter 13 Standing Trustee's Final Report and Account on April 15, 2015 [ECF No. 47]. The Plan Completion Report recognizes that the Debtor completed all payments required by the confirmed plan. [ECF No. 45.] The Trustee's Final Report identifies Chase as a Scheduled Creditor.

On April 21, 2015, Chase filed amended Proof of Claim 8-2 reflecting a secured claim of \$99,820.69 and an arrearage of \$0.00. Also on April 21, the Debtor received her discharge. [ECF No. 49.]

The case was closed on May 29, 2015 and reopened on February 25, 2019. [ECF Nos. 50 & 53.] The Debtor filed the underlying Motion for Contempt alleging Chase violated the discharge injunction by incorrectly informing credit reporting agencies that the Debtor is personally liable for the debt owed to Chase and refusing to correct its reporting. [ECF No. 52.] *See also* 11 U.S.C. § 524(a)(2). The Debtor seeks actual damages and mild punitive damages.

The Motion indicates the Debtor divorced Robert on August 31, 2012, five weeks prior to filing bankruptcy. [ECF No. 52, at ¶¶ 10-18.] The Debtor agreed to quitclaim her interest in the Real Property to Robert as part of their divorce settlement. [*Id.* at ¶ 18.] Therefore, the Debtor had no interest in the home to protect through her plan on the petition date or when the Modification Motion was filed.

Chase filed its Response to Motion to Enforce Discharge Injunction and for Other Relief on March 5, 2019. [ECF No. 57.] It does not dispute the Debtor’s factual allegations. Instead, Chase argues placement of its claim in Section II.C of the plan “makes absolutely no provision for payment or other treatment of Chase’s claim or result in a discharge.” [*Id.* at 5.] Chase also argues that the Debtor’s failure to oppose its Modification Motion supports its position that its debt is not discharged. [*Id.*]

A hearing was held on March 7, 2019. Counsel for Chase stated at the hearing that this is a matter of plan interpretation and Chase does not seek an opportunity to present evidence. The matter was taken under submission and is ready for decision. Upon review of the record and arguments of counsel, it is found that the debt owed to Chase was provided for in the plan and the Debtor’s personal liability on the debt was discharged. 11 U.S.C. § 1328(a) and (c). The record also confirms Chase knew of the bankruptcy discharge and willfully violated the discharge injunction by refusing to correct its inaccurate reporting of the debt as a personal liability.

II. DISCUSSION.

A. The Confirmed Plan Provides for Chase’s Claim So the Debtor’s Personal Liability Was Discharged.

Section 1325(a)(5) tells the court to confirm a plan that treats secured claims in one of three ways: by agreement, cram down, or surrender. 11 U.S.C. § 1325(a)(5)(A)-(C); *see Associates Commercial Corp. v. Rash*, 520 U.S. 953, 957 (1997). The Debtor used the local form to propose her chapter 13 plan, which is a requirement in this district. KYEB LBR 3015-1;

KYEB Local Form 3015-1.² The Debtor chose to comply with § 1325(a)(5)(C) by listing Chase in Section II.C of the plan, titled “Surrender of Property.” [ECF No. 2.]

Chase argues that listing its claim in Section II.C is insufficient to provide for the claim because the Debtor does not indicate to whom she is surrendering the property, the mechanism for surrender, or that surrender is in payment of its claim. [ECF No. 57 at 4-5.] Listing the claim in Section II.C of the plan is enough to provide for the claim and obligated the Court to confirm the plan as instructed in § 1325(a).

To determine whether a claim is provided for by the plan, the relevant inquiry is whether a plan “ ‘makes a provision’ for, ‘deals with,’ or even ‘refers to’ a claim.” *Rake v. Wade*, 508 U.S. 464, 474–75 (1993); *Nicholas v. Oren (In re Nicholas)*, 457 B.R. 202, 222 (Bankr. E.D.N.Y. 2011). Agreeing to surrender collateral pursuant to § 1325(a)(5)(C) is sufficient to provide for a claim. *In re Sharak*, 571 B.R. 13, 19 (Bankr. N.D. N.Y. 2017). *See also Santander Consumer USA, Inc., v. Brown (In re Brown)*, 746 F.3d 1236, 1241 (11th Cir. 2014) (surrender satisfies the creditor’s allowed secured claim); *In re Eubanks*, 219 B.R. 468, 473 (B.A.P. 6th Cir. 1998) (“Section 1325(a)(5)(C) permits a Chapter 13 debtor to satisfy an ‘allowed secured claim’ by surrendering the property securing the claim.”).

The concept of surrender lets the creditor know it may exercise its state-law lien rights if desired.³ *See In re Keokuk*, Case No. 17-30370, 2018 WL 6172032 at *2 (Bankr. E.D. Ky. Nov. 20, 2018) (surrender is generally understood as a relinquishment of rights in the collateral); *see also In re Tosi*, 546 B.R. 487, 492 (Bankr. D. Mass. 2016) (it is well-settled that surrender means

² Local Form 3015-1 was amended on December 1, 2017, but the amendments are not relevant to the decision herein.

³ Section II.C of the Local Form Plan facilitates a creditor’s effort to recover the property by confirming the automatic stay no longer applies.

the debtor will make the collateral available to the secured creditor, so the secured creditor can exercise its state law rights if it so chooses); *Matter of Mattera*, 203 B.R. 565, 572 (Bankr. D.N.J. 1997) (formal action to accomplish surrender is not necessary to provide for a secured claim); 8 COLLIER ON BANKRUPTCY § 1325.06[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2018) (“Surrender in th[e] context [of section 1325(a)(5)(C)] means simply the relinquishment of any rights in the collateral.”). The additional conditions Chase seeks are not required.

The plan provided for Chase’s claim by including it in Section II.C. The Debtor successfully completed her plan and a discharge order was entered on April 21, 2015. [ECF No. 48.] The Debtor’s personal liability on the debt owed to Chase was discharged. 11 U.S.C. § 1328(a) and (c); *see also Johnson v. Home State Bank*, 401 U.S. 78 (1991) (a bankruptcy discharge extinguishes personal liability).

B. Chase Knew Its Claim Was Provided For by the Plan.

Counsel for Chase suggested the lender did not believe its claim was provided for by the plan, but the record refutes this assertion. Chase was served with the proposed plan [ECF No. 2] and legal counsel entered an appearance on Chase’s behalf shortly thereafter [ECF No. 10]. Chase never objected to the proposed treatment.

Chase was also served a copy of the Trustee’s Notice and the Trustee’s Final Report, both indicating her understanding that Chase’s claim was provided for by the plan. [ECF Nos. 28 & 47.] Again, Chase did not object or otherwise raise an issue.

Chase also acknowledged the Debtor’s discharge in a 2018 Garrard County Circuit Court foreclosure proceeding related to the Real Property. [ECF No. 58, Exh. 1.] Paragraph 5 in Count One of the Complaint provides:

In Rem as to Defendant, Stacey M. Noe [f/k/a Stacey M. Van Pelt], due to the Chapter 13 Bankruptcy filed in the Eastern District of Kentucky, case number 12-52572. Said bankruptcy was discharged via entered order therein on April 21, 2015. No personal judgment will be sought as to this Defendant.

[*Id.*]

Chase's counsel in this matter, who was not Chase's original counsel in this bankruptcy case or the state court action, argued that this was likely only a protective measure and does not mean the lender believed the Debtor was discharged. That is not a reasonable interpretation. The complaint shows a clear understanding that the underlying personal obligation of the Debtor was discharged. It is fair to accept the plain reading of this statement when Chase has and will not offer contrary evidence.

C. Approval of the Loan Modification Agreement Did Not Modify the Treatment of Chase's Claim in the Confirmed Plan.

Chase suggests that its agreement to recapitalize any arrearage and take any payment outside the plan described in the Modification Motion and Modification Order shows the Debtor was not released from personal liability. Chase argues that the approval of the modification converted its claim to one under § 1322(b)(5), which is excepted from the chapter 13 discharge under § 1328(c)(1). [ECF No. 57 at 5.] This interpretation is not supported by the documents.

The Modification Motion contains several inaccurate statements that prove that a modification of the treatment of Chase's claim did not occur. Chase represented that the Debtor signed the Loan Modification Agreement, but the document is only signed by Robert Van Pelt, as Borrower. [ECF No. 37, Attachment 1.] Chase's assertion that any prepetition arrearage claim was recapitalized and no longer payable was also wrong because the Trustee was not making arrearage payments anyway. [*Id.*] *See also supra* Part I and Part II.A.1 (the Trustee's Notice indicated no arrearage claim existed because the collateral was surrendered).

The Modification Motion and Modification Order suggest Chase wanted a comfort order or simply made a mistake. The Modification Motion and Modification Order indicate the plan remains feasible and the Debtor must take affirmative action for any plan amendment. [ECF Nos. 37 and 38.] The Debtor had no reason to object to entry of the Modification Order or seek a modification because there was no effect on her confirmed plan.

The Loan Modification Agreement also suggests Chase no longer looked to the Debtor for repayment of the underlying obligation. Robert is the only Borrower listed and nothing else in the agreement indicates the Debtor has continuing liability for the debt. This also calls into doubt Chase's argument that its claim was not treated because it could not file a deficiency claim. It never expected to have one.

Regardless, Section II.C. of the Local Form Plan does not promise a creditor a deficiency claim. It recognizes a secured creditor may, but is not required to, participate in payments to unsecured creditors based on a deficiency claim. Also, the language exists to relieve the Trustee from the obligation to pay the claim until a deficiency amount is determined.

D. The Holding in *Spata* Does Not Apply.

Chase cited *In re Spata* to support its argument that surrender under § 1325(a)(5)(C) in the Local Form Plan is not payment of the claim. Case No. 09-52154, ECF No. 122 (Bankr. E.D. Ky. Apr. 22, 2016). In *Spata*, the chapter 13 debtors moved for sanctions against Chase for violation of the discharge injunction. The debtors' confirmed plan required post-petition payments to Chase outside the plan and payment of arrearages by the Trustee through the plan. The debtors were unable to make the payments and subsequently modified the plan to surrender the collateral. After surrender and discharge, Chase pursued collection of the discharged debt. *Id.* at 1-3.

The debtors argued the post-discharge communications violated the discharge injunction because the residence was surrendered to Chase “in full satisfaction of the debt.” *Id.* at 4. The issue in *Spata* was the impact of surrender as used in a post-confirmation modification, not under § 1325(a)(5)(C). The ruling was limited to the debtors’ narrow argument that the modified plan provisions provided for full satisfaction of Chase’s claim: “The court is not called upon to interpret ‘surrender’ as that term is used in the bankruptcy code; but rather, how it is used in the Debtors’ modified plan. In this modified plan, ‘surrender’ does not mean payment.” *Id.*

Unlike in *Spata*, the question here is not whether the plan provides for payment of a specific claim. The issue is whether the claim was provided for by the plan and the Debtor’s personal liability discharged. 11 U.S.C. § 1328(a). Chase reads too much into the *Spata* decision. The limited ruling in *Spata* is not relevant to this case.

E. Chase’s Refusal to Correct Its Incorrect Reporting of the Discharged Debt Violated the Discharge Injunction.

A discharge “operates as an injunction against the commencement or continuation of any action, the employment of process or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.” 11 U.S.C. § 524(a)(2). The Debtor alleges that Chase violated § 524(a)(2) by “incorrectly reporting its alleged debt against her under the Note, Mortgage and Modification Agreement” to credit reporting agencies. [ECF No. 52 at 5-6.] She attached copies of credit reports as evidence of that inaccurate reporting. [*Id.*, Exhs. 2,4.] The Debtor also alleges that she spoke to representatives of Chase and Chase “did nothing to correct the inaccurate information that it reported...” [*Id.* at 6.]

Chase does not dispute the factual allegations made by the Debtor, so they are accepted as true. These undisputed allegations and exhibits to the Motion are enough to confirm Chase violated the discharge injunction.

The review herein shows Chase knew the plan provided for its claim and the Debtor received her discharge. *In re Joseph*, 584 B.R. 696, 702 (Bankr. E.D. Ky. 2018). Chase does not dispute the Debtor's allegations that its reporting to the credit agencies was inaccurate and it refused to correct it when asked. Chase's only attempt at a defense is the argument the debt was not discharged. This argument was decisively rejected in the preceding analysis. *See Part II.A., supra.*

The prior review leads to a conclusion that the argument is an unsupportable attempt to find a way around Chase's violation of the discharge injunction. Without any explanation otherwise, it is reasonable to infer that Chase's reporting and subsequent refusal to correct the inaccurate information is an attempt to collect a discharged debt. *See In re Russell*, 378 B.R. 735, 743 (Bankr. E.D. N.Y. 2007) (a court may infer intent to collect a discharged debt from a refusal to correct inaccurate credit information); *Torres v. Chase Bank USA, N.A. (In re Torres)*, 367 B.R. 478, 485-486 (Bankr. S.D. N.Y. 2007) (same).

Chase is in contempt for violation of the discharge injunction. The record is not sufficient to determine damages so additional work is required.

III. DECISION.

Based on the foregoing, it is ORDERED:

(1) The Debtor's Motion to Enforce Discharge Injunction Against JP Morgan Chase Bank, N.A. [ECF No. 52] is GRANTED;

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

Case 12-52572-grs Doc 62 Filed 04/11/19 Entered 04/11/19 10:21:15 Desc Main Document Page 11 of 11

- (2) Chase is in CONTEMPT for violating the Discharge Order [ECF No. 48] under 11 U.S.C. § 524(a)(2); and
- (3) The following shall apply to a determination of damages:
- (a) The Debtor shall supplement the record with evidence in support of any damages incurred within 21 days of entry of this Order.
 - (b) Chase shall have 21 days after the Debtor supplements the record to file an objection.
 - (c) If Chase does not object, the matter will be deemed submitted for a decision.
 - (d) If Chase objects, both parties will have fourteen days to request an evidentiary hearing. If no party requests a hearing, the matter will be deemed submitted on the record for a decision.

11

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Thursday, April 11, 2019
(grs)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE

MICHAEL RAY JONES
LINDA KAY JONES

CASE NO. 05-55697
CHAPTER 7

DEBTORS

**MEMORANDUM OPINION AND ORDER GRANTING
DEBTOR'S MOTION FOR CONTEMPT AGAINST CAPITAL ONE BANK**

This matter is before the Court on Debtor's Motion for Contempt [ECF No. 19 ("Contempt Motion")] against Creditor Capital One Bank. Debtor Linda Kay Jones seeks a ruling that Creditor violated the discharge injunction in § 524(a)(2)¹ by failing to release a judgment lien that a prior Order of this Court avoided more than 13 years ago, after Debtor received her chapter 7 discharge. Debtor requests that the Court hold Creditor in contempt for that violation and award Debtor actual damages, attorney's fees, costs, and mild non-compensatory damages. The following constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

A. Procedural Background

1. Bankruptcy Case Activity in 2005 and 2006

Linda Kay Jones and Michael Ray Jones² jointly filed this chapter 7 case on October 14, 2005 ("Petition Date"). Debtors' Schedule A lists their joint, fee simple ownership of one parcel of real property located at 229 Vine Street, Sadieville, Scott County, Kentucky (the "Vine

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. References to the Federal Rules of Bankruptcy Procedure appear as Bankruptcy Rule ____.

² Debtor Michael Ray Jones is deceased.

Property”). Debtors claimed a \$6,000 exemption in the Vine Property on Schedule C. Schedule D lists Creditor as being owed a \$2,602 debt that arose in April 2001 and that is secured by a judgment lien on the Vine Property. Schedule D also listed seven other parties designated as “representing” Creditor. [ECF No. 1 at 10-11.] Creditor and all seven other parties were listed on the mailing matrix that Debtors filed with their petition, and the record reflects that the Bankruptcy Noticing Center served the Notice of Debtors’ bankruptcy on all of them. The mailing matrix has never been amended.

On the Statement of Intention filed with their petition, Debtors stated their intent to avoid Creditor’s judgment lien on the Vine Property. On February 22, 2016, Debtors filed a Motion to Avoid Judgment Lien [ECF No. 8 (“Avoidance Motion”)], seeking to avoid the Notice of Judgment Lien that Creditor filed in the Scott County, Kentucky Clerk’s Office against “all of the right, title and interest of [Debtor Linda Jones] in and to any real property located in Scott County, Kentucky.” [ECF No. 8-2 (“Judgment Lien”); *see also* ECF No. 19 at 10 (file-stamped copy of Judgment Lien).] Debtors sought to avoid the Judgment Lien pursuant to § 522(f), arguing that it is a “judicial lien” that impaired their exemption in the Vine Property. The Judgment Lien states on its face that it was prepared by an attorney with the law firm of Lloyd & McDaniel, PLC. In the certificate of service within the Avoidance Motion, Debtors’ counsel certified that he served the Avoidance Motion on Creditor in care of Lloyd & McDaniel, PLC at the address listed on the Judgment Lien.³

No party objected to the Avoidance Motion. The Court entered an Order granting Debtors a chapter 7 discharge on March 9, 2006. [ECF No. 11 (“Discharge Order”).] Four days later, on March 13, 2006, the Court entered an Order granting the Avoidance Motion. [ECF No.

³ Lloyd & McDaniel, PLC was included on Debtors’ mailing matrix as one of the parties representing Creditor.

13 (“Avoidance Order”).] The record does not show that the Avoidance Order was served on Creditor. Debtors’ bankruptcy case was closed on April 6, 2006.

2. Bankruptcy Case Activity in 2019

On January 15, 2019, Debtor Linda Kay Jones⁴ filed three motions in this case. She filed a Motion to Reopen Case so that she could “take action against a creditor that is continuing to collect on a discharged debt.” [ECF No. 17 (“Motion to Reopen”) at 1.] She filed a Motion to Substitute Counsel because her 2005 attorney was no longer representing debtors in bankruptcy, and she “need[ed] an attorney to file a Motion for Contempt regarding a discharge violation.” [ECF No. 18 (“Motion to Substitute”) at 1.] She also filed the Contempt Motion. The Contempt Motion asserts that Debtor recently inherited real estate in Scott County, Kentucky, which she and her siblings were attempting to sell, but the closing was being delayed because Creditor had not released the Judgment Lien that was avoided nearly 13 years ago.

All three Motions included certificates of service. Debtor’s new bankruptcy counsel, J.D. Kermode, certified that he served the Motion to Reopen and Motion to Substitute on all creditors on January 15, 2019.⁵ Mr. Kermode certified that he served the Contempt Motion via certified mail to Creditor in care of Creditor’s Chief Executive Officer, Richard Fairbank, that same day. Debtor avers in her Supplemental Brief that, upon information and belief, Creditor received the Motion for Contempt on January 23, 2019.

All three Motions included notices of hearing. The Contempt Motion was properly noticed for hearing on February 14, 2019. Because the notices in the other two Motions

⁴ Hereinafter, “Debtor” refers solely to Linda Kay Jones.

⁵ Mr. Kermode’s certifications state that he served the Motion to Substitute on “[t]he creditors per the mailing matrix” and served the Motion to Reopen on “the creditors.”

contained incorrect dates, Mr. Kermode filed amended hearing notices on January 16, 2019, and certified that he served them that day on all creditors.

The Court held a hearing on the three Motions on February 14, 2019. No party responded to any of the Motions, and Mr. Kermode was the only person who attended the hearing. The Court granted the Motion to Reopen and the Motion to Substitute Counsel. The Court entered a separate Order regarding the Contempt Motion, which stated in part:

It is ORDERED that, based upon the Court's review of the record, the Court finds that Creditor Capital One Bank's ("Creditor") judicial lien on Debtor's real property has been avoided. [ECF No. 13.] An Order of Discharge was entered on March 9, 2006. Accordingly, the Court shall enforce the discharge injunction and Creditor Capital One Bank shall forthwith release its judicial lien on the real estate located at 229 Vine Street, Sadieville, Kentucky. If the Lienholder fails to act within 30 days, the Debtor is authorized to present this Order to the applicable recording office and the designated recording officer shall note the release in the applicable lien records.

[ECF No. 30 ("Release Order") at 1.] The Release Order directed Debtor to supplement the record with evidence supporting the remaining relief requested in the Contempt Motion, specifically including damages, within 14 days. The Release Order also allowed any party 21 days from its entry to respond to Debtor's supplement or to otherwise supplement the record with any legal authority or other matters supporting its position regarding the Contempt Motion. Finally, the Release Order set a continued hearing on the Contempt Motion for March 21, 2019 and directed Debtor to serve the Order on Creditor. Mr. Kermode filed a Certificate of Service evidencing that he served the Release Order via certified mail to Creditor in care of CEO Richard Fairbank on February 15, 2019. Debtor avers in her Supplemental Brief that, upon information and belief, Creditor received the Release Order on February 22, 2019.

To further support the Contempt Motion, Debtor timely filed her sworn Affidavit, documents relating to her inheritance and proposed sale of real estate, and Mr. Kermode's

invoice for time spent representing Debtor in this matter through February 28, 2019. Debtor also timely filed her Supplemental Brief. No other party filed anything. Mr. Kermode certified that he served the Affidavit and accompanying documents and, separately, the Supplemental Brief, via certified mail to Creditor in care of Mr. Fairbank on January 28, 2019, and March 7, 2019, respectively.

The Court held a continued hearing on the Contempt Motion on March 21, 2019. Again, only Debtor's counsel appeared. After hearing argument, the Court granted Debtor seven days within which to supplement the record with evidence of the time Mr. Kermode spent representing Debtor in this matter after February 28, 2019. Mr. Kermode timely filed his updated invoice, and the Court took this matter under submission.

B. Debtor's Inheritance and Sale of Real Estate

Debtor still owns the Vine Property. Also, upon her father's death in January 2012, Debtor inherited a 1/6 interest in real estate located at 825 Pokeberry Road, Sadieville, Scott County, Kentucky (the "Pokeberry Property"). Upon her mother's death in December 2017, Debtor inherited a portion of her mother's interest in the Pokeberry Property, thereby increasing Debtor's interest to 1/3. Debtor's brother was appointed administrator of her mother's estate. On July 27, 2018, the estate contracted to sell the Pokeberry Property.

Debtor then discovered that Creditor had not released the Judgment Lien. Because the Judgment Lien was a cloud on the Pokeberry Property's title, the sale closing date was extended to January 18, 2019. On December 18, 2018, Debtor sent Creditor a certified letter requesting that Creditor immediately release the Judgment Lien against her because she no longer owed money to Creditor. Debtor also called Lloyd & McDaniel, PLC regarding the Judgment Lien on

January 17, 2019 (two days after filing the Contempt Motion) and was told she still owed \$4,851.90 to Creditor.

The closing did not occur as scheduled on January 18, 2019 because Creditor had not released the Judgment Lien. The parties executed a Third Addendum to the Purchase and Sale Agreement that delayed the closing until almost a month later, February 15, 2019, and provided that the sales price would be reduced by \$5,000 if Creditor had not released the Judgment Lien by that date. The other heirs to the estate refused to sign the Addendum unless Debtor agreed that the \$5,000 reduction would be subtracted from her share of the sale proceeds.

Creditor did not release the Judgment Lien, and the closing did not occur on February 15, 2019. The parties executed a Fourth Addendum to the Purchase and Sale Agreement that delayed the closing until February 22, 2019 and provided that the sale price would be reduced by \$7,500 if the closing did not occur by that date. The other heirs to the estate refused to sign that Addendum unless Debtor agreed that the \$7,500 reduction would be deducted from her share of the sale proceeds. The closing did not occur by that date, and the sale price and Debtor's portion of the sale proceeds were reduced by \$7,500.

The closing was then scheduled for the following week, February 28, 2019, and the purchaser indicated that he would back out of the purchase contract if the closing did not occur on that date. The closing occurred as scheduled. The closing attorney withheld an additional \$2,000 from Debtor's portion of the sale proceeds for 21 days due to Creditor's failure to release the Judgment Lien, despite the attorney's receipt of this Court's Release Order. The closing attorney also charged Debtor a \$13 fee for filing a "lien release." [ECF No. 33 at 6.] The record does not reflect whether that the closing attorney returned that \$2,000 to Debtor.

Creditor has never appeared in this case, despite being served with multiple pleadings relating to the Contempt Motion. Nothing in the record reflects that the Judgment Lien has been released.

