

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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8 **UNITED STATES BANKRUPTCY COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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13 In re: ) BANKRUPTCY NO: 12-06689-MM7  
14 TREASURES, INC., )  
15 ) CHAPTER: 7  
16 Debtor, ) MEMORANDUM DECISION AND  
17 ) CIVIL CONTEMPT ORDER TO PAY  
18 ) DAMAGES FOR FAILING TO TURN  
19 ) OVER PROPERTY OF THE ESTATE  
20 )  
21 ) DATE: June 13, 2013  
22 ) TIME: 3:00 p.m.  
23 ) CRTRM: 1  
24 ) JUDGE: Margaret M. Mann  
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1 This Memorandum Decision awards civil contempt sanctions ("Contempt Order") to the  
2 estate of debtor Treasures, Inc. ("Debtor"), a failed furniture retailer, in resolution of this Court's  
3 Order To Show Cause Why APJL Consulting, LLC ("APJL") Should Not Be Held In Contempt  
4 And Ordered To Pay Damages For Failing To Turn Over Property Of The Estate ("OSC").

5 As the Court approved auctioneer for the Debtor's furniture sales, APJL had possession  
6 and control of a bank account that held the sales proceeds of Debtor's furniture. When the  
7 auctions were over in September 2012, APJL did not pay Debtor its share of the proceeds,  
8 totaling \$184,000. When Debtor made a demand for turnover of the funds and an accounting,  
9 APJL refused to pay Debtor its money and has to date not provided a full accounting. Nor has  
10 APJL sought relief from stay to retain the money. By the time the Court entered the OSC in  
11 April 2013, APJL had spent much of the money for its own benefit. APJL's defense to turnover  
12 and the OSC has primarily been that it was entitled to keep the money under the parties'  
13 agreement. This defense, even if asserted in good faith, and there is significant evidence to the  
14 contrary, does not release APJL's obligation to seek stay relief before retaining Debtor's money.  
15 Due to the fiduciary duties it owed the estate as a Court approved professional, APJL had no  
16 justification for its retention of the funds without an accounting.  
17

18 As a result of APJL's stay violations, the estate has incurred actual damages measured by  
19 the loss of its funds, and attorneys' fees attempting to correct the stay violation. The Court will  
20 thus award both attorneys' fees and actual damages against APJL to Debtor by this Contempt  
21 Order.  
22

### 23 **I. Jurisdiction**

24 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334, and  
25 constitutional authority to enter final findings of fact and conclusions of law in this dispute.  
26 *Stern v. Marshall*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2594, 2601-02 (2011). Bankruptcy courts have  
27 authority to enter final orders to address violations of the automatic stay. *See Turner v. First*  
28

1 *Cnty. Credit Union (In re Turner)*, 462 B.R. 214, 220 (Bankr. S.D. Tex. 2011) (finding  
2 jurisdiction to determine violations of the automatic stay); *Heflin v. Santander Consumer USA,*  
3 *Inc. (In re Heflin)*, 464 B.R. 545, 547 (Bankr. D. Conn. 2011) (same).

4 **II. Need for Evidentiary Hearing**

5 Because of the gravity of civil contempt proceedings, the Court has given APJL multiple  
6 opportunities to explain its conduct over the past year. The shifting explanations APJL has  
7 provided have led the Court down a convoluted path to this resolution. Yet while the process has  
8 been somewhat confusing, it has generated an extensive record of evidence, including  
9 contradictory admissions by APJL's principal, Allen Parvizian, in the six declarations he has  
10 filed with the Court regarding the OSC proceedings.<sup>1</sup> While the Court has generally found  
11 Parvizian not to be credible for this reason, the factual findings made in support of this Contempt  
12 Order need not be based upon a credibility determination. Instead, this ruling is based on facts on  
13 which there is no material dispute. For this reason, an evidentiary hearing is not necessary to  
14 award the contempt damages here. *See ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)*, 450 F.3d  
15 996, 1008 (9th Cir. 2006) (where no facts are in dispute, an evidentiary hearing is not necessary  
16 to award contempt damages for automatic stay violations).

17  
18 Specifically because the facts are admitted by APJL, the record reflects no dispute as to  
19 the facts as to the following legal issues germane to this Contempt Order:  
20

- 21 (i) APJL, as a Court approved professional, owed fiduciary duties to the estate.  
22 (ii) APJL withheld property of the estate; *i.e.*, Debtor's funds held in a bank account  
23 controlled by APJL in which APJL only held a security interest.

