

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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ENTERED <u>JAN 09 2012</u>
FILED
JAN 6 2012
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY <u>113</u> DEPUTY

8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 In re ) Case No. 10-14105-PB7  
12 )  
12 ROBERT HERRON and ) ORDER ON MOTION FOR ORDER  
13 FRANCES HERRON, ) OF CONTEMPT FOR VIOLATION  
14 ) OF THE AUTOMATIC STAY  
Debtors. )  
\_\_\_\_\_ )

15 This matter came on for evidentiary hearing on debtors'  
16 motion for contempt for violation of the automatic stay, and  
17 for sanctions.

18 The Court has subject matter jurisdiction over the  
19 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
20 No. 312-D of the United States District Court for the Southern  
21 District of California. This is a core proceeding under  
22 28 U.S.C. § 157(b)(2)(A), (O) and 11 U.S.C. § 362(k).

23 The essential facts are not in dispute. Mrs. Herron is  
24 an employee of the Escondido School District. She sued the  
25 School District for harassment, but lost the suit. The School  
26 District was granted a judgment for its costs in approximately

1 October, 2009. When less formal methods of collection were  
2 unsuccessful, the School District commenced garnishment from  
3 Mrs. Herron's wages.

4 The testimony at the hearing was that the Escondido School  
5 District does not perform its own payroll function. Rather, the  
6 District uses the services and facilities of the San Diego County  
7 Office of Education. Employees, including Mrs. Herron, are paid  
8 once a month, on the last day of the month. Most employees are  
9 paid through direct deposit, but a few receive paper checks  
10 through distribution by "truck mail". Unusual or irregular  
11 checks would be delivered by the County Office of Education to  
12 the school districts it services.

13 Garnishment of Mrs. Herron's paycheck to make payments on  
14 the October, 2009 School District judgment began with the  
15 June 30, 2010 paycheck. The sum of \$716.00 was deducted and  
16 recorded as payable to the Sheriff on her June 30, 2010 pay  
17 statement (Exhibit B). In July, 2010 the sum of \$658.05 was paid  
18 over to the Sheriff effective on the issue date of July 30  
19 (Exhibit C). Then, on August 8, 2010 the Herrons filed the  
20 instant case under Chapter 7. In Schedule F, debtors listed Gil  
21 Abed, Esq., of the Stutz law firm, as a creditor for both the  
22 costs award and for a pending request for attorneys' fees of  
23 \$160,000. Debtors also listed the Vista, California station of  
24 the San Diego County Sheriff's Office, for notice purposes only,  
25 because of the garnishment proceedings. Notice was sent through  
26 the Bankruptcy Noticing Center by first class mail to the

1 scheduled creditors, including Mr. Abed and the Sheriff's office,  
2 on Wednesday, August 11, 2010. Mr. Abed has elsewhere stated  
3 without controversion that he received the notice of filing of  
4 the bankruptcy on Monday. August 16.

5 On August 31, 2010, Mrs. Herron received her monthly pay  
6 statement, which showed that the garnishment of her pay  
7 continued. The sum of \$711.09 was deducted and was payable to  
8 the Sheriff. She testified she contacted the payroll office  
9 that same date and was told by them they would get her a  
10 replacement check for the divested funds. Also on August 31,  
11 she contacted her bankruptcy attorney, Mr. Houbeck, who prepared  
12 a letter to Mr. Abed asserting a violation of the stay and a  
13 demand for immediate return of the levied funds (Exhibit G).  
14 That letter was apparently sent by facsimile, and it was followed  
15 by a second letter the next afternoon (Exhibit H). Meanwhile, on  
16 September 1, Mr. Abed sent a copy of the Notice of bankruptcy  
17 filing, along with a cover memo asking the Sheriff's Office to  
18 "take whatever steps are necessary at this time." (Exhibit I).  
19 Mr. Abed also sent a note back to Mr. Houbeck, advising him that  
20 the Sheriff's Office had "suggested that the Petition should come  
21 from you [Houbeck]. If you have any questions, please contact  
22 Mr. Abed at . . . ." (Exhibit J). Mrs. Herron did receive the  
23 replacement check for the deducted funds, \$711.09, issued by the  
24 San Diego County School Districts Office on August 31, 2010.

25 On November 9, 2010 Mr. and Mrs. Herron filed a motion  
26 seeking a contempt finding and damages for violating the

1 automatic stay. They asked for 1) damages of \$711.09 (although  
2 those funds had already been replaced); "2) disgorgement of  
3 \$1,374.05 garnished pre-petition; 3) punitive damages;  
4 4) emotional distress damages in the amount of \$2,000; and  
5 5) costs and attorney fees in the amount of \$4,500 which were  
6 incurred in prosecuting this motion for contempt."