C. Actual Damages and Attorney's Fees

Debtor seeks an award of actual damages including: (a) \$7,500 for the reduction in her portion of the Pokeberry Property sale proceeds; (b) \$13 for the lien release filing fee that the closing attorney charged her; (c) the \$260 filing fee that she incurred by reopening her closed bankruptcy case; and (d) an unspecified amount for the emotional distress she suffered as a result of Creditor's actions. She also seeks an award of attorney's fees. Mr. Kermode's invoice reflects that he spent 21.8 hours representing her in this matter from December 18, 2018 through March 21, 2019. The invoice does not include an hourly rate, but Mr. Kermode advised at the March 21, 2019 hearing that he has charged \$350 per hour in cases in which he represented bankruptcy trustees.

Debtor's Affidavit describes the strain that Creditor's failure to release the Judgment Lien has placed on Debtor's relationship with her family. Until this matter began, Debtor's family was unaware that she filed bankruptcy in 2005. Debtor states that her family's awareness of her bankruptcy case has caused her to suffer "tremendous" embarrassment. [ECF No. 33 at 7.] As of the filing of her Affidavit, Debtor's brother refused to speak with her, and her niece and nephew had repeatedly pressured her over the delayed closing. Debtor states that her brother, niece, and nephew blame Debtor—not Creditor—for the delay. She explained that they pressured her to resolve the issue, even requesting that she pay off her discharged debt to Creditor so that the closing could occur.

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter. 28 U.S.C. § 1334(b). Venue is proper in this District. 28 U.S.C. §§ 1408 and 1409. This is a core proceeding, and the Court is authorized to enter a final order adjudicating this matter. 28 U.S.C. § 157(b)(2)(A) and (O).

I. Creditor Violated the Discharge Injunction.

This Court granted Debtor a discharge under § 727, which discharged Debtor “from all debts that arose before the date of the order for relief” in this case, including her debt to Creditor. 11 U.S.C. § 727(b). Under § 524(a)(2), that discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor” 11 U.S.C. § 524(a)(2). “The discharge injunction promotes the fresh start policy of the Bankruptcy Code.” *In re Joseph*, 584 B.R. 696, 705 (Bankr. E.D. Ky. 2018) (citing *In re Oster*, 474 F. App’x 422, 424 (6th Cir. 2012)). To that end, “[t]he purpose of § 524(a) is to ensure that when a bankruptcy court enters an order discharging a debtor’s outstanding debts, the debtor will be automatically protected against future attempts to collect on the discharged debts.” *In re Isaacs*, 895 F.3d 904, 910 (6th Cir. 2018) (citation omitted). However, “a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991).

As of the Petition Date, Creditor had an *in personam* claim against Debtor and, by virtue of the Judgment Lien, also had an *in rem* claim against all real estate that Debtor owned in Scott County on that date. See *In re Blakely*, No. 13-50069, 2013 Bankr. LEXIS 5474, at *1-2 (Bankr. E.D. Ky. Mar. 27, 2013) (“A Kentucky judgment lien attaches to real property, which creates an

in rem claim; *i.e.*, a claim that attaches to the property itself. ... Therefore, a judgment lien is an *in rem* claim against any real property owned by the judgment debtor at the petition date.”) (citations omitted). Creditor’s *in personam* claim against Debtor was extinguished on March 9, 2006, upon entry of the Discharge Order. 11 U.S.C. § 727(b). That discharge voided Creditor’s underlying judgment against Debtor for the discharged debt. *See* 11 U.S.C. § 524(a)(1) (a discharge “voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727”)

Following discharge, Creditor retained an *in rem* claim against the only real property that Debtor owned on the Petition Date: the Vine Property. On March 13, 2006, however, Creditor’s *in rem* claim against the Vine Property was extinguished when the Court entered the Avoidance Order. At that point, Creditor had no remaining claims against Debtor, either *in rem* or *in personam*, and the § 542(a)(2) discharge injunction prohibited Creditor from taking future collection action against Debtor or her property. Yet, Creditor allowed the Judgment Lien to remain of record, thereby impeding Debtor’s “fresh start” after bankruptcy. *See Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 535 (6th Cir. 2014) (citation omitted) (“The very point of a lien is that it coerces the property holder to settle a debt in order to maintain rights in the property.”)

The Judgment Lien’s interference with Debtor’s efforts to sell the Pokeberry Property illustrates the financial pressure that the Lien’s continued presence places on Debtor. A judgment lien “represent[s] to the least sophisticated consumer and the public that the creditor had a final judgment, had a right to execute on that judgment, and had a valid interest in the debtor’s [real estate].” *Currier*, 762 F.3d at 535 (citation omitted). “Judgment liens under

Kentucky law are enforceable for fifteen years, a potentially lengthy time period for the cloud of an unenforceable lien to hang over a debtor.” *Blakely*, 2013 Bankr. LEXIS 5474, at *4 (citing K.R.S. § 413.090). “A judgment lien is a cloud on title, which is enough for many or most financial institutions to refuse to make a loan.” *Id.* Judgment liens are also enough to cause potential real estate purchasers to refuse to consummate a proposed sale, which is what occurred in this case.

Even though Debtor’s debt to Creditor was discharged in 2006, and the Judgment Lien was avoided in 2006, the Lien’s presence caused the other parties to the proposed Pokeberry Property sale to refuse to proceed unless Debtor agreed to a reduced purchase price and a commensurate reduction in her portion of the sale proceeds. That placed an improper burden on Debtor and her interest in the Pokeberry Property in violation of the § 542(a)(2) discharge injunction. *See Currier*, 762 F.3d at 534-35 (citation omitted) (noting, in the context of a Fair Debt Collection Practices Act claim, that an invalid “judgment lien placed an improper burden on [debtor’s] home, restricting her rights in her own property until [creditor] decided to release the lien or [debtor] undertook the burden of filing an action to quiet title”). Debtor’s interest in the Vine Property is similarly burdened. Although Debtor is not presently attempting to sell or obtain debt secured by the Vine Property, the Judgment Lien remains a cloud on its title.

For the foregoing reasons, the Court finds that Creditor’s failure to release the Judgment Lien violates the § 524(a)(2) discharge injunction.

II. Creditor is in Contempt for Violating the Discharge Injunction.

“[B]ecause the Code does not specify a remedy for a violation of the discharge injunction, the Debtor’s only recourse is to request sanctions for contempt of court.” *In re Frambes*, No. 08-22398, 2012 WL 400735, at *6 (Bankr. E.D. Ky. Feb. 7, 2012) (citing *Pertuso*

v. Ford Motor Credit Co., 233 F.3d 417, 421 (6th Cir. 2000)). “To impose contempt sanctions on an alleged violator of the discharge injunction, the Court must conclude that the creditor’s conduct violated the discharge injunction and was contemptuous.” *In re Campbell*, No. 10-22561, 2014 WL 32161, at *5 (Bankr. E.D. Ky. Jan. 6, 2014). “In the context of a violation of the discharge injunction, [contemptuous] means that the act must have been willful.” *Id.* at *6 (citing *Gunter v. Kevin O’Brien & Assocs., LPA (In re Gunter)*, 389 B.R. 67, 75 (Bankr. S.D. Ohio 2008); *Kanipe v. First Tenn. Bank (In re Kanipe)*, 293 B.R. 750, 756 (Bankr. E.D. Tenn. 2002)).

Proof that a creditor intentionally violated the discharge injunction is not required to find a “willful” violation. *In re Martin*, 474 B.R. 789 (unpublished table decision), available at 2012 WL 907090, at *6 (B.A.P. 6th Cir. Mar. 7, 2012) (citing *McCool, et al. v. Beneficial (In re McCool)*, 446 B.R. 819, 823 (Bankr. N.D. Ohio 2010)). Rather, “[t]he question of whether the violation is willful is based on whether the creditor intended the acts that constituted the violation.” *Campbell*, 2014 WL 32161, at *6. “Thus, a debtor who alleges a violation of § 524(a)(2) must establish by clear and convincing evidence that the creditor: (1) violated the discharge injunction and (2) did so with actual knowledge of the injunction.” *Id.* (citations omitted).

As discussed above, Debtor has met her burden to show that Creditor violated the § 524(a)(2) discharge injunction by failing to release the Judgment Lien. The Court must now determine the point at which Creditor obtained actual knowledge of the injunction. Although the Avoidance Order avoided Creditor’s Judgment Lien on the Vine Property in 2006, there is no evidence that the Avoidance Order was served on Creditor at any time before Debtor filed the Contempt Motion. However, there is no question that the properly-served Contempt Motion

provided Creditor actual knowledge of the injunction in January 2019, as did the properly-served Release Order in February 2019.

Bankruptcy Rule 7004(h) specifies the requisite method of service to Creditor as an insured depository institution.⁶ “Service on an insured depository institution . . . in a contested matter . . . shall be made by certified mail addressed to an officer of the institution unless” one of three exceptions not satisfied here applies. FED. R. BANKR. P. 7004(h). Debtor’s counsel certified that he served the Contempt Motion and Release Order on Creditor by certified mail in care of its Chief Executive Officer on January 15, 2019, and February 15, 2019, respectively. Debtor avers that Creditor received both pleadings, the Contempt Motion on January 23, 2019, and the Release Order on February 22, 2019. Both pleadings discuss Debtor’s discharge and the Judgment Lien’s avoidance. Therefore, the Court finds that Creditor obtained actual knowledge of the discharge injunction when it received the Contempt Motion on January 23, 2019.

Debtor has satisfied her burden to establish by clear and convincing evidence that Creditor willfully violated the § 524(a)(2) discharge injunction. Creditor is in contempt for its failure to comply with the Avoidance Order, the Discharge Order, and the Release Order.

III. Debtor is Entitled to Damages and Non-Compensatory Sanctions as a Result of Creditor’s Contempt.

“Section 524(c) does not specifically authorize monetary relief for a violation of the discharge injunction, but courts may award actual damages based on their inherent contempt power.” *Joseph*, 584 B.R. at 705 (citation omitted). “If contempt is present, the court may sanction the contemnor by awarding damages and attorneys’ fees to the debtor.” *Frambes*, 2012

⁶ The Federal Deposit Insurance Corporation’s BankFind website, <https://research.fdic.gov/bankfind>, allows users to search for FDIC-insured banking institutions. The search results for “Capital One Bank” indicate that it is an assumed name for Capital One, National Association, which has been FDIC insured since 1934, and for Capital One Bank (USA), National Association, which has been FDIC insured since 1994.

WL 400735, at *7 (citations omitted). “A court may also award ‘mild non-compensatory punitive damages’ as necessary to enforce the Bankruptcy Code,” under § 105(a). *Joseph*, 584 B.R. at 705 (quoting *In re Biery*, 543 B.R. 267, 297 (Bankr. E.D. Ky. 2015)).

Sanctions are warranted in this case. Creditor’s Judgment Lien has improperly been a cloud over Debtor’s real estate interests in Scott County, Kentucky for more than thirteen years. Creditor has had knowledge of this matter at least since January 23, 2019. Despite having the opportunity to make written and oral arguments before this Court, and to remedy its ongoing discharge injunction violation, Creditor chose to do neither. Creditor’s failure to act demonstrates its abject disregard for three separate Orders of this Court—the Discharge Order, the Avoidance Order, and the Release Order—and for its obligations under the Bankruptcy Code.

The record supports an award of the damages Debtor requested as outlined above. Her damage claims directly result from Creditor’s failure to release the Judgment Lien and violation of the discharge injunction. Debtor would not have incurred either of the filing fees or been forced to accept a reduced portion of the Pokeberry Property sale proceeds had Creditor released its Lien. Creditor’s violation also directly yielded Debtor’s suffering of tremendous stress and embarrassment during the prolonged delay of the Pokeberry sale, as well as the erosion of her familial relationships. The Court will award Debtor actual damages of \$2,500 for that delay, stress, and embarrassment. Debtor is awarded \$7,773 for the two filing fees and the sale proceeds reduction as well.

Debtor also requests an award of attorney’s fees. “[T]he Court has the discretion to award attorneys’ fees [when a discharge violation has occurred] and in doing so, must find them to be reasonable.” *Frambes*, 2012 WL 400735, at *7 (citing, *inter alia*, *Duling v. First Fed.*

Bank of the Midwest (In re Duling), 360 B.R. 643, 647 (Bankr. N.D. Ohio 2006) (“The sanctions imposed by a court *may* include . . . *reasonable* attorney fees.”) (emphasis added in *Frambes*)). Mr. Kermode’s invoice supports Debtor’s assertion that he spent 21.8 hours representing her in this matter, and the Court finds that amount of time reasonable. While Mr. Kermode stated that he has charged \$350 per hour in cases in which he represented trustees, the Court believes that a \$275 hourly rate is reasonable in this particular matter. Debtor is awarded \$5,995 in attorney’s fees.

Debtor also seeks an award of mild non-compensatory damages in an amount that the Court deems appropriate. “The filing of and refusal to release an invalid lien is taken seriously in Kentucky” *Currier*, 762 F.3d at 535 (citations omitted). Although *Currier* was decided in the context of a Fair Debt Collection Practices Act claim, its recognition of the seriousness of a creditor’s failure to timely release an invalid lien in Kentucky is persuasive.

Creditor could have easily complied with the Court’s Discharge, Avoidance, and Release Orders by releasing the Judgment Lien. As a sizeable financial institution that is often involved in bankruptcy cases in this Court, it is highly likely that Creditor has an internal procedure for responding to an order avoiding a lien under § 522(f). When it received the Contempt Motion, Creditor could have filed a response or attended either of the two hearings on the Motion. Creditor also could have simply released the Judgment Lien and resolved any related issues with Debtor outside of court. Instead, Creditor elected not to participate in this case or release the Lien, and to ignore three separate Orders without explanation. Creditor’s failure to participate and to comply with the Court’s Discharge, Avoidance, and Release Orders warrants an award of mild non-compensatory damages. The Court awards Debtor mild non-compensatory damages of \$7,500.

The Court also finds that an additional coercive sanction may be warranted. Although the Release Order states that “Debtor is authorized to present [the] Order to the applicable recording office and the designated recording officer shall note the release in the applicable lien records,” Debtor argues that doing so may not be a valid lien release under Kentucky law. *See* Supplemental Brief at 2-3 (citing K.R.S. § 382.290; *Ethington, et al. v. Rigg*, 173 Ky. 355, 358 (1917)). The Court declines to comment on that issue of state law, but in light of the 13 years between avoidance of the Judgment Lien and the entry of this Order, the Court finds that a sanction to coerce Creditor into complying with the Discharge Order, Avoidance Order, and Release Order is appropriate if the Judgment Lien has not been released. No earlier than 14 days after service of this Order, the Court will require Debtor to file a notice stating whether the Judgment Lien is released and serve same on Creditor. If the Judgment Lien has not been released, the Court will require Creditor to pay Debtor \$100 per day, commencing on the date that Debtor files the notice and continuing until the Judgment Lien is released.

CONCLUSION

IT IS HEREBY ORDERED as follows:

1. The Contempt Motion [ECF No. 19] is GRANTED.
2. Creditor is in contempt for violating the discharge injunction imposed by § 524(a)(2).
3. Within three days of the entry hereof, counsel for Debtor shall serve a copy of this Order on Creditor in the manner that Bankruptcy Rule 7004(h) requires and shall file a certificate of service as required by KYEB LBR 9022-1(b).

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

Case 05-55697-tnw Doc 39 Filed 05/28/19 Entered 05/28/19 12:07:56 Desc Main Document Page 16 of 16

4. Debtor is awarded \$10,273 in actual damages, attorney's fees totaling \$5,995, and mild non-compensatory damages of \$7,500 (total \$23,768). Within 14 days of the service of this Order, Creditor shall pay this amount to Debtor.

5. No earlier than 14 days after service of this Order, Debtor shall file a notice in the record of this case stating whether the Judgment Lien is released and serve same on Creditor in the manner that Bankruptcy Rule 7004(h) requires. If the Judgment Lien has not been released, Creditor shall pay Debtor \$100 per day, commencing on the date Debtor files the notice and continuing until Creditor releases the Judgment Lien and files a notice of same in the record of this case.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.



Signed By:
Tracey N. Wise
Bankruptcy Judge
Dated: Tuesday, May 28, 2019
(tnw)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAGGART v. LORENZEN, EXECUTOR OF THE ESTATE OF BROWN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–489. Argued April 24, 2019—Decided June 3, 2019

Petitioner Bradley Taggart formerly owned an interest in an Oregon company. That company and two of its other owners, who are among the respondents here, filed suit in Oregon state court, claiming that Taggart had breached the company’s operating agreement. Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code. At the conclusion of that proceeding, the Federal Bankruptcy Court issued a discharge order that released Taggart from liability for most prebankruptcy debts. After the discharge order issued, the Oregon state court entered judgment against Taggart in the prebankruptcy suit and awarded attorney’s fees to respondents. Taggart returned to the Federal Bankruptcy Court, seeking civil contempt sanctions against respondents for collecting attorney’s fees in violation of the discharge order. The Bankruptcy Court ultimately held respondents in civil contempt. The Bankruptcy Appellate Panel vacated the sanctions, and the Ninth Circuit affirmed the panel’s decision. Applying a subjective standard, the Ninth Circuit concluded that a “creditor’s good faith belief” that the discharge order “does not apply to the creditor’s claim precludes a finding of contempt, even if the creditor’s belief is unreasonable.” 888 F. 3d 438, 444.

Held: 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. Pp. 4–11.

(a) This conclusion rests on a longstanding interpretive principle: When a statutory term is “obviously transplanted from another legal source,” it “brings the old soil with it.” *Hall v. Hall*, 584 U. S. ___, ___. Here, the bankruptcy statutes specifying that a discharge order “operates as an injunction,” 11 U. S. C. §524(a)(2), and that a court

Syllabus

may issue any “order” or “judgment” that is “necessary or appropriate” to “carry out” other bankruptcy provisions, §105(a), bring with them the “old soil” that has long governed how courts enforce injunctions. In cases outside the bankruptcy context, this Court has said that civil contempt “should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant’s conduct.” *California Artificial Stone Paving Co. v. Molitor*, 113 U. S. 609, 618. This standard is generally an objective one. A party’s subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable. Subjective intent, however, is not always irrelevant. Civil contempt sanctions may be warranted when a party acts in bad faith, and a party’s good faith may help to determine an appropriate sanction. These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. Under the fair ground of doubt standard, civil contempt may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope. Pp. 5–7.

(b) The standard applied by the Ninth Circuit is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. Taggart, meanwhile, argues for a standard that would operate much like a strict-liability standard. But his proposal often may lead creditors to seek advance determinations as to whether debts have been discharged, creating the risk of additional federal litigation, additional costs, and additional delays. His proposal, which follows the standard some courts have used to remedy violations of automatic stays, also ignores key differences in text and purpose between the statutes governing automatic stays and discharge orders. Pp. 7–11.

888 F. 3d 438, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 18–489

BRADLEY WESTON TAGGART, PETITIONER *v.*
SHELLEY A. LORENZEN, EXECUTOR OF THE
ESTATE OF STUART BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 3, 2019]

JUSTICE BREYER delivered the opinion of the Court.

At the conclusion of a bankruptcy proceeding, a bankruptcy court typically enters an order releasing the debtor from liability for most prebankruptcy debts. This order, known as a discharge order, bars creditors from attempting to collect any debt covered by the order. See 11 U. S. C. §524(a)(2). The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection.

The Bankruptcy Court, in holding the creditors here in civil contempt, applied a standard that it described as akin to “strict liability” based on the standard’s expansive scope. *In re Taggart*, 522 B. R. 627, 632 (Bkrtcy. Ct. Ore. 2014). It held that civil contempt sanctions are permissible, irrespective of the creditor’s beliefs, so long as the creditor was “‘aware of the discharge’” order and “‘intended the actions which violate[d]’” it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d 1384, 1390 (CA11 1996)). The Court of Appeals for the Ninth Circuit, however, disagreed with

Opinion of the Court

that standard. Applying a subjective standard instead, it concluded that a court cannot hold a creditor in civil contempt if the creditor has a “good faith belief” that the discharge order “does not apply to the creditor’s claim.” *In re Taggart*, 888 F. 3d 438, 444 (2018). That is so, the Court of Appeals held, “even if the creditor’s belief is unreasonable.” *Ibid.*

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.

I

Bradley Taggart, the petitioner, formerly owned an interest in an Oregon company, Sherwood Park Business Center. That company, along with two of its other owners, brought a lawsuit in Oregon state court, claiming that Taggart had breached the Business Center’s operating agreement. (We use the name “Sherwood” to refer to the company, its two owners, and—in some instances—their former attorney, who is now represented by the executor of his estate. The company, the two owners, and the executor are the respondents in this case.)

Before trial, Taggart filed for bankruptcy under Chapter 7 of the Bankruptcy Code, which permits insolvent debtors to discharge their debts by liquidating assets to pay creditors. See 11 U. S. C. §§704(a)(1), 726. Ultimately, the Federal Bankruptcy Court wound up the proceeding and issued an order granting him a discharge. Taggart’s discharge order, like many such orders, goes no further than the statute: It simply says that the debtor “shall be granted a discharge under §727.” App. 60; see *United*

Opinion of the Court

States Courts, Order of Discharge: Official Form 318 (Dec. 2015), http://www.uscourts.gov/sites/default/files/form_b318_0.pdf (as last visited May 31, 2019). Section 727, the statute cited in the discharge order, states that a discharge relieves the debtor “from all debts that arose before the date of the order for relief,” “[e]xcept as provided in section 523.” §727(b). Section 523 then lists in detail the debts that are exempt from discharge. §§523(a)(1)–(19). The words of the discharge order, though simple, have an important effect: A discharge order “operates as an injunction” that bars creditors from collecting any debt that has been discharged. §524(a)(2).

After the issuance of Taggart’s federal bankruptcy discharge order, the Oregon state court proceeded to enter judgment against Taggart in the prebankruptcy suit involving Sherwood. Sherwood then filed a petition in state court seeking attorney’s fees that were incurred *after* Taggart filed his bankruptcy petition. All parties agreed that, under the Ninth Circuit’s decision in *In re Ybarra*, 424 F. 3d 1018 (2005), a discharge order would normally cover and thereby discharge postpetition attorney’s fees stemming from prepetition litigation (such as the Oregon litigation) *unless* the discharged debtor “‘returned to the fray’” after filing for bankruptcy. *Id.*, at 1027. Sherwood argued that Taggart had “returned to the fray” postpetition and therefore was liable for the postpetition attorney’s fees that Sherwood sought to collect. The state trial court agreed and held Taggart liable for roughly \$45,000 of Sherwood’s postpetition attorney’s fees.

At this point, Taggart returned to the Federal Bankruptcy Court. He argued that he had not returned to the state-court “fray” under *Ybarra*, and that the discharge order therefore barred Sherwood from collecting postpetition attorney’s fees. Taggart added that the court should hold Sherwood in civil contempt because Sherwood had violated the discharge order. The Bankruptcy Court did

Opinion of the Court

not agree. It concluded that Taggart had returned to the fray. Finding no violation of the discharge order, it refused to hold Sherwood in civil contempt.

Taggart appealed, and the Federal District Court held that Taggart had not returned to the fray. Hence, it concluded that Sherwood violated the discharge order by trying to collect attorney's fees. The District Court remanded the case to the Bankruptcy Court.

The Bankruptcy Court, noting the District Court's decision, then held Sherwood in civil contempt. In doing so, it applied a standard it likened to "strict liability." 522 B. R., at 632. The Bankruptcy Court held that civil contempt sanctions were appropriate because Sherwood had been "aware of the discharge" order and "intended the actions which violate[d]" it. *Ibid.* (quoting *In re Hardy*, 97 F. 3d, at 1390). The court awarded Taggart approximately \$105,000 in attorney's fees and costs, \$5,000 in damages for emotional distress, and \$2,000 in punitive damages.

Sherwood appealed. The Bankruptcy Appellate Panel vacated these sanctions, and the Ninth Circuit affirmed the panel's decision. The Ninth Circuit applied a very different standard than the Bankruptcy Court. It concluded that a "creditor's good faith belief" that the discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." 888 F. 3d, at 444. Because Sherwood had a "good faith belief" that the discharge order "did not apply" to Sherwood's claims, the Court of Appeals held that civil contempt sanctions were improper. *Id.*, at 445.