24  
25 <sup>1</sup> These six declarations were filed on the following dates:

26 October 29, 2012 (Docket #137)  
27 February 22, 2013 (Docket #195)  
28 March 14, 2013 (Docket #204)  
April 25, 2013 (Docket #222,223)  
June 6, 2013 (Docket #249)  
July 17, 2013 (Docket #273)

- 1 (iii) APJL had knowledge of the automatic stay at least as of October 1, 2012 when Debtor  
specifically asserted the automatic stay and demanded payment of its money.
- 2 (iv) APJL never sought relief from stay to retain the money.
- 3 (v) APJL asserted two reasons for refusing to turn over the funds: it had offset the  
moneys due to Debtor against \$103,759 in credit card fees and a manager's salary that  
4 APJL had claimed Debtor owed to it both prepetition and post-petition, and it had also  
offset the funds against previous overpayments of draws made to Debtor.
- 5 (vi) APJL failed to disclose these two offset claims against Debtor to the Court at the time  
of its employment.
- 6 (vii) APJL has failed to date to provide an accounting to support its claim it had overpaid  
Debtor.
- 7 (viii) APJL has raised no factual dispute regarding the amount of damages. The amount of  
attorneys' fees incurred by the estate was not challenged, and the Court can calculate  
8 from APJL's own evidence the amount of funds that were on hand at the time of the  
stay violation that have not been received by Debtor.
- 9

10 There remain hotly disputed issues regarding the parties' rights under their agreement and  
11 as to whether APJL's actions were taken in bad faith. These disputed issues are reserved to be  
12 resolved in the adversary proceeding pending for this purpose. After the adversary proceeding is  
13 resolved, it may be that APJL can establish a secured or administrative claim to the funds it is  
14 paying back to the estate as actual damages, but it may also be that Debtor prevails. In either  
15 case, the automatic stay protected these funds so that they would be available for allocation in  
16 the proper manner, and APJL violated the stay by unilaterally taking the funds before the Court  
17 could resolve the dispute.

18

19 **III. Factual Background**

20 **A. The Agreement and APJL's Employment**

21 Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on  
22 May 8, 2012. At that time, APJL had been providing liquidation and augmentation services to  
23 Debtor pursuant to an earlier agreement dated July 11, 2011 (the "Agreement"), under which  
24 APJL agreed to provide necessary personnel, such as the auctioneer and office manager, for  
25 Debtor's furniture sales. APJL also provided financing for Debtor to purchase furniture to  
26 augment the Debtor's inventory and improve the auction outcome. The Agreement provided  
27 APJL signatory control over a bank account (the "Augmentation Account") that held the  
28

1 proceeds from sale of Debtor's furniture. Although other bank accounts were anticipated in the  
2 Agreement, the undisputed evidence is that the Augmentation Account was the only one actually  
3 established; and it is the only account at issue here. Under the Agreement, APJL was to disburse  
4 the funds in the Augmentation Account according to the following terms of the Agreement:

5 (i) first, to pay the Consultant Fee, (ii) second, if Additional  
6 Furniture is provided by Consultant to the Sale on a consignment  
7 basis, to pay for such Additional Furniture as it is sold and delivered;  
8 and if Additional Furniture is provided by Consultant other than on a  
9 consignment basis, to pay the invoice cost plus billed freight of such  
10 Additional Furniture, (iii) third, to pay for the PMST Fee due to the  
11 Consultant, (iv) fourth, to pay back all monies advanced by the  
12 Consultant to the Sale, and (v) fifth, a draw from the Augment  
13 Account to the Company of 30% all deposits during an Accounting  
14 Week; [and (vi)] sixth, to the remainder to the Company.

15 Agreement, Docket 105-4, Exhibit A, ¶7. Whether APJL did allocate the funds as provided in  
16 the Agreement will be resolved in the adversary proceeding.

17 According to the Agreement, APLJ was to forward to Debtor all sales taxes collected  
18 from customers so Debtor could pay these taxes, but further specified that any funds so  
19 forwarded were first to be considered a payment of sales taxes collected. *Id.* at ¶6. Despite these  
20 provisions of the Agreement, the parties actually handled the sales taxes in a different manner:  
21 APJL provided a weekly accounting of sales taxes collected and then Debtor provided an invoice  
22 to APJL for it to pay. Also in August 2012, APJL increased Debtor's draw to 40% instead of the  
23 30% specified in the Agreement.

24 On application by Debtor, and supported by Parvizian's declaration, the Court approved  
25 APJL continuing to provide these services under the Agreement nunc pro tunc to the petition  
26 date. Debtor claimed it was winding down its business and needed APJL's services for its "going  
27 out of business sales." Although Debtor and APJL claimed they sought Court approval of APJL's  
28 employment only out of an abundance of caution, neither 11 U.S.C. § 327(a)<sup>2</sup> nor Bankruptcy

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<sup>2</sup> Unless otherwise stated all section references refer to title 11 of the United States Code.