7 In support of the motion, Mrs. Herron submitted a  
8 declaration in which she reiterated the fact not only of the  
9 August 31 deduction, but also the June and July prepetition  
10 deductions. Even though no legal argument has been advanced  
11 to claim any impropriety in the prepetition garnishment by  
12 the School District to recover on its 2009 judgment against  
13 Mrs. Herron, she stated in her declaration:

14 3. The levy has caused tremendous hardship  
15 to me and my family. These deductions have  
16 exhausted me and my family financially and  
17 emotionally. It has limited my ability to  
18 pay for everyday necessities, like school  
19 bus fees for my children, child care, after  
20 school care and programs, vehicle repairs,  
21 school clothes for the children, medical  
22 co-pays, dental bills and church tithes to  
23 my church. I have been humiliated at work  
24 for the garnishments and the Sheriff and  
25 Respondents contact with my employer.  
26 This process has hurt my reputation at  
my employment because my employer thinks  
I've done something wrong due to the  
Sheriff's inquiries and Respondents  
communications.

4. I have suffered severe emotional damages  
from this. I feel stress, depression,  
humiliation and guilt for what has happened.  
My children have had to do without basic  
necessities as outlined above because of the  
garnishment. Other children at their school  
have made fun of them and ridiculed them

1           because I have not had the money to provide  
2           for them due to the garnishment.

3           In the Opposition to debtors' motion. Mr. Abed and the  
4 law firm reminded debtors of the Eleventh Amendment's  
5 applicability, and debtors replied that they still wanted relief  
6 against Mr. Abed and the law firm. At the hearing on the motion,  
7 the Court set it for evidentiary hearing. Then, on the date set  
8 for the evidentiary hearing, debtors sought to expand the scope  
9 of the hearing to claim damages for injury allegedly suffered by  
10 Mr. Herron. Respondents were authorized to conduct discovery of  
11 his medical condition.

12           Debtors filed and noticed for hearing a motion to expand  
13 the scope of the proceedings, and Respondents opposed. After a  
14 continuance for further briefing, the motion to expand the scope  
15 was denied, and a new date for evidentiary hearing was set, and  
16 the matter was thereafter heard.

17           At the hearing, Mrs. Herron testified that the family was  
18 short of funds on a monthly basis for some months prior to filing  
19 bankruptcy. Some months they were unable to pay the full amount  
20 of the gas and electric bill. She testified they did not buy  
21 school clothes for the children in April, May, June, July or  
22 August of 2010. She also testified she was upset and depressed  
23 when she lost her lawsuit against the School District and her  
24 supervisor, and that the June, July and August garnishments were  
25 each humiliating. She felt she should not have to pay costs to  
26 the School District.



1           The essence of the issue of violation of the automatic  
2 stay in this case lies in the failure of Mr. Abed or anyone else  
3 in the firm to recognize what has become axiomatic in bankruptcy  
4 cases. In Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210  
5 (9<sup>th</sup> Cir. 2002), the court stated:

6           The maintenance of an active collection  
7 action alone adequately satisfies the  
8 statutory prohibition against "continuation"  
9 of judicial actions. Consistent with the  
10 plain and unambiguous meaning of the statute,  
and consonant with Congressional intent, we  
hold that § 362(a)(1) imposes an affirmative  
duty to discontinue post-petition collection  
actions.

11 309 F.2d at 1215. As early as 1994, the Bankruptcy Appellate  
12 Panel recognized that "cases widely agree that a garnishing  
13 creditor has an affirmative duty to stop garnishment proceedings  
14 when notified of the automatic stay." In re Roberts, 175 B.R.  
15 339, 343 (9<sup>th</sup> Cir. BAP). See, also, In re Gaytan, 2006  
16 WL 2547869 (Bankr. D.ID 2006); In re Hardesty, 442 B.R. 110, 114  
17 (Bankr. N.D. OH 2010); In re Clemmons, 107 B.R. 488, 490 (Bankr.  
18 D.DE 1989). Once a creditor has knowledge of the bankruptcy, it  
19 is deemed to have knowledge of the automatic stay. In re  
20 Ramirez, 183 B.R. 583, 589 (9<sup>th</sup> Cir. BAP 1995). Where the  
21 creditor has knowledge of the bankruptcy filing, and thus of the  
22 automatic stay, the creditor has an affirmative duty to cease  
23 collection efforts it has set in motion.