Taggart filed a petition for certiorari, asking us to decide whether "a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt." Pet. for Cert. I. We granted certiorari.

II

The question before us concerns the legal standard for

Opinion of the Court

holding a creditor in civil contempt when the creditor attempts to collect a debt in violation of a bankruptcy discharge order. Two Bankruptcy Code provisions aid our efforts to find an answer. The first, section 524, says that a discharge order “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset” a discharged debt. 11 U. S. C. §524(a)(2). The second, section 105, authorizes a court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” §105(a).

In what circumstances do these provisions permit a court to hold a creditor in civil contempt for violating a discharge order? In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.

A

Our conclusion rests on a longstanding interpretive principle: When a statutory term is “obviously transplanted from another legal source,” it “brings the old soil with it.” *Hall v. Hall*, 584 U. S. ____, ____ (2018) (slip op., at 13) (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)); see *Field v. Mans*, 516 U. S. 59, 69–70 (1995) (applying that principle to the Bankruptcy Code). Here, the statutes specifying that a discharge order “operates as an injunction,” §524(a)(2), and that a court may issue any “order” or “judgment” that is “necessary or appropriate” to “carry out” other bankruptcy provisions, §105(a), bring with them the “old soil” that has long governed how courts enforce injunctions.

That “old soil” includes the “potent weapon” of civil contempt. *Longshoremen v. Philadelphia Marine Trade Assn.*, 389 U. S. 64, 76 (1967). Under traditional princi-

Opinion of the Court

ples of equity practice, courts have long imposed civil contempt sanctions to “coerce the defendant into compliance” with an injunction or “compensate the complainant for losses” stemming from the defendant’s noncompliance with an injunction. *United States v. Mine Workers*, 330 U. S. 258, 303–304 (1947); see D. Dobbs & C. Roberts, *Law of Remedies* §2.8, p. 132 (3d ed. 2018); J. High, *Law of Injunctions* §1449, p. 940 (2d ed. 1880).

The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the “old soil” they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.

In cases outside the bankruptcy context, we have said that civil contempt “should not be resorted to where there is [a] *fair ground of doubt* as to the wrongfulness of the defendant’s conduct.” *California Artificial Stone Paving Co. v. Molitor*, 113 U. S. 609, 618 (1885) (emphasis added). This standard reflects the fact that civil contempt is a “severe remedy,” *ibid.*, and that principles of “basic fairness requir[e] that those enjoined receive explicit notice” of “what conduct is outlawed” before being held in civil contempt, *Schmidt v. Lessard*, 414 U. S. 473, 476 (1974) (*per curiam*). See *Longshoremen, supra*, at 76 (noting that civil contempt usually is not appropriate unless “those who must obey” an order “will know what the court intends to require and what it means to forbid”); 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* §2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party’s attempt at compliance was “reasonable”).

This standard is generally an *objective* one. We have explained before that a party’s subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively un-

Opinion of the Court

reasonable. As we said in *McComb v. Jacksonville Paper Co.*, 336 U. S. 187 (1949), “[t]he absence of wilfulness does not relieve from civil contempt.” *Id.*, at 191.

We have not held, however, that subjective intent is always irrelevant. Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith. See *Chambers v. NASCO, Inc.*, 501 U. S. 32, 50 (1991). Thus, in *McComb*, we explained that a party’s “record of continuing and persistent violations” and “persistent contumacy” justified placing “the burden of any uncertainty in the decree . . . on [the] shoulders” of the party who violated the court order. 336 U. S., at 192–193. On the flip side of the coin, a party’s good faith, even where it does not bar civil contempt, may help to determine an appropriate sanction. Cf. *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787, 801 (1987) (“[O]nly the least possible power adequate to the end proposed should be used in contempt cases” (quotation altered)).

These traditional civil contempt principles apply straightforwardly to the bankruptcy discharge context. The typical discharge order entered by a bankruptcy court is not detailed. See *supra*, at 2–3. Congress, however, has carefully delineated which debts are exempt from discharge. See §§523(a)(1)–(19). Under the fair ground of doubt standard, civil contempt therefore may be appropriate when the creditor violates a discharge order based on an objectively unreasonable understanding of the discharge order or the statutes that govern its scope.

B

The Solicitor General, *amicus* here, agrees with the fair ground of doubt standard we adopt. Brief for United States as *Amicus Curiae* 13–15. And the respondents stated at oral argument that it would be appropriate for courts to apply that standard in this context. Tr. of Oral

Opinion of the Court

Arg. 43. The Ninth Circuit and petitioner Taggart, however, each believe that a different standard should apply.

As for the Ninth Circuit, the parties and the Solicitor General agree that it adopted the wrong standard. So do we. The Ninth Circuit concluded that a “creditor’s good faith belief” that the discharge order “does not apply to the creditor’s claim precludes a finding of contempt, even if the creditor’s belief is unreasonable.” 888 F. 3d, at 444. But this standard is inconsistent with traditional civil contempt principles, under which parties cannot be insulated from a finding of civil contempt based on their subjective good faith. It also relies too heavily on difficult-to-prove states of mind. And it may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide.

Taggart, meanwhile, argues for a standard like the one applied by the Bankruptcy Court. This standard would permit a finding of civil contempt if the creditor was aware of the discharge order and intended the actions that violated the order. Brief for Petitioner 19; cf. 522 B. R., at 632 (applying a similar standard). Because most creditors are aware of discharge orders and intend the actions they take to collect a debt, this standard would operate much like a strict-liability standard. It would authorize civil contempt sanctions for a violation of a discharge order regardless of the creditor’s subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor’s conduct did not violate the order. Taggart argues that such a standard would help the debtor obtain the “fresh start” that bankruptcy promises. He adds that a standard resembling strict liability would be fair to creditors because creditors who are unsure whether a debt has been discharged can head to federal bankruptcy court and

Opinion of the Court

obtain an advance determination on that question before trying to collect the debt. See Fed. Rule Bkrcty. Proc. 4007(a).

We doubt, however, that advance determinations would provide a workable solution to a creditor's potential dilemma. A standard resembling strict liability may lead risk-averse creditors to seek an advance determination in bankruptcy court even where there is only slight doubt as to whether a debt has been discharged. And because discharge orders are written in general terms and operate against a complex statutory backdrop, there will often be at least some doubt as to the scope of such orders. Taggart's proposal thus may lead to frequent use of the advance determination procedure. Congress, however, expected that this procedure would be needed in only a small class of cases. See 11 U. S. C. §523(c)(1) (noting only three categories of debts for which creditors must obtain advance determinations). The widespread use of this procedure also would alter who decides whether a debt has been discharged, moving litigation out of state courts, which have concurrent jurisdiction over such questions, and into federal courts. See 28 U. S. C. §1334(b); Advisory Committee's 2010 Note on subd. (c)(1) of Fed. Rule Civ. Proc. 8, 28 U. S. C. App., p. 776 (noting that "whether a claim was excepted from discharge" is "in most instances" not determined in bankruptcy court).

Taggart's proposal would thereby risk additional federal litigation, additional costs, and additional delays. That result would interfere with "a chief purpose of the bankruptcy laws": "to secure a prompt and effectual" resolution of bankruptcy cases "within a limited period." *Katchen v. Landy*, 382 U. S. 323, 328 (1966) (quoting *Ex parte Christy*, 3 How. 292, 312 (1844)). These negative consequences, especially the costs associated with the added need to appear in federal proceedings, could work to the disadvantage of debtors as well as creditors.

Opinion of the Court

Taggart also notes that lower courts often have used a standard akin to strict liability to remedy violations of automatic stays. See Brief for Petitioner 21. An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that “an individual injured by any willful violation” of an automatic stay “shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” 11 U. S. C. §362(k)(1). This language, however, differs from the more general language in section 105(a). *Supra*, at 5. The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart’s proposal to warrant its rejection. (We note that the automatic stay provision uses the word “willful,” a word the law typically does not associate with strict liability but “whose construction is often dependent on the context in which it appears.” *Safeco Ins. Co. of America v. Burr*, 551 U. S. 47, 57 (2007) (quoting *Bryan v. United States*, 524 U. S. 184, 191 (1998)). We need not, and do not, decide whether the word “willful” supports a standard akin to strict liability.)

III

We conclude that the Court of Appeals erred in applying a subjective standard for civil contempt. Based on the traditional principles that govern civil contempt, the proper standard is an objective one. A court may hold a creditor in civil contempt for violating a discharge order where there is not a “fair ground of doubt” as to whether the creditor’s conduct might be lawful under the discharge order. In our view, that standard strikes the “careful

Opinion of the Court

balance between the interests of creditors and debtors” that the Bankruptcy Code often seeks to achieve. *Clark v. Rameker*, 573 U. S. 122, 129 (2014).

Because the Court of Appeals did not apply the proper standard, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Chapter 7
Joshua Aaron Newberry, Case No. 19-30726-jda
Debtor. Hon. Joel D. Applebaum
_____ /

**OPINION GRANTING DEBTOR’S MOTION TO HOLD
RPM AUTO SALES, INC. IN CONTEMPT OF COURT FOR VIOLATION OF
THE AUTOMATIC STAY**

The matter before the Court is Debtor’s motion to hold RPM Auto Sales, Inc. in contempt for violating the automatic stay by retaining funds received from the garnishment of Debtor’s state tax refund. For the reasons set forth below, this Court GRANTS Debtor’s motion for contempt for violation of the automatic stay and for actual damages. Debtor has fifteen days to submit support for his request for actual costs under § 362(k) of the Bankruptcy Code.

Jurisdiction

This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O), over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334. An order awarding damages under § 362(k)(1) of the Bankruptcy Code is a final order. *See In re Webb*, 2012 WL 2329051 at *5 (6th Cir. BAP Apr. 9, 2012). “[B]ecause ‘[a] claim under § 362(k)(1) for an automatic stay violation ... derives directly from the Bankruptcy Code’ and ‘necessarily stems from the bankruptcy itself,’ the Court has the constitutional authority to enter a final order in this matter after *Stern v. Marshall*, 564 U.S. 462 (2011).” *In re Johnson*, 580 B.R. 766, 769 (Bankr. S.D. Ohio 2018) (internal citations omitted).

Factual Background

The facts of this case are uncontested. On July 23, 2018, RPM filed a Request and Writ for Garnishment (Income Tax Refund/Credit) (the “Writ”) against Debtor in the District Court for the 73A Judicial District located in Sandusky, Michigan. The district court issued the Writ on July 31, 2018. In the portion of the Writ addressed “**TO THE DEFENDANT,**” the Writ states:

You have **14 days** after being notified of an intercept to file objections to the writ of garnishment with the court. If you do not object within this time, the intercepted tax refund or credit held under this writ will be applied to the judgment **28 days** after the disclosure was filed with the court. (emphasis in original)

On November 1, 2018, the Writ was served on both the State of Michigan and Debtor. Sometime prior to March 5, 2019, Debtor filed his 2018 State of Michigan Income Tax Return and, on March 5, 2019, the Michigan Department of Treasury issued its Garnishment Disclosure, serving both RPM and Debtor. The Garnishment Disclosure stated that Debtor’s 2018 State of Michigan income tax refund in the amount of \$665.43 would be sent to RPM care of its counsel in “28 days from the date of the Garnishment Disclosure” and, further, “[*I*ff a garnishment release, satisfaction of judgment, or *bankruptcy notice* (validated by the court) *is received in our office within the 28 days, we [State of Michigan] will issue a refund to the principal defendant or bankruptcy trustee if there are no other debts to be paid.*” (emphasis added). The Garnishment Disclosure form did not indicate that the 14-day objection period had begun to run.

On March 26, 2019, after the expiration of the 14-day objection period but within the 28-day bankruptcy notice period, Debtor filed his voluntary petition under chapter 7 of the Bankruptcy Code. RPM was properly notified of Debtor’s bankruptcy filing on that day.¹ On April 1, 2019,

¹ Debtor identified the tax refund on his Schedule A/B and claimed it as exempt property under § 522(b) of the Bankruptcy Code on Schedule C. No objections were filed to Debtor’s claim of exemption. Debtor was subsequently granted a discharge on July 23, 2019.

RPM received a check from the Michigan Department of Treasury in the amount of \$655.43 as a result of RPM's garnishment.

On at least one occasion, Debtor's counsel spoke with RPM's counsel and requested that the refund be turned over to Debtor. RPM refused counsel's request. On May 15, 2019, Debtor filed this Motion to Hold RPM Auto Sales, Inc. in Contempt of Court for Violation of the Automatic Stay on the grounds that RPM's acceptance of the tax refund, and its subsequent refusal to turn the money over to Debtor, constituted violations of the automatic stay. Debtor seeks the garnished funds, along with attorneys' fees and costs pursuant to 11 U.S.C. § 362(k)(1). Debtor is not seeking punitive damages in this case.

On June 5, 2019, RPM filed its response to Debtor's Motion, arguing that the tax refund was not property of Debtor or the bankruptcy estate and, therefore, RPM's retention of the funds could not be a stay violation. RPM also argues that the post-petition receipt of an income tax refund resulting exclusively from a pre-petition garnishment is not an act in violation of the automatic stay. A hearing on the motion was held on July 24, 2019, at which time the Court took the matter under advisement.

There are two issues now before the Court. First, did RPM violate the automatic stay when it received the tax refund and then refused to turn it over to Debtor and, second, if RPM violated the automatic stay, was the violation willful such that Debtor is entitled to an award of actual damages, including attorney's fees and costs, pursuant to § 362(k)(1) of the Bankruptcy Code. The Court has reviewed the excellent papers submitted by the parties and has had the opportunity to fully consider this matter. For the reasons explained below, the Court concludes that RPM did willfully violate the automatic stay and, therefore, Debtor's motion is GRANTED.

Legal Analysis

The automatic stay goes into effect immediately upon the filing of a bankruptcy petition, prohibiting certain actions against the debtor or property of the bankruptcy estate. It is considered “one of the fundamental debtor protections provided by the bankruptcy laws.” *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 503 (1986). The automatic stay is designed to provide blanket relief from creditor action once the bankruptcy case has commenced to provide breathing space so that the debtor may reorganize his or her affairs. *In re Banks*, 253 B.R. 25, 29 (Bankr. E.D. Mich. 2000). The protections provided by the automatic stay are set forth in 11 U.S.C. § 362(a), which provides in pertinent part:

(a) [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of-

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor ...;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
- (4) any act to create, perfect, or enforce any lien against property of the estate; [and]
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[.]

The automatic stay also protects against actions against the debtor or property of the debtor. As used in § 362(a), the “stay protects exempt assets that cease to be property of the estate and assets acquired after the commencement of a case . . .,” 3 *Collier on Bankruptcy* ¶ 362.03[4] (Richard Levin & Henry J. Sommers eds., 16th ed.) and “property acquired by an individual debtor after the

date of the filing of the petition, exempt property, abandoned property, and property that does not become a part of the estate such as the debtor's beneficial interest in a spendthrift trust. The purpose of this stay is to prevent preferential treatment of certain creditors and circumvention of the discharge." *Id.* at ¶362.03[7].

Under § 541(a)(1), property of the estate includes "all or legal or equitable interests of the debtor in property as of the commencement of the case." "[T]he term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed'. . . . In fact, every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993), *abrogated on other grounds by Law v. Siegel*, 571 U.S. 415 (2014). Even a bare possessory interest such as a tenancy at sufferance, is "an interest in real property within the scope of the estate in bankruptcy under section 541." *Convenient Food Mart No. 144, Inc. v. Convenient Ind. Of America, Inc. (In re Convenient Food Mart No. 144, Inc.)*, 968 F.2d 592, 594 (6th Cir. 1992) (internal citations omitted).

Although the issue of what property is included in the debtor's bankruptcy estate raises a federal question, a debtor's property rights are created and defined by state law. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992); *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 700 (6th Cir. 1999). Here, the applicable state law is Mich. Comp. Laws §§ 600.4061 and 600.4061a, which address the procedures governing garnishments of state tax refunds.

Section 600.4061 sets out the procedures a plaintiff must follow in a garnishment proceeding in which the State of Michigan is the garnishee. Section 600.4061a, in turn, sets forth the obligations of the State as garnishee in responding to a properly served writ of garnishment. Under this section, barring a timely objection, the state treasurer is required to intercept a state tax

AMERICAN BANKRUPTCY INSTITUTE

refund, calculate the amount available from the interception to satisfy all or part of the garnishment, file with the court and serve a garnishment disclosure upon the plaintiff and defendant, and either deposit the money into the court or pay it to plaintiff's attorney of record in the garnishment action. "Objections to the writ of garnishment of a tax refund must be filed with the court within 14 days after the date of service of the disclosure on the defendant." MCL § 600.4061a(2). It is undisputed that, in the present case, Debtor did not object to the writ of garnishment within 14 days after service of the Garnishment Disclosure on him. It is equally undisputed that the 14-day objection period expired prior the petition date.

The first question presented in this case is whether the tax refund was property of the estate or property of the debtor for purposes of § 362(a). Based on its review of the statutes, this Court finds that Debtor's failure to object to the writ of garnishment within the 14-day objection period in MCL § 600.4061a did not entirely divest Debtor of any interest in the tax refund at issue. The 14-day objection period contained in MCL § 600.4061a mirrors the 14-day objection period contained in Michigan Court Rule 3.101, the court rule governing garnishments generally.² Under MCR 3.101, it is a valid objection to a writ of garnishment that the "garnishment is precluded by the pendency of bankruptcy proceedings." MCR 3.101(K)(2)(b). More importantly, while objections to a writ of garnishment under this court rule "shall be filed within 14 days of the date of service of the writ on the defendant . . .," the rule explicitly recognizes that "[o]bjections may be filed after the time provided in this subrule but [late filed objections] do not suspend payment pursuant to subrule (J) unless ordered by the court." MCR 3.101(K)(1) (emphasis added). Similarly, the state-approved tax refund garnishment disclosure form states:

If a garnishment release, satisfaction of judgment, or bankruptcy notice (validated by the court) is received in our office within the 28 days, we [State of Michigan]

² Section 600.4061a recognizes that "Michigan court rules that do not conflict with this section or section 4061 govern a garnishment in which the state is a garnishee." Mich. Comp. Laws § 600.4061a(7).

will issue a refund to the principal defendant or bankruptcy trustee if there are no other debts to be paid.”

(Emphasis added). This language also contemplates a debtor/defendant’s right to file objections or notices of bankruptcy beyond the 14-day objection period.

Because MCL § 600.4061a and MCR 3.101(K)(1) envision the possibility of an objection to a tax refund garnishment *after* the expiration of the 14-day objection period, the expiration of the 14-day objection period cannot give RPM an unconditional right to the tax refund or cause Debtor to lose all legal or equitable right in the tax refund. As such, the tax refund was property of the estate to which the automatic stay applied, and which was exempted by Debtor under § 522 of the Bankruptcy Code.

The Court also relies on two cases from this district -- *In re Manuel*, 2014 WL 7405471 (Bankr. E.D. Mich. December 24, 2014) and *In re McCall-Pruitt*, 281 B.R. 910 (Bankr. E.D. Mich. 2002) -- in support of its finding that RPM willfully violated the automatic stay. In *McCall-Pruitt*, the debtor argued that a creditor violated the automatic stay by accepting funds from the State of Michigan pursuant to a pre-petition income tax garnishment. In response, the creditor argued that, by virtue of its garnishment, it held a perfected pre-petition lien in the tax refund and, therefore, was entitled to retain the funds received. Alternatively, the creditor argued that it did not violate the stay because it took no post-petition action to collect a debt, but merely accepted the funds from the State. *Id.* at 911. While the court recognized that the creditor’s security interest in the tax refund was perfected at the time that the writ of garnishment was served, the court found that whether the creditor held a perfected security interest in the tax refund irrelevant to the question of whether the automatic stay applied and was violated. Because the stay applies to all creditors, secured and unsecured alike, the court held that the creditor had an affirmative duty to halt or reverse any collection efforts commenced pre-petition upon receiving notice of the bankruptcy

filing, including releasing the garnishment at issue. *Id.* at 912. Understood in the court’s ruling was a finding that the debtor or the estate had an interest in the tax refund that continued post-petition.³

In *Manuel*, the creditor refused to release a pending writ of garnishment of the debtor’s anticipated Michigan state income tax refund and refused to release the funds which it received from the state treasurer post-petition. As in *McCall-Pruitt*, the creditor argued that it held a perfected pre-petition lien once the garnishment was served on the State of Michigan and, accordingly, it was not required to release the writ of garnishment or, once received, return the garnished funds to the debtor. Alternatively, the creditor argued that it should be permitted to hold the funds to preserve its lien and file a motion for relief from stay as the *McCall-Pruitt* court permitted the creditor to do in that case. Relying on *McCall-Pruitt*, the *Manuel* court concluded that, while the creditor may hold a perfected lien in the tax refund, that “is irrelevant to the question before the Court: did [the creditor] violate the automatic stay by accepting funds postpetition pursuant to a prepetition lien?” The court held that “the scope of the automatic stay encompasses more than property of the estate – it prohibits the continuation of actions or proceedings against property of the estate *or against the Debtor.*” *Id.* at *1 (emphasis in original). Because the court found that the debtor retained an interest in the tax refund notwithstanding the creditor’s lien, the court concluded that the creditor willfully violated the automatic stay and awarded damages, including punitive damages under § 362(k) of the Bankruptcy Code.⁴

³ The *McCall-Pruitt* court did not order the creditor to immediately turn over the funds to the debtor. In order to preserve the creditor’s ability to protect its lien, the court permitted the creditor to continue to hold the funds provided it sought relief from the automatic stay within 30 days. Moreover, despite finding that the creditor willfully violated the automatic stay, the court did not award actual damages or address § 362(k).

⁴ The *Manuel* court did not address the creditor’s alternative argument that it should be permitted to retain the refund and file a motion for relief from stay.

In both *Manuel* and *McCall-Pruitt*, the creditors argued that their perfected liens somehow obviated the automatic stay, an argument rejected by both courts. The issue of whether the debtors were divested pre-petition of any interest in the tax refunds under the MCL 600.4061a was never raised in either case. Nevertheless, the courts correctly assumed that the debtors or their bankruptcy estates had a continuing post-petition interest in the tax refunds, an assumption this Court expressly adopts. Based on both the statutes and case law, this Court expressly finds that, at the time of the bankruptcy filing, the tax refund was property of the bankruptcy estate. Consequently, the automatic stay applied to the tax refund, and RPM's refusal to take steps to halt the garnishment or turn the refund over to Debtor constituted willful stay violations.

RPM raises two arguments in support of its position that the garnishment was not property of the estate. First, RPM argues here that Debtor lost all legal or equitable interest in the tax refund when he failed to object to the writ of garnishment within the applicable 14-day period; a period that expired prior to the petition date. According to RPM, because the tax refund was no longer property in which Debtor or the estate held an interest at the time of the bankruptcy filing, it was not property of the estate, and the automatic stay did not apply. RPM argues, therefore, that it was not required to turn the tax refund over to Debtor and the motion for contempt must be denied.

RPM relies on *Johnson v. Cach, LLC (In re Johnson)*, 2010 WL 5296944 (E.D. Mich. December 20, 2010), *vacated*, 2011 WL 7637217 (E.D. Mich. June 14, 2011) and *In re Marsland*, Case No. 16-30563, Dkt. No. 21 (Bankr. E.D. Mich. May 12, 2016), which relies on *Johnson*. In both *Johnson* and *Marsland*, the debtors sought to avoid writs of garnishment served upon the State of Michigan pursuant to § 522(f)(1) of the Bankruptcy Code which allows a debtor to avoid a judicial lien impairing a debtor's exemptions if certain requirements are met. One of the requirements is that "the debtor has an interest in the property." *Harville v. Morris (In re Harville)*,

63 B.R. 371, 372 (Bankr. W.D. Ky. 1986). In the *Johnson* case, upon which *Marsland* relies, the district court found that, because the debtor failed to object to the garnishment disclosure within the 14-day objection period set forth in MCL § 600.4061a, the debtor “lost all legal or equitable right to the \$688 tax refund. Therefore, the refund was not part of the debtor’s estate when she filed a voluntary petition for bankruptcy on May 19, 2010.” *Johnson*. at *3. Because the district court held that the refund was not part of the debtor’s estate, recourse to § 522 of the Bankruptcy Code was unavailable. The *Marsland* court recognized, however, that the filing of a timely objection may preserve an equitable interest in the refund.⁵

This court respectfully disagrees with the district court’s conclusion. The language contained in MCL §§ 600.4061 and 4061a, MCR 3.101, and on the tax refund garnishment disclosure form contemplates a debtor/defendant’s right to file objections or notices of bankruptcy beyond the 14-day objection period and, therefore, the expiration of the 14-day objection period cannot serve to give RPM “an unconditional right” to the tax refund or cause the Debtor to lose “all legal or equitable right” in the tax refund.