1 Rule 6005, deems court approval of the estate's retention of auctioneers to be optional. The US  
2 Trustee initially objected to APJL's employment due to inadequate disclosure by APJL of its  
3 connections with parties in interest. The US Trustee specifically sought clarification of whether  
4 APJL was a creditor from its previous dealings with Debtor. The US Trustee also sought further  
5 explanation regarding APJL's consignment of furniture for the auction and its affiliated entity's  
6 involvement, HFR Rugs.

7  
8 In response, APJL filed a second declaration signed by Parvizian<sup>3</sup> that provided some  
9 additional detail about the US Trustee's questions. Although APJL admitted that it had been  
10 providing services to and had received payments from Debtor post-petition, it stated that it had  
11 no other connections with Debtor. APJL did not disclose any of the following in response to the  
12 US Trustee's objection:

- 13 (i.) APJL was a prepetition creditor due to its outstanding charges against Debtor.  
14 (ii.) APJL had not done an accounting of its services to determine the extent to which  
15 it was a creditor.  
16 (iii.) APJL did not consider itself prohibited from enforcing any of its claims against  
17 Debtor's funds by the need to seek Court approval for such enforcement.  
18 (iv.) APJL had made payments post-petition to entities who were insiders of APJL.

19 In fact, APJL expressly stated it was *not* a creditor of the Debtor.<sup>4</sup> APJL's application for  
20 employment also gave the misleading impression that there would be no outstanding claims  
21 under the Agreement by explaining in Parvizian's declaration the weekly allocation process that  
22 had been established to regularly resolve any such claims.

23 In reliance upon these incomplete and misleading disclosures, the Court approved APJL's

24 <sup>3</sup> The most shocking incident of lack of candor with the Court was when Parvizian claimed he  
25 never signed the declaration he submitted to disclose his connections with the estate even though  
26 he sent his signed declaration from his personal email. *See* APJL's Reply to Opposition of Debtor  
27 to Application for Order Approving Auctioneer's Fees, Docket #137, at 7; *see also* Debtor's Ex  
28 Parte Application for OSC, Docket #146, at 7.

<sup>4</sup> APJL's disclosure stated: "Prior to the Debtor filing bankruptcy on May 8, 2012, APJL  
invoiced and received payment for all services it provided to the Debtor under the terms of the  
Agreement." *See* Supplemental Declaration of Allen Parvizian in Support of the Debtor's  
Application to Employ APJL as Auctioneer, Docket #105-4, at ¶4.

1 employment under the terms of the Agreement on a nunc pro tunc basis in an order entered on  
2 August 28, 2012 ("Employment Order"). The Employment Order specifically restricted APJL's  
3 receipt of compensation without further court order,<sup>5</sup> and did not prospectively grant relief from  
4 stay for APJL to enforce any rights against the Augmentation Account. Had the Court been  
5 aware that APJL had prepetition and post-petition claims against Debtor that it could offset  
6 against Debtor's funds under the Agreement, it could not have approved the employment of  
7 APJL under § 327. These claims prevented APJL from establishing the disinterested status it  
8 needed in order to be employed. These undisclosed claims also left Debtor vulnerable to the cash  
9 flow crisis it suffered here.

#### 11 **B. The Offsets**

12 It took only a few weeks after the Court approved APJL's employment in August 2012  
13 for Debtor's vulnerability to APJL's undisclosed creditor's rights to cause problems for Debtor.  
14 When Debtor and APJL undertook their regular weekly allocation process for the week ending  
15 September 20, 2012, to settle their respective rights to the sales proceeds collected in the  
16 Augmentation Account, Debtor presented APJL documentation justifying a net disbursement to  
17 Debtor in the amount of \$110,000. While APJL did not dispute this amount was due, it only  
18 disbursed \$11,000 to Debtor on September 25, 2012, and withheld the remaining \$99,000. APJL  
19 withheld the remaining \$99,000 from this disbursement claiming it was entitled to offset it  
20 against what was later calculated to be \$103,759 in charges Debtor owed APJL for credit card  
21 fees and manager salary. The following week, APJL did not dispute nor disburse any of the  
22 \$85,000 Debtor claimed to be due under its weekly settlement documentation, even though at  
23 least part of those funds had been collected from customers to pay sales taxes. APJL did not  
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26  
27 <sup>5</sup> See Employment Order, Docket # 108, at ¶4 ("Payment to the Auctioneer of the compensation  
28 and reimbursement of the expenses herein authorized shall be made only after compliance by the  
Auctioneer with Local Bankruptcy Rule 6005 and notice to creditors as required by Local  
Bankruptcy Rules 2002 and 6005-4.")