24           As expressly stated in § 362(k)(1), for a debtor to be able  
25 to recover for a violation of the automatic stay it must show  
26 that the violation was a "willful" one by the creditor. As

1 reiterated by the Ninth Circuit in In re Pinkstaff, 974 F.2d 113,  
2 115 (1992):

3           A "willful violation" does not require a  
4           specific intent to violate the automatic  
5           stay. Rather, the statute provides for  
6           damages upon a finding that the defendant  
7           knew of the automatic stay and that the  
8           defendant's actions which violated the stay  
9           were intentional.

10 See, also, Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215  
11 (9<sup>th</sup> Cir. 2002). As already discussed, garnishing a debtor's pay  
12 for prepetition debts is an intentional act, and a garnishing  
13 creditor has an affirmative duty to stop garnishment when the  
14 creditor learns of the bankruptcy filing, and thus the automatic  
15 stay. When a creditor has a duty to take some action to cease  
16 collection activity, "[f]ailure to act constitutes a willful  
17 violation of § 362(a)." In re Clemmons, 107 B.R. 488, 490  
18 (Bankr. D.DE 1989).

19           As discussed already, the bankruptcy petition was filed on  
20 August 8, 2010, notice of the filing was mailed August 11, and it  
21 is uncontroverted that Mr. Abed and the firm received the notice  
22 no later than Monday, August 16. The record is devoid of any  
23 evidence that Mr. Abed or the firm did anything after receipt of  
24 the Notice, until after Mr. Houbeck faxed his letter demand to  
25 Mr. Abed (Exhibit G). Mr. Abed and the firm had over two weeks  
26 to take appropriate steps to stop the garnishment they had set in  
motion months before. Their duty to do so arose at the moment of  
the filing of the bankruptcy, and their failure to do so became  
actionable upon learning of the filing, which was no later than

1 August 16. The fact that they acted with alacrity after receipt  
2 of Mr. Houbeck's faxed letter mitigates the time period of  
3 damages possibly sustained by Mrs. Herron, but it does not excuse  
4 their failure to act. Accordingly, the Court finds and concludes  
5 that both Mr. Abed and the firm had notice of the bankruptcy  
6 filing no later than August 16, 2010, but took no action to  
7 discontinue the wage garnishment until September 1, 2010 even  
8 though they had a duty to do so. Therefore, the Court finds  
9 and concludes that Mr. Abed and the firm willfully violated  
10 11 U.S.C. § 362(a)(1).

11 Where, as here, the Court finds that a willful violation  
12 of the automatic stay has occurred an award of actual damages  
13 to an individual debtor, including attorney's fees, is mandatory.  
14 In re Ramirez, 183 B.R. 583, 589 (9<sup>th</sup> Cir. BAP 1995); In re  
15 Taylor, 884 F.2d 478, 482-83 (9<sup>th</sup> Cir. 1989). The threshold  
16 question at this juncture is whether Mrs. Herron sustained any  
17 actual damages as a consequence of the established stay  
18 violation.

19 As noted, supra, Mrs. Herron testified at the hearing that  
20 funds had been deducted from her June and July, 2010 paychecks,  
21 before she filed her bankruptcy petition. She said each  
22 garnishment was "humiliating", and that she felt she should not  
23 have to pay costs to the school district. When the August  
24 paycheck was delivered, she was reasonably surprised because she  
25 thought the deduction was supposed to stop because of the filing.  
26 She contacted payroll, who told her the funds would be replaced

1 by check. She did receive the replacement check, issued by the  
2 County on the same date, August 31, although she did not know the  
3 date she actually received it.

4 Mrs. Herron was asked what impact the August garnishment  
5 had. She noted the family was short on funds as of September 1,  
6 and she assumed some bills were paid late or at less than the  
7 full amount, as in the preceding months. She did not produce any  
8 cancelled checks or other evidence of late payments, late charges  
9 or penalties incurred for late payments. She testified her  
10 husband usually made the mortgage payments, and she believed  
11 there was a grace period within which to do so. At one point  
12 during her direct testimony, Mrs. Herron said when she learned of  
13 the August garnishment, she was "devastated", became "really  
14 upset", "depressed", having to face her supervisor, and  
15 "humiliated to go to work". She did not explain how she felt all  
16 those emotions in the short time on August 31 between learning of  
17 the garnishment and being told by payroll she would be issued a  
18 replacement check for the full amount. Nor did she explain what  
19 was different on August 31 than in prior months in regard to her  
20 relationship with her supervisor or being humiliated when going  
21 to work. She had so felt in June, July and most of August  
22 knowing her wages were being garnished to pay a judgment for  
23 costs in favor of the school district. Nothing was different  
24 except her legitimate expectation that the garnishment had been  
25 stopped because of the bankruptcy filing. The Court can imagine  
26 her frustration, even anger, on August 31, as short-lived as it

1 was. But Mrs. Herron has failed to establish any actual damages  
2 proximately caused by the improper garnishment that occurred on  
3 August 31, 2010.