Moreover, if *Johnson* is correct, the pre-petition expiration of the 14-day objection period in MCR 3.101(K)(1) (which mirrors MCL § 600.4061a) would similarly cut off the “legal or equitable right” of a debtor in any garnished funds, not just tax refunds. This Court could find no support for such an unprecedented result. *See McCall-Pruitt*, 281 B.R. at 911 (“Courts have overwhelmingly and consistently held that a creditor’s failure to halt collection proceedings after

⁵ The *Johnson* and *Marsland* courts also noted that the loss of any legal or equitable interest did not mean that a transfer did not occur for the purposes of a possible preference action pursuant to §§ 522(h) and 547(b) of the Bankruptcy Code. *Johnson* at *3-4; *Marsland* at p.5, n.3.

a petition is filed violates the automatic stay.”) It is equally unlikely that the district court would announce such a sweeping result in an unpublished opinion that it subsequently vacated.⁶

RPM’s second argument is that the post-petition receipt of a tax refund resulting from a pre-petition garnishment is not an affirmative act that violates the automatic stay. This is an issue which continues to divide courts, not only in connection with tax refunds, *compare McCall- Pruitt*, with *Saults v. First Tennessee Bank (In re Saults)*, 293 B.R. 739 (Bankr. E.D. Tenn. 2002), but in other contexts as well. *Compare In re Fulton*, 926 F.3d 916 (7th Cir. 2019) with *WD Equipment, LLC v. Cowan (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017) (disagreeing whether the refusal to return a vehicle seized or repossessed pre-petition constitutes a violation of the automatic stay). In this district, failing to halt a pre-petition garnishment or receiving funds post-petition and refusing to turn them over to the debtor constitute stay violations.

Having concluded that RPM violated the automatic stay by its refusal to unwind the tax garnishment and by refusing to turn over the garnished funds, the Court also finds that the stay violation was willful. *In re Banks*, 253 B.R. 25, 29 (Bankr. E.D. Mich. 2000) (“A party acts willfully by taking any action prohibited by § 362(a) after the party receives notice of the bankruptcy filing An intent to violate the stay is not necessary.”) (internal citations omitted). A creditor’s good faith belief that it had a right to the property is not relevant to whether the act was willful or whether damages should be imposed. *Id.* Here, it is undisputed that RPM received notice of the bankruptcy filing on the day the case was filed. Debtor’s counsel subsequently called

⁶ The district court’s opinion was appealed to the United States Court of Appeals for the Sixth Circuit. While on appeal to the Sixth Circuit, the parties settled the underlying dispute contingent upon the district court agreeing to vacate its earlier opinion. To that end, the parties filed (i) a motion for an indicative ruling under F.R.Civ.P. 62.1 requesting the district court to confirm that it would vacate its ruling if the case were remanded to it, and (ii) a motion to vacate on the assumption that the Sixth Circuit would agree to remand the case back to the district court. The district court granted the motion for indicative ruling and, following remand, vacated its opinion. *See In re Johnson*, 2011 WL 7637217 (E.D. Mich. June 14, 2011).

RPM's counsel and they discussed recent case law. Nevertheless, RPM refused to turn over the refund to Debtor or seek appropriate relief from the Court.

“[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362(k)(1). Although Debtor is not seeking punitive damages, he is seeking the turnover of the tax refund in the amount of \$665.43, plus “excess costs of [sic] incurred by Debtor’s Counsel in preparing, filing, and prosecuting this motion and for any other relief this Court finds to be just and warranted.” Motion, Dkt. No. 14, at 3. This Court agrees that Debtor is entitled to recover actual damages, including costs and attorneys’ fees.

Conclusion

For the foregoing reasons, Debtor’s Motion to Hold RPM Auto Sales, Inc. in Contempt of Court for Violation of the Automatic Stay is GRANTED. RPM is ordered to turn over the tax refund in the amount of \$655.43 to Debtor within three business days of entry of the Order issued in connection with this Opinion. Although the Court finds that Debtor is entitled to recover his “excess costs,” the amount of such “excess costs” is not set forth in or supported in the motion. Therefore, Debtor shall have 15 days from the date of the entry of this Opinion to file an affidavit with invoices and/or other appropriate attachments indicating the amount being sought under §362(k)(1), including the fees associated with preparing the affidavit. RPM shall then have 7 days after service of the affidavit to file specific written objections, if any, to the amount being sought. If no objections are filed, Debtor shall file a certificate of no objection and proposed order. In the event that objections are timely filed, the Court will schedule an expedited hearing on the issue of

damages. The costs associated with this hearing may, at the Court's discretion, be included in Debtor's damage request.⁷

Not for Publication

Signed on August 09, 2019



/s/ Joel D. Applebaum

Joel D. Applebaum
United States Bankruptcy Judge

⁷ RPM's request, that the Court follow *McCall-Pruitt* and allow RPM to retain the tax refund provided it seeks stay relief within 30 days, is denied. The court in *McCall-Pruitt* does not explain why, in light of its finding of a willful stay violation, actual damages were not awarded. In this case, RPM had *at least* 45 days within which to seek adequate protection or stay relief before Debtor was forced to file the instant motion. Under the circumstances, the Court is unwilling to give RPM an additional 30 days to do what it should have done upon learning of the filing bankruptcy petition.

AMERICAN BANKRUPTCY INSTITUTE

Case 1:15-bk-13347 Doc 36 Filed 10/18/19 Entered 10/18/19 11:10:34 Desc Main Document Page 1 of 15

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

Dated: October 18, 2019

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re)
)
BRITTANY L. MENTION) **Case No. 15-13347**
) **Chapter 7**
Debtor(s)) **Judge Buchanan**
)

MEMORANDUM OPINION AWARDED DAMAGES FOR TOYOTA MOTOR CREDIT'S VIOLATION OF THE DISCHARGE INJUNCTION

[This opinion is not intended for publication or citation.]

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before this Court following a hearing on damages pursuant to its *Order Granting Debtor's Motion for Contempt* [Docket Number 21] (the "Contempt Order") as it relates to Debtor's *Motion for Contempt and Notice*

[Docket Number 19] filed against Toyota Motor Credit Corporation d/b/a/ Toyota Financial Services (“Toyota”).

On December 11, 2018, this Court entered its Contempt Order holding Toyota in contempt of court for violating the discharge injunction by knowingly and willfully seeking to collect a debt from Debtor Brittany Mention (“Ms. Mention”) that was discharged in bankruptcy. Toyota was ordered to cease its collection efforts and report to the three major credit reporting bureaus “forthwith” that Ms. Mention’s debt to Toyota had been discharged in bankruptcy and that the debt was not reaffirmed.

In the Contempt Order, Toyota was ordered to pay Ms. Mention’s attorney fees, actual damages, damages for her pain and suffering and/or punitive damages to be established by separate hearing. A hearing to quantify damages was held on April 18, 2019. Ms. Mention appeared and presented witnesses and exhibits [Docket Numbers 30 – 32 (containing Exs. 1 – 15)]. Toyota did not appear. Following the hearing, Ms. Mention’s counsel filed a brief in support of the requested damages with two additional exhibits¹ which this Court considered in making its determinations [Docket Number 34 (containing Exs. 16 – 17)].

The following constitutes this Court’s findings of facts and conclusions of law pursuant to Rules 9014(c) and 7052(a) of the Federal Rules of Bankruptcy Procedure.

I. FINDINGS OF FACT

A. Toyota’s Erroneous Reporting and Ms. Mention’s Attempts to Fix It

On August 28, 2015, Ms. Mention filed a chapter 7 bankruptcy petition. In early December of 2015, Ms. Mention amended her Statement of Intent and Schedule G to reject a vehicle lease

¹ The exhibits presented with the post-hearing brief include documentation of time and expenses preparing for and attending the hearing incurred by Ms. Mention’s witness, Mr. Baumann, and debtor counsel’s itemized fees including those for attending the hearing and preparing the post-hearing brief. By necessity, these exhibits could only be submitted after the hearing.

with Toyota and surrender the vehicle, a 2014 Toyota Camry, to Toyota [Docket Numbers 12 and 13]. She subsequently received her discharge on December 15, 2015. The vehicle was surrendered to Toyota and sold.

Around June of 2017, Ms. Mention needed to purchase a more reliable vehicle because of significant travel required for a new job. She inquired about purchasing a vehicle at the McCluskey dealership. However, she was informed that her credit report showed that Toyota had repossessed the 2014 Camry and that she still owed more than \$9,000.00 to Toyota. Indeed, her credit reports, pulled from Equifax and TransUnion, two of the three major credit reporting bureaus, list the Toyota debt as a “charge off” or repossession² with an amount still owing of \$9,932.00 [Exs. 2 and 4]. Based on her credit history, McCluskey rejected her request for a loan and she was told that her poor relationship with Toyota was going to hurt her ability to finance a new vehicle.

A few weeks later, she engaged Lexington Law to help clean up her credit report at a cost of \$99.95 per month. From September of 2017 to February of 2019, Lexington Law sent four electronic challenges to the three major credit reporting bureaus (Equifax, TransUnion, and Experian) to challenge Toyota’s reporting of the debt on Ms. Mention’s credit report [Exs. 3 and 8]. In total, Ms. Mention paid Lexington Law \$1,009.45, although a portion of the fees went towards other credit issues [Ex. 9]. However, Toyota never responded nor did Toyota change its reporting of the debt.

Between the date she received her bankruptcy discharge in December of 2015 and the date she was finally able to purchase a vehicle in March of 2019, Ms. Mention testified that she was rejected by approximately fifteen different lenders when attempting to purchase a vehicle. Those lenders pulled her credit more than forty times. Each time, she asked the lenders why she was

² Two credit reports further indicated, in error, that the Toyota lease debt was reaffirmed [Exs. 1 and 2].

denied financing wondering if the cause was her student loan debt acquired while she finished her doctorate degree or Toyota's reporting of the lease debt to the credit reporting bureaus. The lenders told her that it was the repossession and her poor relationship with Toyota that caused them to reject her for financing. Rejection letters from dealerships were included in Ms. Mention's exhibits admitted into evidence [Exs. 6 and 7].

In 2018, Ms. Mention called Toyota directly on at least three different occasions. During her calls, Toyota initially tried to collect on the discharged debt. When she explained that she had filed for bankruptcy and was calling to ask Toyota to report the debt as discharged because it was impacting her ability to finance a new vehicle, she was transferred to "escalations." Each time, the Toyota representative told her she would receive a returned call. She never received a call or other contact from Toyota.

In August of 2018, Ms. Mention's bankruptcy counsel, Mr. Minnillo, sent Toyota a letter [Ex. 5]. In the letter, he noted that Toyota had erred by reporting Ms. Mention's debt on her credit report as having a balance owed and, when she called to correct the error, Toyota representatives actively sought to collect the discharged debt. He asked that Toyota cease collection efforts and to report the status of the debt properly. Mr. Minnillo never received a response from Toyota nor did it change its reporting of Ms. Mention's debt to the credit reporting bureaus. As of a credit report pulled in April of 2019, Toyota continues to report the debt as "charged off" with a \$9,932.00 balance owing [Ex. 11].

B. Impact on Ms. Mention's Life

Ms. Mention testified to the impact of Toyota's erroneous reporting of the lease debt. In addition to the time and money Ms. Mention expended in attempts to have Toyota correct its reporting, Ms. Mention testified to the embarrassing and expensive process she went through to

purchase a reliable vehicle. The many rejections by lenders negatively impacted her and, although she is a hard working individual, she often felt like giving up. She sometimes had to use other people's vehicles and was worried what affect her failure to obtain a reliable vehicle would have on her job. Nonetheless, she testified that she never sought medical or mental health treatment of any kind.

After months of searching, Ms. Mention was finally able to purchase a vehicle from CarMax on March 15, 2019 but with less than ideal terms. Per the installment agreement entered into evidence [Ex. 12], she financed \$21,265.36 over 72 months with an annual interest rate of 25% giving her a finance charge totaling \$20,379.44. She opined that if Toyota had reported the debt correctly, she would qualify for better financing.

C. Calculation of Damages

Brent Baumann (“Mr. Baumann”), president and owner of Credit Links, was called to testify to a reasonable calculation of damages caused by Toyota's inaccurate reporting. Credit Links is a credit repair firm in Cincinnati that is licensed and bonded in Ohio and 26 other states by the Department of Commerce. Mr. Baumann, who has a bachelor's degree in finance, is a credit analyst and strategic planner who has been in the credit repair field since September 2016. He contributes to several blogs on credit reporting and has been interviewed for a credit publication.

As part of his job helping people correct credit reporting issues, Mr. Baumann reviews and analyzes credit reports every day. He believes he has analyzed between 12,000 and 15,000 credit reports since 2016. His specialty is breaking down credit reports and finding commonly misreported items. He develops plans to work with creditors and the credit reporting bureaus to correct the errors. His goal is to improve his clients' credit scores quickly so that they can obtain

financing. He charges approximately \$500.00 to fix credit issues and is charging \$100.00 per hour for his testimony.

Mr. Baumann reviewed Ms. Mention's credit history and concluded that there were errors in the way Toyota reported the lease debt. It should have been coded as a debt discharged in bankruptcy and not as a charge-off, repossession or listed as carrying any balance or amount past due.

When an individual is faced with incorrect reporting, Mr. Baumann testified that the individual can dispute the items herself or engage a company to obtain help. He testified that Ms. Mention's efforts, in engaging Lexington Law to help clean up her credit report and making direct calls to Toyota, were reasonable. Lexington Law used a common practice to initiate electronic disputes although Mr. Baumann testified that his firm might have provided a more detailed description of what was in dispute. Regardless, he determined that Lexington Law's electronic disputes were sufficient to cause the credit reporting bureaus to process the challenges and notify Toyota. Upon notification from the credit reporting bureau, the creditor has thirty days to investigate, communicate back and then the credit report is updated. Mr. Baumann testified that the end result in Ms. Mention's situation was that Toyota failed to respond to the credit reporting bureaus or change its reporting of the debt to reflect the bankruptcy.

Mr. Baumann testified that this failure of Toyota to accurately report the debt in Ms. Mention's credit reports greatly impacted her credit score, which is currently listed as between 465 and 527 [Ex. 13], and ultimately her ability to qualify for good financing terms. He noted that a person's credit score is what a lender uses to determine whether the person will be able to pay back the loan. Ms. Mention's credit score was negatively impacted not only by Toyota's reporting error, but by the number of credit pulls by multiple lenders while Ms. Mention searched for a vehicle.

Mr. Baumann used a simulator to project Ms. Mention’s credit score if Toyota changed the status of the debt from “charge-off / repossession” to discharged in bankruptcy. Mr. Baumann calculated that Ms. Mention’s credit score would increase by 39-60 points if Toyota corrected its reporting error as of the day before the hearing [Ex. 14]. Mr. Baumann further projected that if Toyota had accurately reported the debt over three years ago, at the time of the bankruptcy discharge, her credit score would be even higher, in the range of 550 to 650. Mr. Baumann noted that a 650 credit score would represent a big increase in the credibility of a borrower to a lender.

Relying on his industry experience and a recent article showing interest rates people could obtain for financing the purchase of used vehicles based a range of credit scores [Ex. 15], Mr. Baumann testified that Ms. Mention would qualify for a much lower rate of interest, between 10.34 and 16.14%, with a credit score between 550 and 650. Mr. Baumann calculated that applying an interest rate of 16.14% to Ms. Mention’s vehicle purchase (while other terms remain the same), would reduce her finance charges from \$20,379.44 to \$12,065.64, a difference of \$8,313.80. Applying the interest rate of 10.34%, her finance charges would be reduced even lower – from \$20,379.44 to \$7,362.64, a difference of \$13,016.80.

Based on the testimony of Ms. Mention and Mr. Baumann, as well as the exhibits presented at trial and with the post-trial brief, Ms. Mention seeks the following damages:

Finance charges:	\$10,667.80 ³
Lexington Law charges:	\$ 399.80 ⁴

³ The finance charges are calculated as the difference between Ms. Mention’s finance charges in the March 15, 2019 installment agreement and the average of the highest and lowest finance charges Ms. Mention would qualify for had Toyota reported the lease debt correctly ($\$8,318.80 + \$13,016.80$ divided by 2 = \$10,667.80).

⁴ Although the Debtor paid more to Lexington Law, she seeks recovery of only four monthly fees to cover the four challenges Lexington Law made to Toyota’s reporting of the lease debt ($\$99.95 \times 4$).

Expert Fees [Ex. 16]:	\$ 665.00 ⁵
Estimated future credit repair fees:	\$ 500.00
Estimated cost in attending court: (parking, etc.)	<u>\$ 20.00</u>
Total actual damages:	\$ 12,252.60

[Docket Number 34]. In addition Ms. Mention seeks an award of attorney fees for the services rendered by her counsel, Minnillo & Jenkins, in this matter. Those fees amount to \$12,950.00 [Ex. 17].

II. LEGAL ANALYSIS

Ms. Mention seeks compensatory and punitive damages for Toyota’s violation of the discharge injunction. Bankruptcy Code Section 524 provides:

(a) A discharge in a case under this title —

* * *

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

11 U.S.C.. § 524(a)(2). The Bankruptcy Code does not provide statutory redress for violations of the discharge injunction and the Sixth Circuit has held that a private cause of action does not exist under § 524. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 422-23 (6th Cir. 2000). This in sharp contrast to the Bankruptcy Code’s provision of damages for a willful violation of the automatic stay. *See* 11 U.S.C. § 362(k). Accordingly, the Sixth Circuit has held that a debtor’s recourse to address a creditor’s violation of the discharge injunction is to bring a motion for contempt against the creditor. *Pertuso*, 233 F.3d at 421 (noting that “the traditional remedy for

⁵ This amount includes the fees on the invoice plus an additional \$41.00 covering the cost of the simulations.

violation of an injunction lies in contempt proceedings, not a lawsuit”). *See also Badovick v. Greenspan (In re Greenspan)*, 464 B.R. 61 (Table), 2011 Bankr. LEXIS 272, at *8, 2011 WL 310703, at *3 (B.A.P. 6th Cir. Feb. 2, 2011); *Frambes v. Nuvel Nat’l Auto Fin., LLC (In re Frambes)*, 454 B.R. 437, 440 (Bankr. E.D. Ky 2011); *In re Pervis*, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003).

Once a creditor is found in contempt for violating the discharge injunction, as Toyota has been found by this Court’s Contempt Order, civil contempt sanctions may be issued. *Greenspan*, 2011 Bankr. LEXIS 272, at *8, 2011 WL 310703, at *3; *Pervis*, 302 B.R. at 370. “As a transgression against the court, broad discretion is invested in the court in selecting an appropriate sanction.” *Chambers v. Greenpoint Credit (In re Chambers)*, 324 B.R. 326, 329 (Bankr. N.D. Ohio 2005). *See also Greenspan*, 2011 Bankr. LEXIS 272, at *12; 2011 WL 310703, at *5.

Although a range of sanctions are available, it is generally acknowledged that a creditor’s contemptible violation of the discharge injunction is likely to cause the debtor to incur damages. *Chambers*, 324 B.R. at 329. Accordingly, “[t]he modern trend in civil contempt proceedings is for courts to award actual damages for violations of § 524’s discharge injunction, and, where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to attorney fees.” *Greenspan*, 2011 Bankr. LEXIS 272, at *9, 2011 WL 310703, at *3 (noting that, otherwise, the discharge injunction is without meaning or effect) (citations omitted). In this case, Ms. Mention’s requests three types of damages, actual damages, attorney fees, and punitive damages, addressed separately below.

A. Actual Damages

Before a bankruptcy court may award actual or compensatory damages, a debtor must prove injury or loss by a preponderance of the evidence. *In re Haltermon*, 592 B.R. 311, 321

(Bankr. S.D. Ohio 2018). “The debtor must support [a] claim of actual injury by establishing ‘adequate proof’ and cannot rely on speculation.” *Id.* (further citation omitted).

In this case, Ms. Mention testified to the lengths she went to in order to clean up Toyota’s errors in reporting her vehicle lease debt to the credit reporting bureaus. She hired Lexington Law at a cost of \$99.95 a month. Lexington Law followed a common practice in these situations of issuing four electronic challenges to the credit reporting bureaus in attempts to call attention to and cause Toyota to fix its credit reporting errors. Although she paid more, Ms. Mention limits her damages request to four months of Lexington Law’s fees, totaling \$399.80, which this Court deems reasonable.

Because neither Lexington Law’s electronic challenges nor Ms. Mention’s own phone calls to Toyota resulted in Toyota taking corrective action, Ms. Mention estimates that it will cost an additional \$500.00 for future credit repair fees. This amount is reasonable and in line with what her expert witness, Brent Baumann, President of Credit Links, would charge for his firm’s services to correct credit reporting errors.

Next this Court turns to the evidence of Toyota’s impact on Ms. Mention’s ability to obtain financing. Mr. Baumann testified that Ms. Mention would qualify for a much lower interest rate, reducing the rate from 25% to between 10.34 – 16.14%, had Toyota correctly reported to the credit reporting bureaus that her lease debt was discharged in bankruptcy. Mr. Baumann testified that this decrease in the interest rate translates to an average of a \$10,667.80 reduction in finance charges compared to what she is paying for her recently purchased vehicle. With no contradictory evidence advanced, this Court concludes that Ms. Mention has proven, to a sufficient degree of certainty, that Toyota’s continued credit reporting errors caused her additional finance charges of \$10,667.80. *See Archer v. Macomb County Bank*, 853 F.2d 497, 499 (6th Cir. 1988) (noting that

the law does not require impossibilities when it comes to proof of damages but does require that degree of certainty that the nature of the case permits).

This Court further deems reasonable Ms. Mention's expert witness fees of \$665.00 for Mr. Baumann's testimony and Ms. Mention's costs of \$20.00 for attending the hearing. In total, Ms. Mention has proven, by a preponderance of the evidence, actual damages in the amount of \$12,252.60.

Ms. Mention further requests damages for mental or emotional distress in an amount that this Court deems appropriate. To establish an actual injury in the form of mental or emotional distress resulting from a creditor's violation of the discharge injunction, the debtor must demonstrate "some appreciable emotional [or] mental harm" and the creditor's actions must be severe in nature. *Phillips v. Deutsche Nat'l Trust (In re Phillips)*, 2012 Bankr. LEXIS 1042, at *7, 2012 WL 830517, at *3 (Bankr. N.D. Ohio March 9, 2012); *Perviz*, 302 B.R. at 371 (noting that the less severe the creditor's conduct, the more important medical or other corroborating evidence will become). "Absent corroborating medical testimony, simple stress and frustration are not sufficient to support an award for mental [or] emotional distress." *Phillips*, 2012 Bankr. LEXIS 1042, at *9, 2012 WL 830517 at *3.

In this case, Ms. Mention testified to the exhaustive search required for her to purchase a vehicle and the embarrassment caused by multiple lenders rejecting her for financing. Undoubtedly, these rejections, along with Toyota ignoring her requests to fix the reporting errors, caused Ms. Mention needless stress and frustration. However, she testified that she did not seek medical help. Without more, her damages for mental or emotional distress are not quantified or compensable.

Accordingly, Ms. Mention's actual damages are limited to \$12,252.60.