1 justify its refusal to disburse the second week's payment at the time, but later claimed it had  
2 overpaid Debtor its weekly draws, and was justified to withhold the sales taxes to ensure it  
3 would not suffer any losses on its credit lines or with its suppliers. Since APJL's accounting is  
4 not yet completed, the claim of overpayment is unsupported.

5 APJL's failure to disburse this money to Debtor caused a major cash shortfall for Debtor.  
6 Debtor's counsel sent an email on September 25, 2012, to APJL's counsel demanding an  
7 accounting and requesting that APJL freeze the Augmentation Account since it held property of  
8 the estate.<sup>6</sup> APJL did neither, and Debtor's counsel followed up with an email attaching an  
9 October 1, 2012 letter that demanded payment of the total \$184,000 Debtor had not received  
10 from the Augmentation Account. The October 1st letter specifically claimed the automatic stay  
11 had been violated.<sup>7</sup> APJL does not dispute receiving either of these communications.  
12

13  
14 <sup>6</sup> The September 25, 2012 email reads:

15 As you may be aware, APJL manages a Treasures furniture-account bank  
16 account, which contains money that is property of the bankruptcy estate. It  
17 is in both parties' best interest to ensure the transparency, speed and  
18 accuracy of the final reconciliation process, as well as to protect property  
19 of the estate. Therefore, Treasures requests that all funds remain  
untouched in the bank account during the reconciliation process, and that  
APJL make no disbursements without Treasures' written consent until a  
final reconciliation is completed.

20 *See Fifth Status Report, Docket #129, Exhibit 1.*

21 <sup>7</sup> The October 1, 2012 letter states:

22 Treasures demands that APJL provide by no later than close of business  
tomorrow, October 2, 2012: (i) immediate delivery to Treasures of the  
23 requested QuickBooks reconciliation documentation flash drive, (ii)  
immediate freezing of the account with no disbursements made without  
24 written authorization from Treasures CRO, Mike Bergthold, which  
authorization will be granted for appropriate charges, and (iii) immediate  
25 payment to Treasures of \$184,000, consisting of a \$99,000 balance owed  
from the 9/20/12 weekly settlement and \$85,000 owed from the 9/27/12  
26 weekly settlement. Please be advised that among other things, failure to  
meet these demands constitutes willful violation of the automatic stay and  
27 conversion of the property of the estate, which is punishable by sanctions.  
Treasures will be forced to take legal action, not least of which includes  
28 withdrawal/objection to APJL's fee application for auctioneer services.

*See Fifth Status Report, Docket #129, Exhibit 1.*

1 On October 4, 2012, Debtor filed a status report advising the Court that APJL had not  
2 released to it \$184,000 of the sales proceeds. Then, on October 15, 2012, Debtor objected to  
3 APJL's compensation based upon Debtor's claim to these funds and also on the ground that APJL  
4 had made false disclosures to the Court about its prepetition creditor status. APJL responded to  
5 Debtor's fee objection asserting it was not obligated to make any payments to Debtor because the  
6 funds in the Augmentation Account were not property of the estate but APJL's own funds. APJL  
7 also asserted its offset rights to justify not making the payments to Debtor. When APJL failed to  
8 comply with Debtor's demand to turn over the moneys it was due, Debtor brought an Ex Parte  
9 Application for the OSC on November 2, 2012 ("OSC Motion"), which APJL opposed on similar  
10 grounds to those stated in response to the compensation objection.  
11

12 Both the OSC Contempt Motion and the objection to APJL's compensation were heard on  
13 November 29, 2012.<sup>8</sup> The Court found that APJL failed to disclose its prepetition creditor status  
14 and related entity relationship and accordingly denied APJL's compensation. As for the OSC  
15 Motion, the Court found APJL's claim that it, rather than Debtor, owned the funds in the  
16 Augmentation Account to be incredible for three reasons: 1) APJL was defined as a secured  
17 creditor by the Agreement, 2) the Augmentation Account held the proceeds of sale of Debtor's  
18 furniture, and 3) APJL's claim it used its own funds to pay itself a debt owed it by Debtor was  
19 illogical. The Court granted the OSC motion, and orally ordered APJL to turn over \$103,759 to  
20 Debtor subject to an accounting by APJL.<sup>9</sup> The Court warned APJL that the stay damages would  
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25 <sup>8</sup> At this November 29, 2012 hearing, the Court also heard the Motion to Dismiss. The Court  
26 denied the Motion to Dismiss but converted the case to a Chapter 7 case.