4 Notwithstanding that Mrs. Herron has failed to establish  
5 actual injury and resulting damages from the stay violation,  
6 attorneys' fees and costs may constitute a component of actual  
7 damages suffered, so long as they were reasonably incurred as a  
8 result of the violation of the automatic stay. The Ninth Circuit  
9 Court of Appeals addressed the issue at some length in Sternberg  
10 v. Johnston, 595 F.3d 937 (2010). There, the court began by  
11 recognizing: "Congress legislates against the backdrop of the  
12 'American Rule.'" 595 F.3d at 945. After contrasting the  
13 "American Rule" with the British, the court observed: "Without  
14 a doubt, Congress intended § 362(k)(1) to permit recovery as  
15 damages of fees incurred to prevent violation of the automatic  
16 stay. In permitting recovery of these fees as damages,  
17 § 362(k)(1) is consistent with the American Rule." 595 F.3d at  
18 946.

19 Later in its opinion, the Sternberg court concluded:

20 The dictionary defines "actual damages" as  
21 "[a]n amount awarded . . . to compensate for  
22 a proven injury or loss; damages that repay  
23 actual losses." . . . Following this  
24 definition, the proven injury is the injury  
25 resulting from the stay violation itself.  
26 Once the violation has ended, any fees the  
debtor incurs after that point in pursuit of  
a damage award would not be to compensate for  
"actual damages" under § 362(k)(1). Under  
the American Rule, a plaintiff cannot  
ordinarily recover attorney fees spent to  
correct a legal injury as part of his

1 damages, even though it could be said he is  
2 not made whole as a result. See, e.g.,  
3 Restatement (Second) of Torts, §914(1) (1979)  
4 ("The damages in a tort action do not  
5 ordinarily include compensation for attorney  
6 fees or other expenses of the litigation.")  
7 The same is true here. The context and goals  
8 of the automatic stay support this narrower  
9 understanding, and it is the one we adopt.

6 595 F.3d at 947.

7 It appears to this Court that Mrs. Herron may be eligible to  
8 recover Mr. Houbeck's fees and costs associated with the two  
9 letters his office prepared and sent to Mr. Abed to have the  
10 garnishment ended and the funds restored to Mrs. Herron, as did  
11 occur. If Mrs. Herron and/or Mr. Houbeck seek to recover such  
12 fees and costs, Mr. Houbeck shall file and serve on Mr. Abed and  
13 the firm, within thirty (30) days of the date of entry of this  
14 decision, an application for fees and costs consonant with this  
15 decision and the Sternberg decision of the Ninth Circuit.  
16 Mr. Abed and the firm shall have fourteen (14) days from the date  
17 of service of any such application to file any opposition.  
18 Thereafter, Mrs. Herron and/or Mr. Houbeck shall have seven (7)  
19 days within which to file any reply. Thereafter, the matter will  
20 again be under submission.

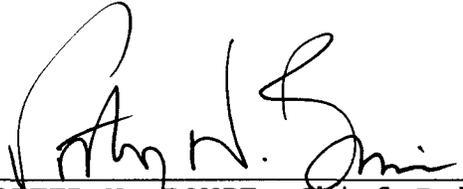
21 The remaining issue is Mrs. Herron's request for punitive  
22 damages for violation of the automatic stay. Section 362(k) (1)  
23 says punitive damages require "appropriate circumstances". That  
24 has been refined to require "egregious, intentional misconduct."  
25 In re McHenry, 179 B.R. 165, 168 (9<sup>th</sup> Cir. BAP 1995). No such  
26 conduct by Mr. Abed or the firm has been shown in this case. To

1 the contrary, Mr. Abed and the firm moved quickly to stop the  
2 garnishment once Mr. Houbeck brought it to their attention. In  
3 addition, the school district the same day made efforts to  
4 restore the deducted funds.

5 For all the foregoing reasons, the Court finds and concludes  
6 that Mr. Abed and the firm willfully violated the automatic stay  
7 within the meaning of 11 U.S.C. § 362(k). However, the debtors  
8 have failed to establish any actual damages as a result of the  
9 stay violation except possibly for limited attorney's fees and  
10 costs, as to which a procedure has been established to make  
11 application for fees and costs. Finally, no factual basis  
12 whatsoever has been shown to support an award of punitive  
13 damages.

14 IT IS SO ORDERED.

15 DATED: JAN - 6 2012

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19 PETER W. BOWIE, Chief Judge  
20 United States Bankruptcy Court  
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