B. Attorney Fees

Ms. Mention further seeks attorney fees for the services rendered by her counsel, Minnillo & Jenkins, in the amount of \$12,950.00 as itemized on Exhibit 17 [Docket Number 34]. As noted previously, this Court may award attorney fees when a creditor is held in contempt for a discharge injunction violation. *Greenspan*, 2011 Bankr. LEXIS 272, at *9, 2011 WL 310703, at *3; *Chambers*, 324 B.R. at 329-30. However, the debtor carries the burden of establishing that those attorney fees are reasonable rather than “a profit making endeavor.” *Haltermon*, 592 B.R. at 321-24; *Mitchell v. Anderson (In re Mitchell)*, 545 B.R. 209, 227 (Bankr. N.D. Ohio 2016). When reviewing the reasonableness of attorney fees, courts often look to what actions the debtor or debtor counsel took to resolve the matter in a non-litigious manner prior to filing an action in bankruptcy court. *Cousins v. CitiFinancial Mortg. Co. (In re Cousins)*, 404 B.R. 281, 290 n.9 (Bankr. S.D. Ohio 2009) (reviewing attorney fees requested in connection with a creditor’s willful violation of the automatic stay). “If no such mitigative steps are taken, courts often limit attorney fees to the reasonable value of legal services that should have been sufficient to resolve the matter in an expeditious manner.” *Id. See also Haltermon*, 592 B.R. at 324.

In this case, debtor counsel’s pre-litigation services were limited to meeting with Ms. Mention and drafting one letter to Toyota requesting that it stop collection efforts and fix its misreporting of her debt to the credit reporting bureaus [Exs. 5 and 17]. These pre-litigation actions totaled less than one and a half hours of time with debtor counsel’s remaining efforts, over twenty-five hours, devoted to litigating contempt and damages in this Court [Ex. 17].

While limited, the reasonableness of these pre-litigation services must be viewed in context with the additional actions taken by Ms. Mention to remedy Toyota’s credit reporting errors. Ms. Mention hired Lexington Law which issued four electronic challenges to Toyota’s reporting of the

vehicle lease debt to the credit reporting bureaus. Further, Ms. Mention made at least three phone calls directly to Toyota. Undoubtedly, the combined efforts of Ms. Mention, Lexington Law and debtor counsel were sufficient to alert Toyota to the problem and should have led Toyota to take corrective action. Instead, Toyota failed to respond. Accordingly, this Court concludes that any additional pre-litigation efforts on the part of debtor counsel would have been ineffectual and wasted.

This Court has further reviewed debtor counsel's litigation fees and finds them reasonable and necessary to litigate Toyota's contempt and Ms. Mention's damages [Ex. 17]. *See Greenspan*, 2011 Bankr. LEXIS 272, at *13-14, 2011 WL 310703, at *5 (finding no abuse of discretion in the bankruptcy court's award of \$12,510.00 in attorney fees for litigating contempt proceedings and other actions necessary to resolve creditor-attorney's actions in violation of the discharge injunction).

Accordingly, this Court awards Ms. Mention \$12,950.00 in attorney fees against Toyota.

C. Punitive Damages

In addition to actual damages and attorney fees, Ms. Mention requests punitive damages against Toyota calculated as five times her actual damages (but excluding attorney fees) or \$61,263.00.⁶ To support this request, debtor counsel notes Toyota's lack of participation in these proceedings and that its erroneous reporting continues to this day making the discharge injunction violation "egregious" in nature. In addition, counsel argues that such a penalty may coerce Toyota into compliance with the discharge injunction by correcting its misreporting.

⁶ Within the post-hearing brief, debtor counsel calculates punitive damages to total \$62,938.00 in one place [Docket Number 34, p. 8] and \$61,263.00 in another place [*Id.*, p. 10]. Using the Debtor's actual damages of \$12,252.60, this Court calculates the punitive damages request of five times actual damages to equal \$61,263.00.

The authority of bankruptcy courts to issue punitive sanctions, also called noncompensatory damages, has been the subject of much debate. The Sixth Circuit has recognized bankruptcy courts' inherent power to sanction parties for improper conduct. *Adell v. John Richards Homes Bldg. Co. LLC (In re John Richards Homes Bldg. Co., LLC)*, 552 F. App'x 401, 413-14 (6th Cir. 2013) (citing *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996)). The Sixth Circuit has further held that bankruptcy courts have some authority to award punitive damages for abuse of process and fraud on the court under both 11 U.S.C. § 105(a) and the bankruptcy courts' inherent powers. *Id.* at 414. However, noting that bankruptcy courts have limited jurisdiction, are not Article III courts, and are less capable of providing the necessary procedural protections afforded by district courts, the Sixth Circuit has stated that the authority is not "without limits." *Id.* at 414-15 (noting that "§ 105(a) is prospective rather than retrospective; as such, that provision is best read not to encompass a power to award criminal-like punitive sanctions"). Accordingly, while bankruptcy courts retain the authority to award "mild noncompensatory punitive damages" they do not have the inherent or general statutory power to award "serious noncompensatory punitive damages," which are more criminal in nature. *Id.* at 415.

In this case, the \$61,263.00 in punitive damages requested by Ms. Mention is beyond the type of mild noncompensatory damages that the Sixth Circuit contemplates. Moreover, while an award for civil contempt may include coercive penalties intended to "cajole the party in contempt" to comply with court orders and the requirements of the Bankruptcy Code, *In re Biery*, 543 B.R. 267, 298-99, Ms. Mention's request for punitive damages seeks more to punish Toyota rather than coerce Toyota into correcting its reporting errors. "Using contempt to punish is generally viewed as criminal, not civil," *id.* at 299, and therefore beyond the purview of this Court.

Toyota, however, is on further notice that its failure to correct its reporting of Ms. Mention's discharged debt and attempts to collect on that debt when Ms. Mention called to report the errors are blatant violations of the discharge injunction. If Toyota does not correct its reporting errors with the three major credit reporting bureaus or if Toyota takes other action in violation of the discharge injunction, an award of additional contempt sanctions is possible.

III. CONCLUSION

For Toyota's contemptible actions in violation of the discharge injunction, this Court awards the following to Ms. Mention:

1. Actual compensatory damages totaling \$12,252.60; and,
2. Attorney fees totaling \$12,950.00.

A separate order will be entered consistent with this memorandum opinion.

SO ORDERED.

Distribution List:

Default List Plus:

Toyota Motor Credit Corporation
c/o its statutory agent for service of process
CT Corporation System
4400 Easton Commons Way, Suite 125
Columbus, OH 43219

Toyota Financial Services
PO Box 4102
Carol Stream, IL 60197-4102

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

By order of the Bankruptcy Appellate Panel, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8024-1(b). See also 6th Cir. BAP LBR 8014-1(c).

File Name: 20b0006n.06

BANKRUPTCY APPELLATE PANEL

OF THE SIXTH CIRCUIT

IN RE: DUANE L. BENTLEY,

Debtor.

DUANE L. BENTLEY,

Appellant,

v.

ONEMAIN FINANCIAL GROUP, LLC,

Appellee.

No. 19-8026

Appeal from the United States Bankruptcy Court
for the Eastern District of Kentucky at Covington.
No. 2:18-bk-20281—Tracey N. Wise, Judge.

Decided and Filed: July 8, 2020

Before: BUCHANAN, CROOM, and PRICE SMITH, Bankruptcy Appellate Panel Judges.

COUNSEL

ON BRIEF: Robert R. Sparks, STRAUSS TROY CO., LPA, Cincinnati, Ohio, John M. Simms, ATKINSON SIMMS & KERMODE, PLLC, Lexington, Kentucky, for Appellant. Douglas M. Foley, Stephanie J. Bentley, MCGUIREWOODS LLP, Washington, D.C., Adam R. Kegley, FROST BROWN TODD LLC, Lexington, Kentucky, for Appellee.

OPINION

JIMMY L. CROOM, Bankruptcy Appellate Panel Judge. The Debtor in this case, Duane L. Bentley (“Debtor”), asserts that the bankruptcy court erred in concluding that OneMain Financial Group, LLC (“Creditor”), did not violate the 11 U.S.C. § 524(a)(2) discharge injunction when it refused to release its lien on a vehicle that Debtor surrendered during his chapter 7 case. Specifically, Debtor argues that Creditor violated the discharge injunction by refusing to release its lien when asked to do so by Debtor and by conditioning release of the lien on payment of an undetermined amount. Debtor argues that Creditor’s actions were objectively coercive and sanctionable under the standard set forth by the First Circuit Court of Appeals in *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006). Debtor also argues that Creditor’s actions were sanctionable under *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019).

ISSUES ON APPEAL

Debtor argues that the Bankruptcy Court erred in granting Creditor summary judgment and concluding that Creditor did not violate the discharge injunction when it failed to release its lien on Debtor’s vehicle after it decided not to repossess the vehicle and thereafter attempted to coerce Debtor into paying for a lien release.

JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction to decide this appeal. The United States District Court for the Eastern District of Kentucky has authorized appeals to the Panel and no party has timely elected to have this appeal heard by the district court. 28 U.S.C. § 158(b)(6), (c)(1). A final order of the bankruptcy court may be appealed as of right pursuant to 28 U.S.C. § 158(a)(1). “Orders in bankruptcy cases qualify as ‘final’ when they definitively dispose of discrete disputes within the overarching bankruptcy case.” *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586 (2020) (citing *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501, 135 S. Ct. 1686 (2015)). An order granting summary judgment to one party and denying it to another is a final order for purposes of appeal. *Walls v. Amerisure Mut.*

Ins. Co., 343 F.3d 881, 884 (6th Cir. 2003) (quoting *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 235 (6th Cir.2003)); *Rogan v. Fifth Third Mortg. Co. (In re Rowe)*, 452 B.R. 591, 593 (B.A.P. 6th Cir. 2011) (citation omitted). The bankruptcy court's denial of a debtor's motion for contempt for violation of the discharge injunction is also a final, appealable order. *In re Glaspie*, 410 B.R. 261, 266 (E.D. Mich. 2007).

"An order granting summary judgment is reviewed de novo." *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 597 B.R. 614, 616 (B.A.P. 6th Cir. 2019) (citation omitted). An order denying summary judgment "on purely legal grounds" is also reviewed de novo. *Tennessee ex rel. Wireless Income Props., LLC v. City of Chattanooga*, 403 F.3d 392, 395-96 (6th Cir. 2005) (citing *Walls*, 343 F.3d at 884). "Under a de novo standard of review, the reviewing court decides an issue independently of, and without deference to, the trial court's determination." *Menninger v. Accredited Home Lenders (In re Morgeson)*, 371 B.R. 798, 800 (B.A.P. 6th Cir. 2007) (citation omitted).

The court's interpretation of 11 U.S.C. § 524 is reviewed de novo. *Ford Motor Credit Co. v. Morton (In re Morton)*, 410 B.R. 556, 559 (B.A.P. 6th Cir. 2009) (citation omitted). The bankruptcy court's determination that the creditor did not violate the discharge injunction presents a mixed question of law and fact. *Id.* (citing *WesBanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 106 F.3d 1255, 1259 (6th Cir. 1997)). Accordingly, "the court's conclusions of law are reviewed de novo" and its "findings of fact are reviewed under the clearly erroneous standard." *Id.* (citations omitted). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S. Ct. 1504 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525 (1948)).

FACTS

Debtor does not dispute any of the bankruptcy court's factual findings. As such, the factual findings are reproduced here, verbatim (footnotes in original):

The parties agree on the material facts. In June 2017, Debtor obtained a loan from Creditor and granted Creditor a lien on a 2001 Dodge Dakota (the "Vehicle"). Debtor filed a chapter 7 petition on March 5, 2018, and Creditor received notice of the bankruptcy filing. Debtor's Schedule D, filed with his petition, stated that Creditor had an \$8,000 claim secured by the Vehicle, which Debtor valued at \$150. Debtor also filed a statement of his intention to surrender the Vehicle to Creditor with his petition. Debtor did not reaffirm the debt to Creditor before entry of his discharge on June 11, 2018. Creditor's lien was not avoided or eliminated in the bankruptcy, and Creditor received notice of entry of the discharge. Debtor never paid the balance of Creditor's claim. Creditor never repossessed the Vehicle, which was stored on property owned by Debtor's ex-father-in-law, Paul Reis.

On June 29, 2018, Debtor called Creditor¹ and stated that he had received his discharge, wanted "to take the lien off the title of the vehicle that was in bankruptcy that you guys have the lien on," and advised that the Vehicle "is old. It's trash. It's totaled." [ECF No. 78-1 at 6.] Creditor's representative told Debtor: "once there's a discharge you are not responsible for the balance of the loan, but creditors are allowed to keep an interest in the lien on the vehicle and they'll ask for some kind of offer to be made for a lien release." [*Id.*] Creditor's representative then said that it sounded as though "this is just a salvage car. It's junk value probably," and told Debtor to have a local salvage yard call Creditor to provide a "scrap value offer maybe so much on the pound" at which point Creditor would "consider accepting that to release the lien. They will sell it for some minimal consideration and get the lien released." [*Id.* at 7.]

Several weeks later, on August 1, 2018, Mr. Reis and Debtor called Creditor. Near the start of the call, Creditor's representative advised Debtor: "If your personal liability to this debt has been discharged in bankruptcy, any payments you make on this account are voluntary[.] [A]lthough you may not be legally obligated to repay this debt, [a lien] on or against collateral securing the account may have survived the discharge[.]. If such a lien exists, [Creditor] may enforce any applicable state release [*sic*] to recover such collateral." [ECF No. 78-1 at 11.] The representative, speaking with Mr. Reis (at Debtor's request and

¹Transcribed versions of this call and other calls involving Debtor and Creditor are in the record. Debtor affirmed at his deposition that the call transcripts accurately reflected the conversations he and Mr. Reis had with Creditor. Mr. Reis agreed that the transcripts were accurate.

with his permission), advised that Creditor would not repossess the Vehicle because “[t]he value is too low,” and then said:

So the options that we can give now are working with a salvage yard, an individual or the customer himself. If it’s a customer or a third party wanting to make an offer on it against the lien, then we would require a mechanic’s estimate to come along with that offer. If it’s a really low offer just to support the value that you’re saying the vehicle is worth. If it’s a junk vehicle and doesn’t run and you’re wanting to just scrap it, you can contact the local salvage yard to see if they are interested in working with us. You would explain to them that we are the lienholders and they would call and make an offer on the lien and then once that is approved by management and we could work with them to get payment and release that lien to the salvage yard.

[*Id.* at 12.] Mr. Reis responded that he would have the Vehicle towed to the highway or to one of Creditor’s locations. Creditor’s representative then stated that Debtor still owned the Vehicle, that Creditor only had a lien on it, and that Debtor would be charged any fees associated with abandoning the Vehicle: “You can do whatever you want with the vehicle, that’s up to him and you whatever you want to do with the vehicle itself. We just can’t release the lien without some kind of satisfaction on that lien.” [*Id.* at 15.]

Mr. Reis and Creditor’s representative then discussed the options presented to Debtor. Mr. Reis stated that his “neighbor down the road has a junkyard” and “offered me \$100 for it. . . .” [*Id.* at 15.] Mr. Reis and the representative also discussed whether Mr. Reis would buy the Vehicle himself for \$100. Creditor’s representative stated that Mr. Reis could submit an offer along with “a mechanic’s estimate written up on a mechanic’s shop’s letterhead saying what’s wrong with the vehicle and how much it costs to repair that,” which Creditor would consider in deciding whether to accept his offer. [*Id.* at 12.] Although Mr. Reis first stated he did not intend “to go through a lot of hassle getting a mechanic to write it up,” he later said that he knew a mechanic who could provide a written statement. [*Id.* at 12, 15.] By the end of the call, Mr. Reis suggested that he would send via email or fax a \$100 offer to Creditor with pictures of the Vehicle (that would show damage to the vehicle, high odometer mileage, or otherwise provide information to support his offer), and also that if a mechanic’s estimate ultimately was needed he could provide that from a local mechanic as well.

However, Mr. Reis did not send in an offer. Instead, on October 19, 2018, Mr. Reis again called Creditor and stated that a local salvage yard owner was willing to remove the car from Mr. Reis’s property, pay \$100 for it, and waive the tow fee.² Creditor’s representative stated: “It would probably be best if the guy

²Debtor was present during the call but did not participate.

from the salvage yard would contact us and let us know he's picked it up and make us an offer for \$100 to release it." [ECF No. 78-1 at 21.] Mr. Reis then stated: "I just want to get rid of it, but I'll give him your number." [*Id.*]

But, again, this did not occur. Instead, on November 21, 2018, Debtor moved to reopen his bankruptcy case to pursue Creditor for an alleged violation of the discharge injunction, which motion was granted. Then, on December 18, 2018, Debtor filed his Motion for Contempt against Creditor, in which Debtor alleged that Creditor violated "the discharge injunction under Section 524(a)(2) . . . by collecting and attempting to collect discharged debts by refusing to release its lien on his valueless motor vehicle until [Debtor] paid the full balance due on its [sic] prepetition debt." [ECF No. 16 ¶ 11.] Debtor sought to pursue relief for the discharge violation on his own behalf and on behalf of a class of allegedly similarly-situated debtors.

Ten days after Debtor filed the Motion for Contempt, Creditor released its lien on the Vehicle.

In re Bentley, 607 B.R. 889, 891-93 (Bankr. E.D. Ky. 2019).

Following the filing of Debtor's motion for contempt, the parties filed competing motions for summary judgment. The bankruptcy court conducted a hearing on the motions on September 10, 2019.

The court issued a memorandum opinion and order on October 2, 2019 ("Opinion"), granting Creditor's motion for summary judgment and denying Debtor's motion for summary judgment and motion for contempt.

The bankruptcy court began its analysis by setting forth the standard for summary judgment and noting that it "does not change when each side seeks a summary judgment in their favor." *Id.* at 893 (citing *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). Accordingly, "[t]he court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* (quoting *Taft Broad. Co.*, 929 F.2d at 248).

The court then turned its attention to the 11 U.S.C. § 524(a) discharge injunction. The court set forth the statutory language of § 524(a)(2) and stated that "[a] creditor that violates the discharge injunction may be found in contempt of court" and may be sanctioned pursuant to 11 U.S.C. § 105(a). *Id.* at 894 (citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421-23

(6th Cir. 2000)). The bankruptcy court noted that a debtor alleging a violation of the § 524 discharge injunction bears the burden of proof and must satisfy that burden with clear and convincing evidence. The court also noted that under *Taggart*, “a creditor may be found in contempt ‘when there is no objectively reasonable basis for concluding that the creditor’s conduct might be lawful under the discharge order.’ ” *Id.* (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019)).

The bankruptcy court examined the particular facts in Debtor’s case and determined that Creditor had not violated § 524(a)(2). In so doing, the court examined the case Debtor extensively relied upon, *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14 (1st Cir. 2006). *Bentley*, 607 B.R. at 894. The bankruptcy court began by recognizing that *Pratt* is “an out-of-circuit decision[.]” *Id.* The bankruptcy court explained *Pratt*’s holding as follows: “In assessing violations of the automatic stay and the discharge injunction, the core issue is whether the creditor acted in such a way as to ‘coerce’ or ‘harass’ the debtor improperly.” *Bentley*, 607 B.R. at 895 (internal punctuation omitted) (quoting *Pratt*, 462 F.3d at 19). The bankruptcy court recognized that such an analysis is a fact-specific inquiry and requires a court to determine whether the exercise of a creditor’s *in rem* rights under state law hampers a debtor’s right to a fresh start.

The bankruptcy court distinguished the facts in this case from the creditor’s actions in *Pratt*. In *Pratt*, the creditor conditioned release of its lien on the debtors’ payment of the full balance of the claim, whereas, in the case before the bankruptcy court, Creditor had agreed to release its lien on Debtor’s vehicle for “some minimal consideration.” *Id.* at 897. The bankruptcy court concluded this was an important difference.

The bankruptcy court also examined *Canning v. Beneficial Me., Inc. (In re Canning)*, 706 F.3d 64 (1st Cir. 2013). Although *Canning* involved real property, the bankruptcy court found “the First Circuit’s guidance in *Canning* . . . apropos,” noting that

[t]he First Circuit rejected the Cannings’ reading of *Pratt* that “we would have to find a discharge injunction violation every time a secured creditor opposes a debtor’s ‘foreclose or release’ demand based on the business determination that repossession is not cost effective,” because “*Pratt* sought to strike a balance

between the competing state-law rights of secured creditors and the bankruptcy rights of debtors[.]”

Bentley, 607 B.R. at 896 (quoting *Canning*, 706 F.3d at 72). The bankruptcy court rejected Debtor’s “argument about the distinction between *Pratt* and *Canning* – that *Pratt* stands as the law for ‘old vehicles’ (repossess or release) and *Canning* applies to real estate[.]” *Id.* at 897. The bankruptcy court held that “[t]he difference in the two cases is in the facts, not that different law applies to surrender and *in rem* remedies depending on the type of collateral involved.” *Id.* The court stated that it “generally agree[d] with the First Circuit’s statements in both *Pratt* and *Canning* that whether coercive behavior occurred is dependent on the facts of each case.” *Id.*

In concluding that Creditor did not violate the discharge injunction, the bankruptcy court relied heavily on the fact that Creditor “did not even demand \$150 from Debtor in exchange for a lien release; in fact, *Creditor did not ask Debtor to pay any funds to Creditor at all, let alone pay any specific amount.*” *Id.* Instead, Creditor offered Debtor several different methods of obtaining release of Creditor’s *in rem* rights in the vehicle. The court concluded that “[n]o evidence supports Debtor’s position that the options Creditor presented to accomplish a lien release were a subterfuge to coerce payment of the discharged debt.” *Id.* The court also noted that Debtor could have secured the lien release by filing a motion to redeem the Vehicle under § 722 “and offer[ing] a nominal amount to bring Creditor’s ‘demands’ to a conclusion.” *Id.*

Because the bankruptcy court determined that Creditor’s actions were not objectively coercive and did not violate the § 524 discharge injunction, the court concluded that it was unnecessary to determine whether Creditor should be sanctioned under the standard set forth in *Taggart*, 139 S. Ct. at 1801.³

Debtor filed his timely appeal on October 14, 2019.

³In denying the motion for contempt, the bankruptcy court also denied Debtor’s request to certify the matter as a class action proceeding pursuant to Federal Rule of Bankruptcy Procedure 7023 and Federal Rule of Civil Procedure 23. Debtor does not challenge that portion of the court’s ruling.

DISCUSSION

I. SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7056 and 9014, provides that summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986) (internal quotation marks and citation omitted). The party moving for summary judgment has the initial “burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law.” *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005) (citation omitted). The burden then shifts to the nonmoving party to “come forward with ‘specific facts showing that there is a genuine issue for trial.’ ” *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (citing Fed. R. Civ. P. 56(e)). When faced with competing motions for summary judgment, a court “must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party.” *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994) (citing *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)).

II. 11 U.S.C. § 524(a)(2)

Section 524(a)(2) of the Bankruptcy Code provides that a discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any . . . debt [discharged under section 727 . . . of this title] as a personal liability of the debtor, whether or not discharge of such debt is waived[.]” 11 U.S.C. § 524(a)(2).⁴ “The purpose of § 524(a) is to afford a debtor a ‘fresh start’ by ensuring that a debtor will not be pressured in any way to repay a debt after it has been discharged.” *Paglia v. Sky Bank (In re Paglia)*, 302 B.R. 162, 166 (Bankr. W.D. Pa. 2003) (citation omitted);

⁴Unless otherwise indicated, all citations are to title 11 of the United States Code.

see also Isaacs v. DBI-ASG Coinvestor Fund, III, LLC (In re Isaacs), 895 F.3d 904, 910 (6th Cir. 2018).

As the language of § 524(a)(2) makes clear, the discharge injunction prohibits creditors from attempting to collect a discharged debt “as a personal liability of the debtor.” 11 U.S.C. § 542(a)(2); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S. Ct. 1905 (2004). It does not, however, affect a creditor’s *in rem* rights in the collateral. In *Johnson v. Home State Bank*, the Supreme Court held that “a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” 501 U.S. 78, 84, 111 S. Ct. 2150 (1991).