27 <sup>9</sup> The numbers submitted by APJL have not been consistent. While Parvizian later recalculated  
28 the amount of the APJL offset due to the office manager to \$27,666.68, and the credit card fees  
to \$70,884.57, that had not previously been charged against Debtor's share of the Augmentation  
Account, he has not paid the Debtor the difference.

1 continue to accrue until it turned over the funds.<sup>10</sup> The Court also ruled that any remaining  
2 disputes regarding the accounting of the funds in the Augmentation Account would need to be  
3 resolved in a separate adversary hearing.<sup>11</sup> The Court ordered Debtor to lodge the OSC, but its  
4 counsel failed to do so, apparently because the conversion of the case to Chapter 7 displaced  
5 Debtor's counsel. For apparently the same reason, the order requiring APJL to turn over all  
6 compensation previously received in the amount claimed of \$37,649 was not entered until June  
7 10, 2013. APJL has timely complied with that order, but has appealed it.

### 9 C. The OSC Order

10 The OSC was not lodged until February 15, 2013, when the newly appointed Chapter 7  
11 Trustee did so. APJL objected to the OSC as lodged and submitted a further declaration from  
12 Parvizian, along with 147 pages of accounting records in support of its objection. Parvizian  
13 reversed his initial denial that the Augmentation Account contained Debtor's property and  
14 admitted that APJL was just a secured creditor. Parvizian justified the \$103,759 offset claiming  
15 he had simply forgotten to assert these offsets earlier.

16  
17 After entering a scheduling order to try to resolve APJL's inconsistent explanations of  
18 what had happened to Debtor's funds, the Court held a hearing on the objections to the lodged  
19 OSC on March 28, 2013. It thereafter entered its own OSC on April 2, 2013. As amended,<sup>12</sup> the  
20 OSC ordered APJL to show cause: 1) why it should not be ordered to return Debtor's funds in the  
21 amount of \$171,346<sup>13</sup> to the Augmentation Account, and 2) why it should not be found in  
22 contempt and liable for damages for violating the automatic stay. The OSC also ordered the  
23

24 <sup>10</sup> Transcript of Hearing held on November 29, 2012, Docket # 172, at 16-17.

25 <sup>11</sup> *Id.*, Docket # 172, at 51-52.

26 <sup>12</sup> Later amended on April 12, 2013 to correct an error.

27 <sup>13</sup> The Court increased the amount to be turned over to \$171,346 from the \$103,759 stated in its  
28 oral ruling at the November 29, 2012 hearing because it realized that its reasoning applied  
equally to the sales tax portion of the disputed funds.

1 Chapter 7 Trustee to bring an adversary proceeding to resolve the accounting dispute, which he  
2 has done and is pending. A hearing on the OSC was scheduled for May 2, 2013, and was  
3 thereafter continued to June 13, 2013.

#### 4 **D. Response to OSC**

5 In response to the OSC, APJL did not refute the amount of attorneys' fees or other  
6 damages claimed by the estate as contempt damages. Instead, APJL argued that it did not "take  
7 the \$171,346.17" the Court ordered be turned over, although it admitted that it refused to turn  
8 over to Debtor \$184,000 of its own money because of its offset claims. APJL also elaborated  
9 upon its assertion it was not required to pay Debtor its share of the sales proceeds because it had  
10 overpaid Debtor its weekly draws, which left insufficient funds to pay the sales taxes. After the  
11 hearing, the Court allowed further briefing on the OSC by both APJL and the Chapter 7 Trustee  
12 on APJL's defenses to the OSC. APJL then filed a supplemental brief and a new Parvzian  
13 declaration that averred it was impossible for APJL to turn over Debtor's funds to it since APJL  
14 needed these funds to pay other expenses that APJL would otherwise have been liable. APJL  
15 also claimed it ultimately complied with its turnover obligation on June 17, 2013, by turning  
16 over the remaining funds in the Augmentation Account of \$27,958.75. The Court took the matter  
17 under submission at the hearing on June 13, 2013 and now rules on the issues.

#### 20 **IV. Stay Violation**

21 The Court finds multiple stay violations under the undisputed facts here. The funds in the  
22 Augmentation Account were property of the estate under § 541(a)(7), subject to APJL's security  
23 interest. As property of the estate, APJL was obligated to turn over the funds in the  
24 Augmentation Account under § 542 upon the Debtor's demand. Debtor made such a demand for  
25 payment of \$184,000 on October 1, 2012, and asserted that a stay violation would result if APJL  
26 failed to do so. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206-07 (1983) (requiring  
27 turnover of property of the estate). "[T]he failure to return property of the estate with knowledge  
28

1 of the bankruptcy is a violation of both the automatic stay and of the turnover requirements of  
2 the Bankruptcy Code." *Abrams v. Sw. Leasing & Rental, Inc. (In re Abrams)*, 127 B.R. 239, 242-  
3 43 (B.A.P. 9th Cir. 1991); *see also Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 432 B.R.  
4 812, 822 (B.A.P. 9th Cir. 2010).