The concept that a lien “rides through” bankruptcy is axiomatic. The Supreme Court recognized the principle as early as 1886 in *Long v. Bullard*, 117 U.S. 617, 621, 6 S. Ct. 917 (1886). “If a creditor had a lien to secure payment of a pre-petition debt before the Chapter 7 bankruptcy, that lien survives, or ‘rides through’ the Chapter 7 bankruptcy and bankruptcy discharge, unless the lien is avoided in the bankruptcy case.” *In re Kalabat*, 592 B.R. 134, 143 (Bankr. E.D. Mich. 2018). “As a general proposition, where liens have ‘passed through bankruptcy unaffected’, a creditor may exercise valid lien rights postdischarge without violating the discharge injunction.” *Botson v. Citizens Banking Co. (In re Botson)*, 531 B.R. 719, 726 (Bankr. N.D. Ohio 2015).

Although there is no private right of action under § 524, courts enforce the discharge injunction through their civil contempt power and, in appropriate circumstances, the imposition of sanctions. *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000). Pursuant to the Supreme Court’s decision in *Taggart v. Lorenzen*, “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.” 139 S. Ct. 1795, 1799 (2019). However, before sanctions may be considered, the debtor must first demonstrate that the creditor committed a violation of the discharge injunction by clear and convincing evidence. *In re Jackson*, 554 B.R. 156, 164-65 (B.A.P. 6th Cir. 2016), *aff’d*, No. 16-4021, 2017 WL 8160941 (6th Cir. Oct. 18, 2017). An otherwise valid exercise of a creditor’s *in rem* rights may violate the discharge injunction “if the

debtor proves the creditor acted in such a way as to coerce or harass the debtor improperly, i.e., so as to obtain payment of the discharged debt.” *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1308 (10th Cir. 2008) (internal quotation marks omitted) (citing *Pratt v. GMAC (In re Pratt)*, 462 F.3d 14, 19 (1st Cir. 2006)); *see also In re Borowski*, 216 B.R. 922, 924 (Bankr. E.D. Mich. 1998).

Relying on the First Circuit’s decision in *Pratt*, 462 F.3d 14, Debtor argues that Creditor’s failure to release its lien on the Vehicle was objectively coercive and constituted a sanctionable violation of the discharge injunction.⁵ In *Pratt*, at the time of conversion from chapter 13 to chapter 7, the debtors owed approximately \$2,600.00 on their vehicle. *Id.* at 16. The debtors filed a notice indicating they intended to surrender the vehicle to GMAC. After concluding that costs of repossession outweighed the vehicle’s value, GMAC decided to leave the car in the debtors’ possession and wrote off the remaining balance of its claim.

Following the chapter 7 discharge, the car became inoperable and the Pratts had it towed to a salvage yard; however, pursuant to state law, the salvage yard would not accept the car until GMAC’s lien was released. For several months, the Pratts attempted to force GMAC to either repossess the vehicle or release its lien. GMAC would not repossess the car and refused to release its lien until the Pratts paid the total amount of the discharged debt.

The debtors in *Pratt* reopened their bankruptcy case and filed a contempt action against GMAC. The debtors alleged that GMAC violated the discharge injunction by refusing to either (1) repossess the surrendered vehicle or (2) release the lien without full payment of the discharged loan balance. The bankruptcy court ruled that GMAC was simply enforcing its *in rem* rights under state law and did not violate the discharge injunction. The district court agreed.

On appeal, the First Circuit reversed and concluded that GMAC had objectively coerced the Pratts into repaying the discharged debt as a personal liability. *Id.* at 19. The First Circuit recognized that a creditor’s *in rem* rights in collateral typically survive a bankruptcy discharge and may be enforced according to state law. The First Circuit then considered § 521(a)(2) which discusses a debtor’s ability to surrender collateral along with the other alternatives of redemption

⁵See note 6, *infra*.

and reaffirmation. The First Circuit recognized that the Bankruptcy Code does not define the term “surrender.” However, because “Congress did not use the term ‘deliver,’ ” the First Circuit concluded that “the most sensible connotation of ‘surrender’ in the present context is that the debtor agreed to make the collateral *available* to the secured creditor[.]” *Id.* at 18-19. The First Circuit also determined that “nothing in subsection 521(a)(2) remotely suggests that the secured creditor is *required* to accept possession of the vehicle[.]” *Id.* at 19. Accordingly, the court determined that the debtors’ surrender of the vehicle did not require GMAC to “repossess the vehicle if GMAC deemed such repossession cost ineffective.” *Id.*

The First Circuit then turned to the question of whether a debtor’s stated intention to surrender requires the creditor to release its lien. In addressing this issue, the court recognized that “the core issue is whether the creditor acted in such a way as to ‘coerce’ or ‘harass’ the debtor improperly.” *Id.* (citation omitted). The court noted that “the line between forceful negotiation and improper coercion is not always easy to delineate, and *each case must therefore be assessed in the context of its particular facts.*” *Id.* (emphasis added) (citation omitted).

The First Circuit stated that there were five facts “material” to the “assessment of objective coercion” in the Pratts’ case: (1) the debtors timely filed their § 521(a)(2) notice of intent to surrender; (2) the debtors made the vehicle available to GMAC; (3) the value and the condition of the vehicle made it necessary to tow it a salvage dealer who would not accept it without a lien release; (4) GMAC determined it was not cost effective to repossess the vehicle; and (5) state law would not allow the vehicle to be junked without a release of GMAC’s lien. *Id.* Although “GMAC did not create all these circumstances” and there was “no record evidence that GMAC acted in bad faith,” the First Circuit concluded that GMAC’s actions were “objectively coercive.” *Id.* The First Circuit held that GMAC’s right to refuse to release its lien until the loan balance was paid in full under state law was outweighed by the strong federal interest in ensuring “that debtors receive a ‘fresh start’ and are not unfairly coerced into repaying discharged prepetition debts.” *Id.* (internal quotation marks and citations omitted). The court noted that “even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction[.]” *Id.*

In summarizing its decision, the First Circuit stated that “the particular confluence of the above-mentioned circumstances renders the GMAC refusal to release its lien objectively coercive.” *Id.* In so doing, the court highlighted two important facts. “First, GMAC announced that it did not intend to repossess the ‘surrendered’ vehicle because it was of insufficient value, then expressly conditioned its release of the lien upon the Pratts’ agreement to repay the loan balance in full.” *Id.* at 19–20. Second,

as the Pratts could not junk the vehicle without a release of the GMAC lien, . . . they were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle.

Id. at 20. Thus, the First Circuit concluded that “the GMAC refusal had the *practical effect* of eliminating the Pratts’ ‘surrender’ option under § 521(a)(2)” and coercing them into reaffirming the debt. *Id.*

In making this decision, the First Circuit cautioned that the inquiry was fact specific. “We do not suggest that a secured creditor invariably would be in violation of the discharge injunction were it to insist upon its *in rem* rights under state law.” *Id.* If a creditor can provide justification for its actions that is not outweighed by the strong federal interest in providing debtors a fresh start, the First Circuit noted that the outcome might be different. *Id.*

The First Circuit revisited the *Pratt* decision in 2013 in *Canning v. Beneficial Me., Inc.* (*In re Canning*), 706 F.3d 64 (1st Cir. 2013). In that case, the Cannings filed chapter 7 and indicated their intent to surrender their residence to the mortgage holder, Beneficial Maine, Inc. (“Beneficial”). At the time of filing, the property was valued at \$130,000.00 and the outstanding mortgage was \$186,521.00. Beneficial did not foreclose on the property during the case nor did it release its lien.

Approximately two months after the Cannings received their chapter 7 discharge, Beneficial started sending correspondence to the debtors. The first letter informed the Cannings that Beneficial was not going to foreclose on the property and that the debtors would still be responsible for insurance, taxes, and maintenance on the home. The Cannings responded by demanding Beneficial either immediately foreclose or release its lien. Beneficial refused to do

either and stated that it would not release the lien until either the mortgage balance was paid in full or the parties could agree to some sort of compromise, such as a settlement offer or a short sale. In each of its letters, Beneficial informed the Cannings that they were not personally liable for the mortgage balance because their account had been charged off.

Eventually, the Cannings informed Beneficial that they had moved out of the house, turned off the utilities, and instructed the relevant authorities that Beneficial was responsible for the residence. The Cannings then reopened their chapter 7 case and filed a contempt proceeding against Beneficial for violation of the § 524(a)(2) discharge injunction. In so doing, the Cannings relied exclusively on *Pratt* and argued that Beneficial “acted in an objectively coercive manner” in their case. *Id.* at 68. Beneficial disagreed and argued that the facts in the Cannings’ case were markedly different from those in *Pratt*. The bankruptcy court ruled in favor of Beneficial and the Bankruptcy Appellate Panel affirmed.

On appeal, the First Circuit affirmed, explaining *Pratt* as follows:

In reversing the bankruptcy court’s judgment for the secured creditor, *we zeroed in on the following facts*: (1) the secured creditor refused to repossess the car, but conditioned release of its lien upon *full payment of the loan balance*; (2) the debtors could not dispose of the car while encumbered and thus would have to keep it indefinitely (together with the accompanying costs) unless they “*paid in full*”; and (3) there were no reasonable prospects that the car would generate sale proceeds for the secured creditor to attach, as it was essentially worthless with limited possibilities of appreciation over time.

...

[W]e held that the secured creditor’s posture in exclusively conditioning release of its lien on full payment of the loan balance amounted to a reaffirmation of debt demand that contravened “the stringent ‘anti-coercion’ requirements of [the] Bankruptcy Code[.]” Similarly, we noted that the secured creditor’s refusal to release its lien “had the practical effect of eliminating the [debtors’] ‘surrender’ option under § 521(a)(2).”

Id. at 70 (emphasis added) (citing *Pratt*, 462 F.3d at 20).

Turning to the Cannings' case, the First Circuit determined that it was factually distinguishable from *Pratt*.

Absent from this case is the exclusive "pay in full" conditional release presented in *Pratt*. Rather, in this case, Beneficial offered to release its lien through either a settlement offer or a short sale. This not only indicates the intent to collect no more than the value secured by the underlying lien, as the bankruptcy court observed, but also denotes a willingness to negotiate a palatable solution for all involved.

Id. at 71. The First Circuit also recognized that Beneficial had offered alternatives to the Cannings and the Cannings failed to demonstrate why these alternatives were "unfeasible." *Id.* The court noted that the Cannings failed to present evidence of "other indicia of coercion, such as, for example, Beneficial's refusal to negotiate with the Cannings a compromise different to the one originally proposed." *Id.*

In their appeal to the First Circuit, the Cannings downplayed the factual differences with *Pratt* and asserted that Beneficial had determined that foreclosure would not be cost effective because the property's value had decreased. The Cannings argued that this decision jeopardized their fresh start "which is what the First Circuit in *Pratt* specifically prohibited a creditor from doing." *Id.* at 72. The First Circuit found the Cannings' "reading of *Pratt* ...overly broad" and reasoned that

[u]nder the Cannings' reading, we would have to find a discharge injunction violation every time a secured creditor opposes a debtor's "foreclose or release" demand based on the business determination that repossession is not cost effective. But *Pratt* unequivocally held that the applicable inquiry revolves around the *particular facts of each case*, with the value of the underlying collateral being only one of several factors to be considered.

Id. (emphasis added).

In cautioning that nothing in its opinion should be "relied upon to leverage a way out of the bargaining table," the First Circuit recognized the great benefits negotiation and compromise play in relationships between secured creditors and discharged debtors. *Id.* at 73. The court emphasized that "our remarks in *Pratt* still control: 'the line between forceful negotiation and

improper coercion is not always easy to delineate, and each case must therefore be assessed in the context of its particular facts.’ ” *Id.* (quoting *Pratt*, 462 F.3d at 19).

III. CASE ON APPEAL

In the case on appeal, Debtor does not dispute that the bankruptcy court set forth the proper summary judgment standard. He also does not dispute any of the bankruptcy court’s factual findings. Rather, he asserts that the bankruptcy court erred in finding that Creditor was not objectively coercive and did not violate the discharge injunction. He argues that this error was based on the court’s incorrect interpretation of applicable law and that *Pratt* mandates a determination that Creditor violated the discharge injunction.⁶ In advancing this argument, Debtor makes several critical errors. He distorts the factual differences between his case and those in *Pratt* and misconstrues the First Circuit’s holding. He further downplays the relevance of the First Circuit’s subsequent decision in *Canning*. Lastly, he improperly argues that the bankruptcy court should have analyzed the case under *Taggart v. Lorenzen*.

The Panel rejects Debtor’s argument that the “facts in *Pratt* are similar, if not identical, to the facts” in this case. (Appellant’s Br. at 15.) Although many of the facts in the two cases are similar, the most important ones are not. First, the vehicle in *Pratt* was “worthless” and there was no indication anyone was willing to purchase the vehicle. In the case on appeal, Debtor valued the Vehicle at \$150.00 on his bankruptcy schedules and the undisputed facts make clear that both Mr. Reis and at least one, if not two, salvage yards were willing to pay \$100.00 for it. Thus, the Vehicle had some economic value. Second, the creditor in *Pratt* refused to release the lien unless and until the debtors paid the *full amount* discharged in the chapter 7 case. In the case on appeal, Creditor never requested any specific amount of money from Debtor, let alone the full amount of the discharged loan. Creditor simply responded to offers proposed by Debtor and Mr. Reis. Creditor stated that Mr. Reis or an interested third party could make an offer for the Vehicle and present evidence of the Vehicle’s value to Creditor. Creditor would then consider

⁶*Pratt* is not controlling law in the Sixth Circuit; however, nothing in its reasoning would lead to a conclusion that Creditor violated the discharge injunction in this case. Although the Panel concludes that the bankruptcy court did not err by following the logic and reasoning in *Pratt*, the Panel does not conclude that *Pratt* is the only approach to addressing violations of the § 524(a) discharge injunction.

whether to release the lien to the purchaser in exchange for payment of that amount. Creditor was merely attempting to ensure that if anyone was going to purchase the vehicle, Creditor would receive the value of its *in rem* lien.

Debtor's arguments also misconstrue the First Circuit's decision in *Pratt* in several significant ways. First, he asserts that the "gravamen" of the violation was the creditor's failure to release the lien. This is incorrect. The "gravamen" of the violation was GMAC's refusal to release the lien *unless* the debtor paid the full amount of the outstanding debt. *Pratt*, 462 F.3d at 20. Debtor also argues that once a creditor makes the decision not to repossess surrendered collateral, the creditor has an affirmative duty to release its lien regardless of whether the debtor requests such release. Nothing in the *Pratt* or *Canning* decisions mandates that a creditor release a lien without some compensation for its *in rem* interest. In fact, the First Circuit specifically acknowledged that failure to release a lien on collateral that has some value is not objectively coercive in and of itself. *Canning*, 706 F.3d at 71. If the collateral at issue is truly valueless, then the creditor's security interest in the property has no value and, thus, the "*raison d'être*" for its lien is extinguished. If, however, there remains a modicum of value and there is an entity willing to pay that value, there is nothing objectively coercive about requiring payment of that amount in exchange for releasing the lien.

The Panel also rejects Debtor's argument that the presence of the five "material" facts listed in *Pratt* "necessarily and as a matter of law establish an objectively coercive situation." (Appellant Br. at 15.) Although the First Circuit listed five facts as "material to [its] assessment of objective coercion," it also made clear that GMAC's "pay in full" demand was a crucial factor in its determination. *Pratt*, 462 F.3d at 19. As the First Circuit stated, "the core issue is whether the creditor *acted* in such a way as to 'coerce' or 'harass' the debtor improperly" and such a determination is dependent on the "particular facts" of the case. *Id.* (emphasis added) (citations omitted). The only "material" fact that focused on the creditor's actions was "GMAC determined it was not cost effective to repossess the vehicle." *Id.* The First Circuit determined that this decision was well within GMAC's rights and that the debtors' surrender of the vehicle under § 521 did not require GMAC to take possession of the vehicle. Thus, the five "material"

facts do not take into consideration any action that could serve as the basis for a violation of the discharge injunction.

Additionally, the *Pratt* court never indicated that the presence of the five “material” facts, without more, established a kind of strict liability and a court would be hard pressed to find a sanctionable violation under them alone. *Taggart* requires a court to determine “there is no objectively reasonable basis for concluding that the creditor’s *conduct* might be lawful” before holding a party in contempt. *Taggart*, 139 S. Ct. at 1799 (emphasis added). Quite simply, in order to be held in contempt, a creditor must *do* something other than decide not to repossess the collateral. The five “material” facts set forth in *Pratt* do not consider any action by the creditor, let alone something that demonstrates improper coercion or harassment.

Finally, Debtor misconstrues *Pratt* in arguing that it prohibits conversations such as the ones that occurred between Debtor and Creditor in this case. Debtor argues that these “conversations give creditors ... the opportunity to request payment for a pre-petition obligation under the guise of requesting a lien release, and thereby coerce often unrepresented debtors.” (Appellant Br. at 21.) Again, the violation in *Pratt* was GMAC’s refusal to release the lien on a worthless vehicle until the debtor paid the total amount due under the pre-petition note. The violation had nothing to do with the fact that the debtors and GMAC had conversations post-discharge. “[T]he discharge injunction in § 524(a)(2) does not prohibit all communications between the secured creditor and the debtor, but only enjoins any actions and communications designed to ‘collect, recover or offset’ the debt as a “ ‘personal liability of the debtor.’ ” *In re Cantrell*, 605 B.R. 841, 853 (Bankr. W.D. Mich. 2019) (quoting 11 U.S.C. § 524(a)(2)).

Debtor argues that the only “purpose of the conversations” between Creditor and Debtor was for Creditor to “request[] payment for the pre-petition obligation[.]” (Appellant Br. at 21.) This is inaccurate. Debtor’s chapter 7 discharge only extinguished Debtor’s *in personam* liability for the car note. It had no effect on Creditor’s *in rem* lien rights in the Vehicle. The lien survived the discharge and was enforceable under state law to the extent of the Vehicle’s value. Both Debtor and Mr. Reis asserted that the Vehicle had some value as scrap. Therefore, Creditor’s statement that it would consider releasing the lien in exchange for payment of this value was not a request for payment of the pre-petition obligation and was not objectively

coercive. There was no evidence that Creditor ever attempted to impose any *in personam* liability on Debtor.

Additionally, Debtor fails in his attempt to distinguish the First Circuit's subsequent decision in *Canning*. Debtor argues that *Canning* is not analogous because that case involved real property. As the bankruptcy court recognized in its opinion, "[t]he difference in the [*Pratt* and *Canning*] cases is in the facts, not that different law applies to surrender and *in rem* remedies depending on the type of collateral involved." *Bentley*, 607 B.R. 889, 897 (Bankr. E.D. Ky. 2019). The *Pratt* and *Canning* decisions both acknowledged the fact-specific nature of a § 524(a)(2) determination and placed great emphasis on the nature of the creditor's demand in comparison to the value of the collateral. The only significance the First Circuit placed on the different types of collateral was in recognizing that a vehicle's value rarely appreciates over time whereas the value of real estate often does. *Canning*, 706 F.3d at 72. Although the value of the collateral was at issue in both *Pratt* and *Canning*, the only role the nature of the collateral played was in determining the residual value of the creditor's collateral in comparison to the amount creditor requested to release the lien.

Debtor also argues that this case is distinguishable from *Canning* because Creditor did not prove that the Vehicle had value or that it had offered Debtor a "feasible" or "viable alternative to continued ownership of the Vehicle." (Appellant Br. at 25.) In making this argument, Debtor improperly attempts to shift the burden of proof in this action from himself to Creditor. It is the debtor who carries the burden of proving that a creditor violated the § 524(a)(2) discharge injunction. This includes the burden of demonstrating that a creditor's alternatives were "unfeasible." *Canning*, 706 F.3d at 71. Additionally, the undisputed facts demonstrate that Creditor's actions in this case mirror the creditor's actions in *Canning*. As in *Canning*, Creditor exhibited a willingness to consider the various methods for disposing of the Vehicle. In *Canning*, the creditor's willingness to consider a settlement weighed heavy in the First Circuit's determination that it had not acted in a coercive manner.

Like the debtors in *Canning*, Debtor made no attempt to demonstrate why the settlement Creditor proposed was unfeasible. The evidence demonstrated that Creditor was wholly willing to release its lien once it received proof and payment of the Vehicle's value. Although Debtor argues in his appellate brief that the options Creditor gave were "unduly onerous and comprise an impermissible burden on a debtor's fresh start," such argument is without merit. (Appellant Br. at 22.) Creditor never required Debtor to do anything other than direct the party wishing to take possession of the Vehicle to contact Creditor.⁷

Debtor also asserts he was burdened by the ownership of the Vehicle because he had to pay personal property taxes for it, and it took up space on his property. A debtor's surrender of collateral "does not divest a debtor of ownership and its obligations." *Maple Forest Condo. Assoc. v. Spencer (In re Spencer)*, 457 B.R. 601, 612 (E.D. Mich. 2011) (citations omitted). And, as *Pratt* and *Canning* make clear, a debtor's surrender of collateral under § 521 does not require a creditor to take possession thereof. *Pratt*, 462 F.3d at 19; *Canning*, 706 F.3d at 69-70. Until title of the Vehicle was transferred to a third party, Debtor was responsible for the obligations associated with ownership.⁸

Lastly, Debtor asserts the bankruptcy court erred in failing to analyze the case under *Taggart*. As stated *supra*, the bankruptcy court determined that Creditor did not violate the discharge injunction. As such, the court concluded it did not need to determine whether Creditor's actions were sanctionable under *Taggart*. The bankruptcy court did not err in this decision. *Taggart* is only applicable after a court has found that a party violated the discharge order. *Roth v. Nationstar Mortg., LLC (In re Roth)*, 935 F.3d 1270, 1276 (11th Cir. 2019). Thus, if the creditor did not violate the discharge injunction, there is no need to analyze the creditor's actions under *Taggart*.

⁷Debtor also argues that his inability to "convince" Creditor to accept an offer to release the lien proves how burdensome Creditor's "demands" were. There is no evidence that Creditor ever received an offer in this case. Thus, there was nothing for Creditor to accept or reject.

⁸Debtor cites additional cases in his brief that the Panel finds easily distinguishable or inapplicable. As such, it is unnecessary to address them.

CONCLUSION

In this case, the bankruptcy court correctly interpreted the summary judgment standard under Federal Rule of Civil Procedure 56, the discharge injunction of 11 U.S.C. § 524(a)(2), and the First Circuit's decision in *Pratt v. GMAC (In re Pratt)*, 462 F.3d 15 (1st Cir. 2006). It also committed no clear error in analyzing the facts in the case. As such, the Panel affirms the bankruptcy court's October 2, 2019 memorandum opinion and order.

AMERICAN BANKRUPTCY INSTITUTE

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0470n.06

Nos. 19-3987/3990

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PERCY SQUIRE,)	
)	
Plaintiff-Appellant,)	
)	
v.)	ON APPEAL FROM THE
)	UNITED STATES DISTRICT
VICKIE STRINGER,)	COURT FOR THE
)	SOUTHERN DISTRICT OF
Defendant-Appellee.)	OHIO
)	

BEFORE: NORRIS, NALBANDIAN, and READLER, Circuit Judges.

CHAD A. READLER, Circuit Judge. In a bankruptcy proceeding, the automatic stay of collection activity plays a vital role in preserving the rights of debtors and creditors alike. *See* 11 U.S.C. § 362. For debtors, they gain a concentrated means for organizing their financial affairs. And for creditors, they gain a concentrated means for maximizing collection efforts. Here, the bankruptcy court found that Sterling Williams and his counsel Percy Squire (together, “Creditors”) violated the automatic stay by unilaterally moving in state court to collect assets held by the debtor. Because Creditors offer no valid justification for their collection efforts, and because no other reversible error occurred below, we **AFFIRM** the judgment of the bankruptcy court.

BACKGROUND

Vickie Stringer authored an urban fiction novel based upon her life experiences in the late 1990s. Simon & Schuster later agreed to publish the novel. As part of the agreement, Simon & Schuster and Stringer agreed on a means for calculating royalty payments owed to Stringer based

Nos. 19-3987/3990, *Squire v. Stringer*

upon book sales. Experiencing sales success with her initial novel, Stringer continued to write, and Simon & Schuster continued to publish her writings. Over seventeen years, Stringer authored twelve novels under various pen names, all with Simon & Schuster. During that time, book royalties were Stringer's primary income.

Despite her publishing success, debt was a constant problem for Stringer. At one point, she engaged an accountant, Sterling Williams, to help her navigate an IRS audit. Williams eventually agreed to loan Stringer a considerable sum to settle her tax liability, a sum Stringer was to pay back with interest. When Stringer failed to do so, Williams filed suit against her in Ohio state court. Williams obtained a judgment against Stringer for \$71,960.80, with eight percent annual interest, an amount equivalent to roughly \$130,000 today. By that time, however, Stringer's collective debt to her creditors (including Williams) had ballooned to nearly \$5,000,000.

Lacking the means to pay back her debt, Stringer filed for Chapter 7 bankruptcy protection. In her filing, Stringer disclosed her home, valuable personal property, and other assets. She also identified each of her publishing agreements as well as her entitlement to royalties for the books she wrote under aliases. Stringer correctly recorded that she was owed just over \$3,200 in royalties from Simon & Schuster, including for the alias novels. Stringer, however, failed to identify those aliases in the proper place on the bankruptcy schedule.

Following Stringer's filing, the automatic stay was instituted under 11 U.S.C. § 362, and a Trustee was appointed to administer the bankruptcy estate. Stringer notified the Trustee of the royalties owed to her by Simon & Schuster. After concluding that the royalty agreements held little equity and were burdensome to the estate, the Trustee abandoned them to Stringer.

As Stringer's bankruptcy proceeding began to unfold, Williams engaged Percy Squire to represent him in the proceeding. On Williams's behalf, Squire filed in state court an affidavit and

Nos. 19-3987/3990, *Squire v. Stringer*

order of garnishment, which sought to garnish the unpaid royalties from the “Simon & Schuster account belonging to Vickie Stringer.” Due to that filing, along with subsequent communications from Squire threatening litigation, Simon & Schuster refused to release the royalties to Stringer. Stringer responded by filing in state court an emergency motion to release the garnishment. Upon learning of the pending bankruptcy proceeding, the state court promptly granted the release. The next day, Squire removed the state court garnishment action to the bankruptcy court.

Creditors’ collection efforts prompted Stringer to file a motion in the bankruptcy court for Creditors to show cause why they should not be held in contempt for violating the automatic stay. At a hearing on the motion, Squire participated both as a party to the contempt motion and as counsel for his co-party, Williams. During direct examination by Stringer’s counsel, Squire testified that he believed he was entitled to seek garnishment in state court because Stringer had not been entirely forthright during the bankruptcy process, most notably by excluding her pen names from her bankruptcy filings. Squire testified that these omissions coupled with Stringer’s “hustler” background and two-decade-old criminal convictions gave him license to take action to protect Williams’s interests. He also suggested that Stringer’s pen names constituted separate entities from Stringer herself, but eventually conceded that was not the case.

Following the direct examination of Squire, the bankruptcy court allowed Squire to “cross-examine himself,” affording him the opportunity to testify freely about the events leading up to the show-cause motion. At one point during his self-cross-examination, Squire attempted to introduce evidence of Stringer’s decades-old convictions under Federal Rule of Evidence 609. The district court sustained an objection from Stringer’s counsel to exclude that evidence as irrelevant.

Nos. 19-3987/3990, *Squire v. Stringer*

Finding that Creditors had willfully violated the automatic stay, the bankruptcy court entered judgment in favor of Stringer, awarding her the attorney's fees she incurred in pursuing the contempt motion as well as punitive damages equal to three times that amount—a sum totaling over \$100,000. On appeal to the district court, Creditors asserted that the bankruptcy court erred by: (1) finding that Creditors willfully violated the stay; (2) refusing to allow Squire to introduce evidence of Stringer's past convictions; (3) failing to ratify or annul Creditors' violation of the stay; and (4) failing to recuse for judicial bias. The district court declined to reach the latter two arguments on the ground that Creditors did not raise them below. It then rejected Creditors' remaining arguments and affirmed the judgment of the bankruptcy court.

ANALYSIS

Creditors' appellate arguments are identical to those asserted in the district court, with one addition: That the bankruptcy court should have taken judicial notice of public records showing that Stringer had an interest in certain Ohio corporate entities, which she failed to disclose on her bankruptcy schedules. Creditors' failure to properly preserve their arguments, however, has dramatic ramifications for their success on appeal. Like the district court, we will not consider Creditors' argument regarding recusal, as it was not raised in the bankruptcy court. *Grider Drugs, LLC v. Express Scripts, Inc.*, 500 F. App'x 402, 406–07 (6th Cir. 2012) (citing *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 863 (6th Cir. 1992) (refusing to address an argument for recusal not raised in the bankruptcy court)). Likewise, because Creditors failed to raise their ratification/annulment argument in timely fashion in the bankruptcy court, we review it for plain error only. *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537, 548 (6th Cir. 2003). Finally, we will not consider Creditors' judicial notice argument, which was not raised below. *See Ealy v. Comm'r of Soc. Sec.*, 594 F.3d 504, 513 (6th Cir. 2010). As to their remaining arguments, we independently

Nos. 19-3987/3990, *Squire v. Stringer*

review the bankruptcy court's decision, examining its findings of fact for clear error and its conclusions of law de novo. *In Re Am. HomePatient, Inc.*, 420 F.3d 559, 563 (6th Cir. 2005).

The Contempt Finding. The protocol surrounding the Bankruptcy Code's automatic stay is well defined. When a debtor files for bankruptcy, an automatic stay is immediately instituted, preventing nearly all collection activities by creditors. *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020) (citing 11 U.S.C. § 362(a)). A creditor who violates the stay may be found in contempt. *In re Nicole Gas Prod., Ltd.*, 916 F.3d 566, 578 (6th Cir. 2019). And in the case of a willful violation, the creditor may be required to pay the harmed parties actual and punitive damages as well as attorney's fees. 11 U.S.C. § 362(k)(1).

Upon finding that Creditors willfully violated the automatic stay in this proceeding, the bankruptcy court entered a monetary judgment against them. Creditors concede that, despite their knowledge of the stay, they undertook collection actions, as broadly defined under 11 U.S.C. § 362(a). They initially justified those efforts by arguing that a person's trade name is separate from that person for purposes of collections. This meant, to their mind, that pursuing the royalties due from the books Stringer published under aliases did not violate the stay prohibiting collection efforts against Stringer herself. But Squire later conceded this argument is wrong. And on that point of Ohio law, he is correct. *In re Nicole Gas*, 916 F.3d at 573 (applying Ohio corporate law to resolve whether a party violated the automatic stay). "Doing business under another name does not create an entity distinct from the person operating the business." *LexisNexis v. Moreau-Davila*, 95 N.E.3d 674, 686 (Ohio Ct. App. 2017).

That leaves Creditors' argument that the alias royalties were not entitled to the protection of the bankruptcy stay even as Stringer's own assets. That is so, Creditors say, because Stringer did not disclose her aliases in her bankruptcy filing. As a general matter, Creditors are correct that

Nos. 19-3987/3990, *Squire v. Stringer*

the bankruptcy process is designed for the “honest but unfortunate debtor.” *See, e.g., Grogan v. Garner*, 498 U.S. 279, 287 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). But that venerable principle did not serve as a gateway for Creditors to circumvent the automatic stay based upon their individual determination that Stringer had been dishonest in some aspect of the bankruptcy process. The Bankruptcy Code, in fact, provides a specific mechanism for Creditors to request relief from a § 362 stay. Under 11 U.S.C. § 362(d), a bankruptcy court can grant such relief so long as it provides notice and a hearing to the other parties. This mechanism ensures both that a creditor’s request for relief is meritorious and that the interests of the other parties are adequately protected. And to ensure that those interests are preserved, a creditor who acts without prior approval from the bankruptcy court (like Creditors here) risks being held in contempt of the stay. *In re Webb*, 472 B.R. 665 (Table), at *12 (B.A.P. 6th Cir. 2012) (“A creditor seeking to proceed with an action prohibited by the automatic stay must seek relief from the stay pursuant to § 362(d.)”); *In re Clark*, 207 B.R. 559, 565 (Bankr. S.D. Ohio 1997) (“Unless a particular proceeding is specifically designated an exception to the automatic stay, creditors must obtain relief from the stay *prior* to taking any action involving property of the estate. To the extent creditors fail to do so, they act at their own peril.”) (internal citations omitted).

Creditors respond with a request that we retroactively ratify or annul their violation of the stay under our § 362(d) equitable authority. *See Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910 (6th Cir. 1993) (“This section expressly permits the bankruptcy court to annul the stay. This power to annul ‘permits the order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay. Such actions would otherwise be void.’” (quoting 2 L. King, *Collier on Bankruptcy* § 362.07 (15th ed. 1987))). We may do so, however, “only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the

Nos. 19-3987/3990, *Squire v. Stringer*

debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result.” *Id.* at 911. And here, Creditors concede that Stringer did not withhold notice of the stay. Nor do they argue that Stringer is somehow unfairly using the stay to shield herself from an unfavorable result. All things considered, then, the district court did not plainly err in finding that Creditors willfully violated the stay.

Honoring Creditors’ unauthorized pursuit of self-help, it bears adding, would contravene the basic vision of the Bankruptcy Code. The automatic stay allows the debtor’s assets and debts to be accounted for in one forum, facilitating an organized, collective plan that considers the interests of all parties. The stay gives debtors relief from collection efforts, harassment, and foreclosure actions, and permits them to attempt a repayment or reorganization plan. *In re Robinson*, 764 F.3d 554, 559 (6th Cir. 2014). At the same time, it helps creditors “preserve what remains of the debtor’s insolvent estate and provide a systematic equitable liquidation procedure.” *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 382–83 (6th Cir. 2001) (cleaned up). Allowing a creditor to circumvent the automatic stay based upon his own judgments would lead to the very “chaotic and uncontrolled scramble for the debtor’s assets” the stay was designed to prevent. *Id.* (quoting *Holtkamp v. Littlefield*, 669 F.2d 505, 508 (7th Cir. 1982)). Here, Creditors knew of the § 362 stay and pursued their state court collection action anyway, without prior approval from the bankruptcy court, in willful violation of the stay. *See Weary v. Poteat*, 627 F. App’x 475, 477 (6th Cir. 2015) (holding that a willful violation of a § 362 stay occurs when a creditor takes action to coerce a debtor into paying the creditor despite “knowledge of the bankruptcy stay”).

Stringer’s Past Convictions. Creditors next challenge the bankruptcy court’s refusal to allow Squire to introduce evidence of Stringer’s past convictions while Squire was “cross examining himself” at the contempt hearing. The bankruptcy court excluded that evidence on the

Nos. 19-3987/3990, *Squire v. Stringer*

grounds that Stringer’s credibility—the matter that her prior convictions could have impeached—was irrelevant to the issue at the heart of the contempt hearing—whether Creditors willfully violated the automatic stay. Our standard of review raises the bar for Creditors on appeal. We review the bankruptcy court’s evidentiary rulings for abuse of discretion, meaning we will reverse an erroneous exclusion of evidence only where it affects the substantial rights of the complaining party. *United States v. Kerley*, 784 F.3d 327, 336 (6th Cir. 2015).

Creditors’ argument raises a pair of interesting questions about the mechanics of introducing evidence of a testifying witness’s past convictions as impeachment evidence under Federal Rule of Evidence 609. One is whether evidence of Stringer’s convictions should have been handled under Rule 609(a), which governs recent convictions, or 609(b), which governs convictions for which “more than 10 years have passed since the witness’s conviction or release from confinement for it, whichever is later.” Complicating matters here is the fact that, at the time of the contempt hearing, 10 years had passed since Stringer was released from prison, but not since she had completed her term of supervised release. In this setting, we have noted disagreement among courts over which event triggers Rule 609(b)’s 10-year clock. *See United States v. Peatross*, 377 F. App’x 477, 489–90 (6th Cir. 2010) (collecting cases).

A second question is the acceptable point at which such evidence can be admitted during the hearing. Historically, such evidence was admissible only during cross-examination of the witness whose convictions were being introduced. 3 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 6:43 (4th ed. 2020). But a 1990 amendment to Rule 609 removed the cross-examination limitation, allowing introduction of past-conviction evidence without precise limitations. *Id.* (“[I]n 1990 the language was amended, so that it no longer limits the attacking party to cross-examination or any particular method of proof.”); *see* Fed. R. Evid. 609 (providing

Nos. 19-3987/3990, *Squire v. Stringer*

that “the following rules apply to attacking a witness’s character for truthfulness by evidence of a criminal conviction” without specifying when and how such evidence can be introduced). Perhaps the narrowest way to construe this amendment is a grant of permission to introduce prior convictions on direct examination of a witness who would otherwise be impeached with that evidence on cross-examination, ostensibly to soften the blow of prior convictions sprung during cross-examination. *Cf. Ohler v. United States*, 529 U.S. 753, 756 (2000) (observing that the 1990 amendment to Rule 609 “clarif[ied] that [conviction] evidence could also be introduced *on direct examination*”) (emphasis added). Today’s case, however, goes beyond that narrow ground. Creditors sought to introduce this evidence not during Stringer’s testimony, but instead during Squire’s “self-cross-examination.” And due to this unusual aspect of the hearing, no prior decision appears directly on point.

Regardless of how we might answer these questions, any hypothetical error in the bankruptcy court’s exclusion of the conviction evidence was harmless. Neither Stringer’s candor on the witness stand nor in her bankruptcy filing was relevant to whether Creditors willfully violated the automatic stay. Admission of the conviction evidence thus would not have moved the needle on the bankruptcy court’s finding of contempt. *See United States v. Collins*, 799 F.3d 554, 571 (6th Cir. 2015) (finding that improper admission of past conviction evidence was harmless given the overwhelming evidence of guilt presented at trial). Nor did the bankruptcy court’s exclusion of the conviction evidence deny Creditors a fair trial, a point largely undeveloped by Creditors.

CONCLUSION

For these reasons, we **AFFIRM** the judgment of the bankruptcy court.

MIDWEST REGIONAL BANKRUPTCY SEMINAR 2021

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

JAHNEE REED,

Case No. 20-40311

Chapter 7

Judge Thomas J. Tucker

Debtor.

JAHNEE REED,

Plaintiff,

v.

Adv. Pro. No. 20-4187

UNIVERSITY NEUROSURGICAL
ASSOCIATES, P.C.,

Defendant.

OPINION REGARDING SUMMARY JUDGMENT

I. Introduction

In this adversary proceeding, the Plaintiff, Jahnee Reed (the “Debtor”), is the Debtor in a pending Chapter 7 bankruptcy case. Before the Debtor filed her bankruptcy case, her wages were garnished by a judgment creditor, Defendant University Neurosurgical Associates, P.C. (the “Defendant”). The Debtor filed this adversary proceeding in an effort to recover \$2,056.69 in garnished funds that were received by the Defendant during the 90 days before the bankruptcy case was filed.

The Debtor’s adversary complaint contained five counts. Counts I and II sought to avoid the garnishment transfers as preferential transfers, and to recover the garnished funds, based on 11 U.S.C. §§ 547(b), 522(h), 522(i) and 550(a). Count III sought the disallowance of any claim

the Defendant might file in the bankruptcy case, under 11 U.S.C. § 502(d). Count IV alleged a violation of the automatic stay, 11 U.S.C. § 362(a). In a second count labeled “Count IV” the Debtor alleged a claim of statutory and common law conversion under Michigan law.

Sixteen days after the Debtor filed this adversary proceeding, the Defendant returned the entire garnishment amount at issue, \$2,056.69, to the Debtor. But the case remained pending. On November 2, 2020 the Court held a final pretrial conference, and entered a Final Pretrial Order (Docket # 25) which dismissed four of the five counts in Plaintiff’s Complaint. The Order states, in part:

With the consent and agreement of Plaintiff, expressed by Plaintiff’s counsel on the record during the final pretrial conference, IT IS ORDERED that the following counts of Plaintiff’s Complaint (Docket # 1) are dismissed, with prejudice: Counts I, II, III, and the second Count IV (labelled “STATUTORY AND/OR COMMON LAW CONVERSION”). The first Count IV (labelled “AUTOMATIC STAY VIOLATION”) remains pending.¹

For the reasons explained below, the Court now concludes that it should grant summary judgment against the Debtor on the one claim that remains pending — the first Count IV, alleging a violation of the automatic stay.

II. Jurisdiction

This Court has subject matter jurisdiction over the Debtor’s Chapter 7 bankruptcy case and over this adversary proceeding under 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1), and L.R. 83.50(a) (E.D.Mich.). This is a core proceeding under, among other possible provisions, 28 U.S.C. §§ 157(b)(2)(F) and 157(b)(2)(O).

¹ Final Pretrial Order (Docket # 25) at pdf p. 3.

This proceeding also is “core” because it falls within the definition of a proceeding “arising under title 11” and of a proceeding “arising in” a case under title 11. *See* 28 U.S.C. § 1334(b). Matters falling within either of these categories in § 1334(b) are deemed to be core proceedings. *Allard v. Coenen (In re Trans-Industries, Inc.)*, 419 B.R. 21, 27 (Bankr. E.D. Mich. 2009). This is a proceeding “arising under title 11” because it is “created or determined by a statutory provision of title 11,” including Bankruptcy Code § 362(a). *Id.* It is a proceeding “arising in” a case under title 11 because it is a proceeding that “by [its] very nature, could arise only in bankruptcy cases.” *Id.*

III. Relevant facts and procedural history

All the facts that the Court finds to be material are undisputed — the parties stipulated to them in the Final Pretrial Order:

Stipulation of Facts and Law. (1) Plaintiff filed a Chapter 7 Bankruptcy on January 9, 2020. (2) In the ninety (90) days prior to Debtor’s bankruptcy filing, Defendant garnished \$2,056.69 from Plaintiff’s wages for a prior debt Plaintiff owed to Defendant. (3) On January 26, 2020 Plaintiff’s Attorney forwarded a letter to Creditor Attorney requesting Defendant to return the garnished funds. Plaintiff’s Attorney contacted Defendant’s Attorney again via email on February 24, 2020 for a status. (4) Plaintiff filed this Adversary Proceeding on April 6, 2020. (5) Plaintiff’s Attorney received a check for \$2,056.69 and cashed it on or around April 22, 2020. (6) Plaintiff has received all monies that were garnished by Defendant-Creditor in the 90 days prior to the petition date. (7) As of April 22, 2020, Defendant does not owe Plaintiff any money.²

During the final pretrial conference, the Court and counsel for the parties discussed the issues presented in this case. With respect to the remaining claim of a stay violation, the Court identified a potentially dispositive legal issue, and asked counsel for the parties if they agreed

² *Id.* at pdf p. 2.

that the Court should require briefing on that legal issue, before the parties were put to the time and expense of a trial. The Court indicated that it may render a decision on the legal issue.

Counsel for the parties agreed that briefing would be appropriate.

In the Final Pretrial Order, the Court ordered that the parties file briefs on the legal issue.

The Court stated the issue:

Legal Issue: Is it a violation of the automatic stay, under 11 U.S.C. § 362(a)(6) or under any other provision of 11 U.S.C. § 362(a), when the transferee of a pre-petition transfer done through a wage garnishment, which transfer is avoidable under 11 U.S.C. § 547(b), fails to comply, or delays in complying, with a post-petition demand by the bankruptcy debtor for payment of the garnishment amount that was paid pre-petition to the transferee?³

The parties then filed their briefs,⁴ which the Court has reviewed.

IV. Summary judgment standards

Neither party in this case filed a motion for summary judgment, and the deadline for doing so was October 23, 2020. But this Court may consider granting summary judgment “on its own,” after “giving notice and a reasonable time to respond,” and “after identifying for the parties material facts that may not be genuinely in dispute.” *See* Fed. R. Civ. P. 56(f)(3).⁵

As explained above, the potentially dispositive issue before the Court is a legal issue, and the parties do not dispute any material facts. The Court gave the parties adequate notice that the Court may decide the issue before trial, and the parties were given the opportunity to brief the

³ *Id.* at pdf p. 3 (bold and italics in original).

⁴ Docket ## 30, 31.

⁵ Fed. R. Civ. P. 56 is made applicable in this adversary proceeding by Fed. R. Bankr. P. 7056.

issue. The Court now concludes that it should grant summary judgment for the Defendant, under Fed. R. Civ. P. 56(f)(3). Because of the Court’s ruling on the legal issue, there is no need for a trial.

In considering whether to grant summary judgment, the Court has applied the generally applicable standards governing summary judgment, which the Court now incorporates by reference from one of its prior opinions in another case, *Schubiner v. Zolman (In re Schubiner)*, 590 B.R. 362, 376-77 (Bankr. E.D. Mich. 2018).

V. Discussion

The dispositive legal issue in this case is whether the Defendant’s delay in returning the garnished funds that it received pre-petition can be deemed a violation of the automatic stay under 11 U.S.C. § 362(a). The Court concludes that it cannot.

The Debtor relies on two provisions of § 362(a): §§ 362(a)(3) and 362(a)(6). The Debtor alleges that the Defendant violated 11 U.S.C. § 362(a)(6), which, upon the filing of the bankruptcy petition, automatically stays “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.” But the Defendant did not do anything, after the bankruptcy petition was filed, to try to collect its claim against the Debtor. At most, the Defendant merely failed or refused, for a time, to undo a collection action it took pre-petition — the wage garnishment that was done and completed pre-petition. That cannot be deemed a violation of § 362(a)(6).

The Debtor also contends that the Defendant violated 11 U.S.C. § 362(a)(3), which automatically stays “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” Citing *TranSouth Fin. Corp. v. Sharon*

(*In re Sharon*), 234 B.R. 676, 681 (6th Cir. BAP 1999), the Debtor states that “[a] creditor’s post-petition refusal to surrender property taken pre-petition constitutes a violation of the automatic stay.”⁶

In *Sharon*, a secured creditor repossessed the debtor’s car before the debtor filed bankruptcy, and then refused to return the car after the bankruptcy case was filed. The Bankruptcy Appellate Panel determined that the debtor’s possessory interest in the car was “part of the bundle of rights that became ‘property of the estate’ at the [filing of the petition].” *Id.* at 682. The panel held that “[o]nce defined as ‘property of the estate,’ the statutory consequence under § 362(a) is application of the automatic stay. The Debtor’s right to possession of the car was protected by the automatic stay.” *Id.* The panel concluded that by refusing to turn the car back over to the debtor, the creditor was “exercising control” over property of the bankruptcy estate, in violation of the automatic stay under 11 U.S.C. § 362(a)(3).⁷ *Id.*

Sharon is distinguishable from this case. Under 11 U.S.C. § 541(a)(1), the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” In the case of *In re Parham*, No. 16-44233, 2017 WL 3207663 (Bankr. E.D. Mich. July 26, 2017), the court noted the difference between a creditor’s post-petition retention of a vehicle that was repossessed pre-petition, on the one hand, and a creditor’s post-petition retention of garnished funds received pre-petition, on the other hand:

⁶ Debtor’s Brief (Docket # 30) at pdf p. 2.

⁷ The Court notes that the issue of whether the passive retention of property of the bankruptcy estate constitutes a violation of the automatic stay is currently pending before the United States Supreme Court. See *In re Fulton*, 926 F.3d 916 (7th Cir. 2019), cert. granted sub nom. *City of Chicago v. Fulton*, ___ U.S. ___, 140 S.Ct. 680 (2019). That issue is not before the Court in this case, because as discussed below, the garnished funds at issue in this case were never property of the bankruptcy estate.

[D]ebtors, whose vehicles or other tangible personal property are repossessed before filing bankruptcy, still have an interest in the property until it is sold. However, the Court finds Debtor's interest in the garnished funds was terminated with finality upon [the creditor's] *pre-petition* receipt. The garnished funds were not property of the estate.

Id. at * 2 (italics in original).

The Court agrees with *Parham*. The garnished funds received pre-petition by the Defendant were never property of the bankruptcy estate under 11 U.S.C. 541(a)(1), and the automatic stay was not implicated.

The Debtor also argues that the pre-petition garnished funds became property of the bankruptcy estate under 11 U.S.C. § 541(a)(3), which states that property of the estate includes “[a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.” But the short answer to this argument is that, in this case, the trustee never recovered any property under any of the cited sections. For that reason, § 541(a)(3) clearly does not apply.