5 While APJL claims it was entitled to Debtor's share of the funds due to its offset claims  
6 and other contractual rights, these disputed claims do not relieve APJL of its turnover  
7 obligations, even though it was a secured creditor under the Agreement. *Whiting Pools*, 462 U.S.  
8 at 207 (IRS, even as a secured creditor must comply with turnover obligation); *see also*  
9 *California Empl. Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147, 1151-1152 (9th Cir.  
10 1996) (retention of disputed state taxes violated the automatic stay because: "To effectuate the  
11 purpose of the automatic stay, the onus to return estate property is placed upon the possessor; it  
12 does not fall on the debtor to pursue the possessor."). The Court's earlier approval of the  
13 Agreement also did not relieve APJL from its obligation to turnover the funds when the dispute  
14 arose. APJL was required to seek relief from stay before taking action to affect Debtor's  
15 property, even under an assumed agreement and it failed to seek such relief. *See Carroll v. Tri-*  
16 *Growth Centre City, Ltd. (In re Carroll)*, 903 F.2d 1266, 1271 (9th Cir. 1990) (stay under §  
17 362(a)(3) violated where creditor, without getting stay relief at the time, terminated post-petition  
18 court approved agreements that had not granted relief from prospective stay, even though  
19 creditor's action did not involve collection of a prepetition debt).

20 APJL's offset claims are not a defense to turnover under the circumstances before the  
21 Court. Although § 362(a)(7), which specifically prescribes that a setoff is a stay violation, is not  
22 directly applicable, a different subsection of § 362(a) applies. Section 362(a)(7) is not directly  
23 applicable here since APJL did not offset its claims against a prepetition debt it owed to Debtor;  
24 rather, Debtor's right to its sales proceeds arose post-petition. Even regarding post-petition offset  
25 situations, relief from stay must be requested and is not necessarily justified. *See In re Gunn*,

1 2008 Bankr. LEXIS 2227, at \*2-3 (Bankr. N.D. Cal. Aug. 11, 2008) (unpublished) (declining to  
2 grant relief from stay to allow post-petition offsets (citing *In re TLC Hospitals, Inc.*, 224 F.3d  
3 1008 (9th Cir. 2000))). Additionally, under § 362(a)(3), a creditor's retention of funds of a debtor  
4 can be a prohibited exercise of control over debtor's property in violation of the stay. *Citizens*  
5 *Bank of Maryland v. Strumpf*, 516 U.S. 16, 20-21 (1995); *Del Mission*, 98 F.3d at 1151.

6 APJL asserts a defense to turnover under § 542(b). This subsection of § 542 justifies a  
7 creditor, with prepetition offset rights against a prepetition debt it owes the Debtor, to  
8 temporarily not pay the debt without violating the turnover or automatic stay requirements of the  
9 Bankruptcy Code. The creditor must still promptly seek stay relief. *Strumpf*, 516 U.S. at 20-21.  
10 APJL cannot rely on § 542(b) to defend its contempt for two reasons. First, APJL never bothered  
11 to seek stay relief. *Mwangi*, 432 B.R. at 820 (bank's refusal to turn over funds to a debtor even  
12 where no offset rights are asserted is a violation of the automatic stay if no relief is requested).

13  
14 Second, because the funds in the Augmentation Account belonged to Debtor, not APJL, §  
15 542(b) is not applicable because the offsets were not of different debts owed by one to the other.  
16 Under § 542(b) an offset can only be a defense to a payment of a debt. But APJL did not merely  
17 owe Debtor a debt; it was holding Debtor's own money. For this reason § 542(a), requiring  
18 turnover of property of a debtor regardless of whether there are offset rights, is germane here.  
19 APJL could not retain Debtor's money based on its offset claims without violating the automatic  
20 stay. *Del Mission*, 98 F.3d at 1151.