The Debtor argues that “the garnished wages become property of the estate **if avoided pursuant to section 547.**”⁸ The Debtor cites *Parham* for this proposition, but in *Parham* the court found that the garnished funds were not property of the estate under § 541(a)(3). The court noted that the debtor had not filed an adversary proceeding seeking avoidance under § 547(b), “much less [had there been] a judicial determination that all of the elements of a preference were established.” *In re Parham*, 2017 WL 3207663 at * 2.

In this case, the garnished funds were transferred to the Defendant pre-petition and, at the

⁸ Debtor's Brief at pdf p. 2 (emphasis added).

time the bankruptcy case was filed, belonged to the Defendant. The Defendant's ownership of the funds continued after the Debtor's bankruptcy filing, and would continue unless and until the transfer was actually avoided and recovered, or as in this case, until the Defendant voluntarily returned the funds to the Debtor.

In this case, there was no avoidance under § 547, and there was no recovery under § 550. The avoidance count (Count I) of the Debtor's complaint was dismissed, with the Debtor's consent, and it had become moot in any event when the garnished funds were voluntarily returned by the Defendant. There was no judicial determination that the elements of a § 547 action were established. *See In re Parham*, 2017 WL 3207663 at * 2. Likewise, the count of the complaint seeking recovery under § 550 (Count II) was dismissed, with the Debtor's consent, and also had become moot when the Defendant returned the funds.

There was no avoidance under § 547 and no recovery of any interest in property by the trustee (or anyone else) under § 550. Therefore, the garnished funds never became property of the estate under 11 U.S.C. § 541(a)(3).

The Court's rulings today about §§ 362(a)(6) and 362(a)(3) are further supported by another decision of this Court, *Andrews v. Indirect Purchaser Class (In re Andrews)*, No. 18-3070, 2019 WL 3331604 (Bankr. E.D. Mich. July 23, 2019). *Andrews* followed *Parham*, and held that:

[F]unds garnished pre-petition are not property of the estate, and a refusal to return funds garnished pre-petition does not constitute a post-petition enforcement of a judgment or an attempt to control property of the estate.

Id. at * 6

VI. Conclusion

For the reasons stated above, the Court concludes that there is no genuine dispute as to any material fact, and the Defendant is entitled to judgment as a matter of law on the remaining count of the Debtor's Complaint, "Count IV: (Automatic Stay Violation)". The Court will enter a judgment for Defendant.

Signed on December 2, 2020



/s/ Thomas J. Tucker

**Thomas J. Tucker
United States Bankruptcy Judge**

AMERICAN BANKRUPTCY INSTITUTE

By order of the Bankruptcy Appellate Panel, the precedential effect of this decision is limited to the case and parties pursuant to 6th Cir. BAP LBR 8024-1(b). See also 6th Cir. BAP LBR 8014-1(c).

File Name: 21b0004n.06

BANKRUPTCY APPELLATE PANEL

OF THE SIXTH CIRCUIT

IN RE: BENNY DARNELL MCCARTHY,

Debtor.

BENNY DARNELL MCCARTHY,

Appellant,

v.

ATLANTA POSTAL CREDIT UNION,

Appellee.

No. 20-8027

On Appeal from the United States Bankruptcy Court
for the Western District of Tennessee at Memphis.
No. 2:15-bk-29883—Jennie D. Latta, Judge.

Decided and Filed: June 16, 2021

Before: DALES, GUSTAFSON, and WISE, Bankruptcy Appellate Panel Judges.

COUNSEL

ON BRIEF: Steven N. Douglass, HARRIS SHELTON HANOVER WALSH, PLLC, Memphis, Tennessee, for Appellee. Benny D. McCarthy, Memphis, Tennessee, pro se.

OPINION

JOHN P. GUSTAFSON, Bankruptcy Appellate Panel Judge. Unrepresented Debtor-Appellant Benny Darnell McCarthy (“the Debtor”) appeals the bankruptcy court’s order granting his motion for sanctions against Creditor-Appellee Atlanta Postal Credit Union (“the Credit

Union”) for violation of the automatic stay. The Debtor asserts that the bankruptcy court erred by awarding him inadequate damages. In response, the Credit Union moves to dismiss the appeal based upon the “acceptance of benefits” doctrine and mootness. For the reasons set forth below, we deny the Credit Union’s motion to dismiss and affirm the order of the bankruptcy court.

ISSUE ON APPEAL

The issue properly presented in this appeal is whether the bankruptcy court erred by failing to award “substantial punitive damages.”

JURISDICTION AND STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Sixth Circuit has jurisdiction to decide this appeal. The United States District Court for the Western District of Tennessee has authorized appeals to the Panel and no party has timely elected to have this appeal heard by the district court. 28 U.S.C. §158(b)(6), (c)(1)

A party may bring an appeal as of right under 28 U.S.C. §158(a)(1) from final judgments, orders, and decrees of the bankruptcy court. “Orders in bankruptcy cases qualify as ‘final’ when they definitively dispose of discrete disputes within the overarching bankruptcy case.” *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. ___, ___, 140 S. Ct. 582, 586 (2020). “An order sanctioning a party and imposing a sum certain amount in damages is a final order.” *In re Jackson*, 554 B.R. 156, 159 (B.A.P. 6th Cir. 2016).

“A bankruptcy court’s decision to sanction is reviewed for an abuse of discretion.” *Id.* “Sanctions premised upon an erroneous view of the law or an erroneous assessment of the evidence are necessarily an abuse of discretion.” *Id.* (quotation and internal quotation marks omitted).

FACTS

On or about October 14, 2010, the Debtor obtained a loan from the Credit Union to finance the purchase of the Debtor’s 2007 Chevrolet Corvette. The Debtor granted the Credit Union a security interest in the vehicle. To evidence its security interest in the vehicle, the

Credit Union was listed as the holder of the “1st Lien or Security Interest” on the Certificate of Title issued by the Georgia Department of Revenue.

The Debtor subsequently moved from Georgia to Tennessee. After moving to Tennessee, the Debtor initiated the process of transferring the vehicle’s Certificate of Title from Georgia to Tennessee. The Credit Union received a letter requesting the vehicle’s Certificate of Title from the State of Tennessee Department of Revenue. This letter was dated November 2, 2012. The Credit Union did not act upon the 2012 letter sent by the State of Tennessee Department of Revenue.

On or about October 16, 2015, the Debtor filed his voluntary petition for relief under Chapter 13. The Credit Union participated in the bankruptcy case by filing a timely proof of claim.

In May 2016, the Debtor filed a formal complaint with the Georgia Department of Banking & Finance based upon the Credit Union’s failure to transfer the vehicle’s Certificate of Title. This complaint was filed in response to the Credit Union’s failure to act upon the letter sent by the State of Tennessee Department of Revenue in 2012.

In response, the Credit Union’s counsel sent email correspondence to Debtor’s counsel falsely stating that the Credit Union had not received any letters from the State of Tennessee requesting the vehicle’s Certificate of Title.

Subsequently, the Credit Union received a second letter requesting the vehicle’s Certificate of Title, this time from the Shelby County Clerk’s Office in Memphis, Tennessee. This letter was dated January 21, 2017. The Credit Union did not act upon the 2017 letter sent by the Shelby County Clerk’s Office.

On April 27, 2020, the Debtor filed a pro se motion for sanctions against the Credit Union for violation of the automatic stay. Three weeks later, the Credit Union filed a response denying the sole allegation in the Debtor’s motion, that the Credit Union refused the Debtor’s requests to transfer the Certificate of Title to his vehicle from Georgia to Tennessee.

On August 17, 2020, the Credit Union supplemented its response, providing material facts the Credit Union learned after filing its initial response to the Debtor's motion. The Credit Union informed the bankruptcy court that due to the Credit Union's transition to a paperless record-keeping process, the Credit Union had not identified the 2012 letter from the Tennessee Department of Revenue or the 2017 letter from the Shelby County Clerk's Office. These letters had provided the Credit Union with directions as to how the title could be transferred subject to the Credit Union's lien, and had directed the Credit Union to send the Georgia title to the Tennessee clerk's office in order for the clerk to send back a newly-issued Tennessee Certificate of Title listing the Credit Union's lien.

Although the record is not clear on the date, at some point after the Debtor filed his pro se motion for sanctions the Debtor's counsel stepped in and ultimately participated in the litigation of the Debtor's motion.

On August 18, 2020, a hearing was held on the motion for sanctions, the Credit Union's response, and its supplemental response. The bankruptcy court announced its oral ruling at the end of the hearing, sanctioning the Credit Union. The bankruptcy court tasked the Debtor's counsel with drafting the order.

On August 26, 2020, the bankruptcy court entered its written order. The order provided:

IT IS THEREFORE ORDERED,

1. That Atlanta Postal Credit Union shall forward the lien free title to the 2007 Chevrolet Corvette such that it is received by Debtor's counsel within seven days of the entry of this order;
2. That Debtor is hereby granted damages for violation of the automatic stay by Atlanta Postal Credit Union in the amount of \$25,000.00; and
3. That Atlanta Postal Credit Union shall forward certified funds made payable to Debtor in payment of said damages in the amount of \$25,000.00 such that said funds are received by Debtor's counsel within seven days of the entry of this order.

(Order Granting Mot. Sanctions Against Credit Union ("Order") at 1-2, Aug. 26, 2020, 2:15-bk-29883, ECF No. 61.)

The Credit Union complied with the directives set forth in the Order. On August 20, 2020, after the oral ruling but before the entry of the Order, the Credit Union issued Check No. 78174 in the amount of \$25,000.00 (“Check”) made payable to the Debtor.

On September 3, 2020, the Debtor timely filed his pro se notice of appeal and statement of election.

On that same day, the Credit Union hand delivered the Check to Debtor’s counsel along with the lien-free Certificate of Title to the vehicle. The phrase “Please Negotiate Promptly” was noted on the Check. (Kelly Aff., Ex. 1, Dec. 7, 2020, Case No. 20-8027, ECF No. 13-2.) On September 9, 2020, the Debtor endorsed and negotiated the Check.

The Debtor and the Credit Union have filed their respective briefs, including a reply brief filed by the Debtor. Along with the Credit Union’s brief, the Credit Union also filed a motion to dismiss. The Debtor did not file a response to the Credit Union’s motion to dismiss.

DISCUSSION

The Credit Union moves to dismiss the Debtor’s appeal on the grounds that by accepting the benefits of the judgment (by endorsing and negotiating the Check six days after the notice of appeal), the Debtor waived his right to appeal and should be estopped from proceeding with his appeal. However, in this appeal the Debtor disputes the sufficiency of the damages the bankruptcy court awarded the Debtor, asserting that the damages were inadequate. Accordingly, the Debtor’s entitlement to the amount awarded by the bankruptcy court is uncontested, and he is seeking additional recovery under a single legal theory. Under these facts, the motion to dismiss will be denied. *See, United States v. Hougham*, 364 U.S. 310, 81 S. Ct. 13 (1960).¹

Turning to the issue presented, the Debtor’s pro se brief offers only minimal insight regarding the basis for this appeal. He asserts that the bankruptcy court erred when it “overlooked the duration of the creditor’s violations, [and] accepted Atlanta Postal Credit Union[’s] excuses as justification to overlook their willful violation of automatic stay.” (B.A.P.

¹To the extent this issue is governed by Tennessee law, Tennessee follows the rule in *Hougham*. *See, e.g., McClendon v. House*, 637 S.W.2d 883, 884 (Tenn. Ct. App. 1982).

Pro Se Br. Form at 1-2, Case No. 20-8027, ECF No. 5.)² The Debtor indicates that he wants the Panel to “[c]onsider the egregious violations of Atlanta Postal Credit Union and their disregard and disrespect for the rule of law.” (*Id.* at 2.) The Debtor also asserts that “Atlanta Postal Credit Union continued to withhold vehicle title even after they were paid in full in August 2019. After they were paid the vehicle belonged to me and they had no legal claim to my property.” (*Id.*) The Debtor provided a single paragraph summary of his appeal in his merits brief, in which he asserted that due to the Credit Union’s actions he could not “register/operate” his car for five years. (*Id.*, Suppl. Statement at 1-2.) In conclusion, he argued that “these violations warrants [sic] imposing substantial punitive [sic] damages for deterrence and punishment.” (*Id.*, Suppl. Statement at 2.)

The Order grants the motion for sanctions, finds that the Debtor is entitled to damages, and orders specific relief. The Order granted the Debtor damages in the amount of \$25,000.00. The Order does not identify whether the amount awarded reflects actual or punitive damages, or both, and the Debtor did not designate a transcript of the bankruptcy court’s August 18, 2020 oral ruling in the record on appeal. Nor does the bankruptcy court docket reflect that a transcript was ever ordered.

In the Statement of Issues, (Case No. 20-8027, ECF No. 9), the Debtor asserts the following errors by the bankruptcy court: (1) the bankruptcy court ignored the Credit Union’s admission that it was mistaken regarding receipt of requests from the State of Tennessee; (2) the court ignored that the Credit Union no longer had any financial or legal right to the property; and (3) the court should not have instructed Debtor’s counsel to prepare the order granting the motion for sanctions because the Debtor filed his motion for sanctions pro se. Although the Debtor’s brief is vague, it appears his position is that the bankruptcy court did not award “substantial punitive damages.”

Under 11 U.S.C. §362(k), an “individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in

²The Clerk’s office offers a pro se brief form to Pro Se Appellants which allows them to answer a series of questions in lieu of drafting a merits brief. The Debtor utilized this form and included a supplemental one paragraph response. He also filed a four-page reply brief restating his position.

appropriate circumstances, may recover punitive damages.” *See, Archer v. Macomb Cnty. Bank*, 853 F.2d 497, 499 (6th Cir. 1988). “Damages under §362(k) must also be proven with reasonable certainty and must not be speculative or based on conjecture.” *Grine v. Chambers (In re Grine)*, 439 B.R. 461, 469 (Bankr. N.D. Ohio 2010). The party seeking recovery has “the burden of proving entitlement to damages.” *Id.* *See also, TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999)(“The bankruptcy court appropriately assigned to the Debtor the burden to prove entitlement to damages.”); *IRS v. Mathews (In re Mathews)*, 209 B.R. 218, 220 (B.A.P. 6th Cir. 1997); *In re Perrin*, 361 B.R. 853, 856-58 (B.A.P. 6th Cir. 2007). In addition to actual damages, if a “bankruptcy court believes that the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay . . . the bankruptcy court is free to impose an appropriate amount of punitive damages.” *Archer*, 853 F.2d at 500.

The Credit Union did not appeal either the finding that it had violated the automatic stay or the amount of sanctions awarded.³ Instead, it immediately complied with the bankruptcy court’s ruling by transferring the title and paying the sanctions in full. The Debtor is unable to carry his burden on appeal because he did not include a transcript of the bankruptcy court’s oral ruling as part of the appellate record. Where “an appellant fails to provide an adequate appellate record on an issue finally decided by a prior court, that failure makes his road to victory difficult at best.” *Hawley v. City of Cleveland*, 24 F.3d 814, 821-22 (6th Cir. 2001). Additionally, “an appellant’s failure to provide a transcript is more critical when the ruling being appealed is oral.” *Knowles Bldg. Co. v. Zinni (In re Zinni)*, 261 B.R. 196, 202 (B.A.P. 6th Cir. 2001).

Federal Rule of Bankruptcy Procedure 8009(b)(1)(A) requires the appellant to file “a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal[.]” Additionally the rule requires appellants to “include in the record a transcript of all relevant testimony and copies of all relevant exhibits” when “the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is

³On January 14, 2021, the Supreme Court of the United States issued an opinion holding that the mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3). *City of Chicago v. Fulton*, 592 U.S. ___, 141 S. Ct. 585 (2021). Since the Credit Union did not appeal the determination that it violated the automatic stay, there is no need to evaluate the impact of the *Fulton* decision in the present appeal.

contrary to the evidence.” Fed. R. Bankr. P. 8009(b)(5). Moreover, the rule requires that the record on appeal must include “transcripts of all oral rulings.” Fed. R. Bankr. P. 8009(a)(4).

Without a transcript of the hearing and the bankruptcy court’s oral ruling, the Panel has nothing before it to support the Debtor’s assertion that the bankruptcy court erred and that the sanctions awarded were not adequate. The Debtor’s brief asserts that the bankruptcy court did not appropriately consider the length of the Credit Union’s violation. However, without the transcript, the Panel cannot determine if there is any basis for that assertion.

The only exhibit that the Debtor designated as part of the record on appeal is the Credit Union’s supplemental response to the motion for sanctions. In its supplemental response, the Credit Union admitted that it had previously falsely informed the bankruptcy court and the Debtor’s counsel that it had not received any requests to transfer the title. Without a transcript of the oral ruling, the Panel is unable to determine how this admission impacted the court’s determination regarding sanctions. However, the bankruptcy court did find that a violation existed, and did award sanctions.

The supplemental response and the Debtor’s brief do not provide any insight or evidence regarding the amount of damages the Debtor suffered. The Debtor does not articulate what specific damages he incurred, nor does he suggest an amount that he would find satisfactory as punitive damages. In his reply brief, the Debtor asserts that the Credit Union’s action in refusing to transfer title, even after the loan had been paid in full through the Chapter 13 plan, caused him frustration, anxiety, and anger. He asserts that his inability to use the vehicle impacted his mobility and quality of life. (Reply Br. at 2, Case No. 20-8027, ECF No. 15.) However, he does not explain why the bankruptcy court’s award of \$25,000.00 as a sanction was insufficient to compensate him for his loss. And, without the transcript, the Panel is unable to evaluate what arguments the Debtor made to the bankruptcy court and what metrics the bankruptcy court used to reach its decision. Further, the Debtor’s brief does not explain how the requirement that his attorney draft the order was unfair, or harmed him in any way.

On the record before this Panel, the Debtor has not met his burden of persuasion that the bankruptcy court erred. *See, Pinnacle Tech. Res., Inc. v. Spencer (In re Spencer)*, 359 B.R. 357

(unpublished table decision), available at 2006 WL 3539295, at *1, 2006 Bankr. LEXIS 3297, at *3 (B.A.P. 6th Cir. Dec. 8, 2006)(“Failure to provide the Panel with relevant portions of the trial transcript makes evaluation of the validity of the Debtor’s arguments difficult.”). “Appellant is the party responsible for presenting a complete record on appeal and will not prevail on any assignment of error which depends on information omitted from the designation.” *Slizyk v. Smilack (In re Slizyk)*, Case No. 6:06-cv-1896-Orl-19, 2007 WL 2154231, at *5, 2007 U.S. Dist. LEXIS 53266, at *15 (M.D. Fla. July 24, 2007), reconsideration granted in part 2007 WL 2406997, 2007 U.S. Dist. LEXIS 60856 (M.D. Fla. Aug. 20, 2007), on reconsideration 2007 WL 2554637, 2007 U.S. Dist. LEXIS 63291 (M.D. Fla. Aug. 28, 2007). These principles, which are crucial to a meaningful appellate process, apply regardless of whether an appellant proceeds with counsel or without. *Eglinton v. Loyer (In re G.A.D., Inc.)*, 340 F.3d 331, 335 (6th Cir. 2003) (“The Supreme Court has instructed courts to hold pleadings filed by pro se litigants to a less stringent standard than those filed by lawyers, but has ‘never suggested procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.’” (citations omitted)).

CONCLUSION

For the foregoing reasons, the Panel AFFIRMS the bankruptcy court’s order and DENIES the Credit Union’s motion to dismiss.

Faculty

Michael B. Baker is a solo practitioner with The Baker Firm, PLLC in Ft. Mitchell, Ky., and has represented a variety of debtors and creditors in chapter 7, 11 and 13 in the areas of bankruptcy and civil litigation. He also routinely represents chapter 7 trustees. Mr. Baker received his J.D. *cum laude* in 2007 from Northern Kentucky University Salmon P. Chase College of Law.

Edward J. Boll, III is the managing bankruptcy attorney with Lerner, Sampson & Rothfuss, LPA in Cincinnati. His bankruptcy law practice before all 12 active Ohio bankruptcy judges has included the representation of secured and unsecured creditors in chapters 7, 11, 12 and 13 cases. He is a former chairman of the Cincinnati Bar Association's Bankruptcy Judicial Liaison Committee, a former chairman of the Cincinnati Bar Association's Bankruptcy Committee, and a former board member of the Cincinnati Bar Association's Board of Trustees. He is actively involved with the NACTT Mortgage Subcommittee, and he is a member of the board of directors for the Trustee's Education Network (TEN) and ABI's Midwest Regional Bankruptcy Seminar Advisory Board. Mr. Boll received his B.A. from the University of Cincinnati in 1997 and completed an International & Comparative Business Law Study Abroad in London in 1998 with the University of Notre Dame School of Law, and he received his J.D. from the University of Dayton School of Law in 2000, where he was a member of the University of Dayton National Bankruptcy Moot Court Team.

Brian D. Flick is the managing partner of The Dann Law Firm's Cincinnati office, where he focuses his practice in consumer law in Ohio, Kentucky and across the U.S. His practice areas include consumer bankruptcy debtor representation in the areas of chapters 7, 12 and 13, consumer fraud, real estate litigation, foreclosure defense, student loan debt defense, bankruptcy litigation and mortgage servicing litigation under the Real Estate Settlement Procedures Act and the Truth in Lending Act. Since beginning the practice of law, he has been very active in local and national attorney associations. Mr. Flick is active with the Cincinnati Bar Association's Bankruptcy Committee, and he sits on the Volunteer Lawyers Committee for the Cincinnati Bar Association. He also is the current Sixth Circuit Listserv Moderator for the National Association of Consumer Bankruptcy Attorneys and the current Ohio State Chair for the National Association of Consumer Advocates, both positions he has held since May 2017. In addition, he was appointed by the Board of Trustees as a member of the Unauthorized Practice of Law Committee of the Cincinnati Bar Association in June 2017. Mr. Flick has been a frequent speaker at Cincinnati Bar Association, NACBA and NACA events since 2014, and he has assisted with DannLaw's Regulation X and Z Seminars, which have taken place since 2016. In addition, he serves as a facilitator for the SDOH Bankruptcy Mortgage Modification Program and a mediator with the SDOH Bankruptcy Court Mediation Program. Mr. Flick received his B.A. from Adrian College and his J.D. from the Ohio Northern University Petition College of Law.

Hon. Jeffery P. Hopkins is a U.S. Bankruptcy Judge for the Southern District of Ohio in Cincinnati, appointed in 1996 and reappointed in 2010. After graduating from law school, he clerked for Hon. Alan E. Norris on the U.S. Court of Appeals for the Sixth Circuit, then worked as an associate with Squire, Sanders & Dempsey, LLP, specializing in complex commercial litigation. In 1990, Judge Hopkins sought appointment as an Assistant U.S. Attorney and advanced to become chief of the Civil Division for the Southern District of Ohio. During his tenure on the bankruptcy court, he has

AMERICAN BANKRUPTCY INSTITUTE

served on several committees of the Judicial Conference of the United States and for bar-related and civic organizations. In 2002, the late Chief Justice William H. Rehnquist appointed Judge Hopkins to the Federal Judicial Center's Education Committee for bankruptcy judges. Chief Justice John G. Roberts, Jr. appointed him to the Advisory Committee on Bankruptcy Rules, for which he chaired its Business Bankruptcy Subcommittee until 2009. Judge Hopkins formerly served on the boards of ABI, the ABA Business Bankruptcy Committee and the Cincinnati Symphony Orchestra, and as chair of the Queen City Foundation. Judge Hopkins is a Fellow of the American College of Bankruptcy and was an adjunct professor at the University of Cincinnati College of Law. He also was an adjunct professor at the University of Cincinnati College of Law. In 2010, Judge Hopkins received the William K. Thomas Distinguished Jurist Award from his alma mater, The Ohio State College of Law. He also is a past president of the National Conference of Bankruptcy Judges. Judge Hopkins received his A.B. in government and legal studies and anthro-sociology from Bowdoin College in 1982 and his J.D. in 1985 from The Ohio State University's Michael E. Moritz College of Law.