21  
22 **A. Knowledge of the Automatic Stay**

23 Neither Debtor as a corporation nor the Chapter 7 Trustee may seek contempt damages  
24 under § 362(k). That statutory remedy is only available to individual debtors. *Havelock v. Taxel*  
25 (*In re Pace*), 67 F.3d 187, 192 (9th Cir. 1995). Contempt damages are nevertheless available  
26 under § 105 in this case. *Id.*  
27  
28

1 Under § 105, "[t]he standard for finding a party in civil contempt is well settled: The  
2 moving party has the burden of showing by clear and convincing evidence that the contemnors  
3 violated a specific and definite order of the court." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d  
4 1178, 1190-91 (9th Cir. 2003) (quoting *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069  
5 (9th Cir. 2002)). The movant must prove that the creditor (1) knew the automatic stay was  
6 applicable and (2) intended the actions which violated the injunction. *Id.*; *see also ZiLOG, Inc.*,  
7 450 F.3d at 1007-08. "Knowledge of the injunction, which is a prerequisite to its willful  
8 violation, cannot be imputed; it must be found." *ZiLOG, Inc.*, 450 F.3d at 1008; *see also Dyer*,  
9 322 F.3d at 1191-92 (contempt sanctions upheld where creditor admitted having notice of the  
10 automatic bankruptcy stay, yet took no steps to remedy his violation of the stay).  
11

12 The Court finds clear and convincing evidence of a knowing stay violation, but only as of  
13 October 1, 2012. On September 25, 2012, after the dispute over the funds arose, Debtor's  
14 attorney sent APJL an email explaining that the funds in the Augmentation Account were  
15 property of the estate, stating "APJL manages a Treasures furniture-account bank account, which  
16 contains money that is property of the bankruptcy estate." Counsel did not, however, demand  
17 turnover at that time or mention the automatic stay. Counsel merely requested that "APJL make  
18 no disbursements without Treasures' written consent until a final reconciliation is completed."  
19 The Court does not find that this email clearly and convincingly gave APJL knowledge of the  
20 automatic stay under *Dyer*, 322 F.3d at 1191-92 (imposing a higher standard of proof for  
21 awarding contempt damages for stay violations than the statutory standard under § 362(k), by  
22 requiring that the alleged contemnor be advised that its conduct violated the automatic stay).  
23  
24

25 There is no doubt, however, that as of October 1, 2012, APJL knew Debtor was asserting  
26 an automatic stay violation. In its letter, Debtor's counsel explicitly advised APJL that "failure to  
27 meet these demands [that APJL pay Debtor its \$184,000 of sales proceeds and freeze the  
28 account] constitutes willful violation of the automatic stay and conversion of the property of the

1 estate, which is punishable by sanctions." This clear communication is convincing to the Court  
2 that APJL had knowledge of the automatic stay at least as of October 1, 2012.

3 **B. APJL's Conduct Was Not Justified**

4 *1. APJL's Good Faith in Asserting its Contract Defenses is Irrelevant*

5 APJL's primary defense to the OSC is that it was only asserting its contract rights and it  
6 acted in good faith. Whether APJL actually believed in its defenses in good faith need not be  
7 decided at this time, however. As *Dyer*, 322 F. 3d at 1191, reasoned in affirming an award of  
8 contempt damages:  
9

10 In determining whether the contemnor violated the stay, the  
11 focus "is not on the subjective beliefs or intent of the  
12 contemnors in complying with the order, but whether in fact  
13 their conduct complied with the order at issue." *Hardy v.*  
14 *United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir.  
15 1996) (internal citations omitted); *accord McComb v.*  
16 *Jacksonville Paper Co.*, 336 U.S. 187, 191, 93 L. Ed. 599, 69  
17 S. Ct. 497 (1949) (Because civil contempt serves a remedial  
18 purpose, "it matters not with what intent the defendant did the  
19 prohibited act.").

20 *See also In re Taylor*, 884 F.2d 478, 483 (9th Cir. 1989) (good faith is irrelevant to awarding  
21 compensation for stay violations).

22 *Carroll*, 903 F.2d at 1272, illustrates why relief from stay must be sought before a  
23 counterparty to a contract can affect the debtor's contract rights, regardless of how righteous the  
24 counterparty believes its rights to be. In *Carroll*, the Ninth Circuit, reversing the bankruptcy  
25 court and district court's contrary decisions, found a creditor who terminated a post-petition court  
26 approved agreement with the debtor had violated the automatic stay by not seeking relief from  
27 stay in advance. The creditor's basis for terminating the contract was so sound that the  
28 bankruptcy court had previously denied the debtor's motion for a preliminary injunction against  
the termination of the contract. Yet the Ninth Circuit held that the defense of the injunction was  
not tantamount to moving for stay relief, and the creditor's failure to do so violated the automatic

1 stay. *Id.* at 1273; see also *Ozenne v. Bendon (In re Ozenne)*, 337 B.R. 214, 221 (B.A.P. 9th Cir.  
2 2006) (landlord's violation of the automatic stay was willful for purposes of damages regardless  
3 of the landlord's good faith belief that the debtor no longer owned the property). Similarly here,  
4 even if APJL's intention in withholding Debtor's money was pure,<sup>14</sup> it was still obligated to seek  
5 relief from stay.

6  
7 *2. APJL was not Entitled to Ignore the Stay until the OSC was Entered*

8 APJL claims it did not violate the automatic stay because it promptly complied with the  
9 OSC when it was entered in April 2013<sup>15</sup> by turning over the remaining funds in the  
10 Augmentation Account at that time. APJL is mistaken that it was entitled to ignore the  
11 automatic stay until the Court issued its OSC, however. "[T]here can be no doubt that the  
12 automatic stay qualifies as a specific and definite court order." *Dyer*, 322 F.3d at 1190-91  
13 (awarding contempt damages against secured creditor who recorded a deed of trust believing it to  
14 be within his legal rights without a court order compelling him to do so). Even without a court  
15 order, the October 1, 2012 email notified APJL of the stay and potential sanctions and was  
16 sufficient notice to trigger APJL's liability for damages. *Hansbrough v. Birdsell (In re Hercules*  
17 *Enters.)*, 387 F.3d 1024, 1028 (9th Cir. 2004).

18  
19 *3. As a Fiduciary, APJL's Creditor Rights do not Justify its Actions*

20 APJL's third defense to the contempt sanctions requested is that as a secured creditor its  
21 actions were justified under the Agreement, and it cannot be liable for contempt. As noted above,  
22

23 <sup>14</sup> While the Court need not find APJL to have acted in bad faith to award contempt damages, the  
24 facts present a prima facie case of bad faith, due to APJL's denial that it had ever signed its  
25 disinterestedness disclosure, its failure to fully disclose its connections, its abuse of its  
26 undisclosed creditor status to take funds from the estate, and its breaches of fiduciary duties. The  
27 good faith issue is nevertheless disputed and therefore cannot be the basis of contempt sanctions  
28 without an evidentiary hearing. *ZiLOG, Inc.*, 450 F.3d at 1008. Because the Court did not hold an  
evidentiary hearing, it will not award punitive damages or rely upon its inherent authority to  
sanction bad faith conduct. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *Hale v.*  
*United States Tr.*, 509 F.3d 1139, 1148 (9th Cir. 2007); *Fink v. Gomez*, 239 F.3d 989, 992 (9th  
Cir. 2001) (citing *Chambers*, 501 U.S. at 46-47). This issue is reserved for later determination.

<sup>15</sup> Supplemental Brief of APJL, Docket #273, at 11 (July 17, 2013).

1 even if this were the case, APJL was not free to refuse to turn over Debtor's funds without relief  
2 from stay. *See Carroll*, 903 F. 2d at 72; *Temecula v. LPM Corp. (In re LPM Corp.)*, 300 F.3d  
3 1134, 1137 (9th Cir. 2002) (court order requiring immediate payment of post-petition rent as an  
4 administrative priority did not relieve the landlord of the necessity of obtaining relief from the  
5 automatic stay before proceeding with a writ of execution).

6 APJL's asserted justification for its retention of funds without completing an accounting  
7 is also not valid in light of the fiduciary duties it owed the estate as an approved auctioneer under  
8 § 327(a). *Herzog v. Stopol, Inc. (In re Cornerstone Prods.)*, 416 B.R. 591, 608 (Bankr. E.D. Tex.  
9 2008); *see also Salazar v. McCormick (In re Crestview Funeral Home, Inc.)*, 287 B.R. 832, 838  
10 (Bankr. D.N.M. 2002) (auctioneer owed a fiduciary duty to estate and should not purchase  
11 property of the estate). These fiduciary duties govern APJL's conduct even though it was a  
12 secured creditor in the Augmentation Account. *See STOUBMOS v. Whitesides*, 988 F.2d 949,  
13 959 (9th Cir. 1993) (insider who owed fiduciary duties to creditors was not free to take action on  
14 its secured claim that harmed creditors' rights).

15  
16  
17 Because APJL is a fiduciary, it was not justified in asserting offsetting claims until it  
18 could properly account for them. Yet APJL still had not finished its accounting and the Chapter 7  
19 Trustee disputes the claims of overpayment. *Leonard v. Optimal Payments Ltd. (In re Nat'l Audit*  
20 *Def. Network)*, 332 B.R. 896, 907 (Bankr. D. Nev. 2005) (fiduciaries have an obligation to  
21 safeguard property of the estate for the debtor); *see also May v. Henderson*, 268 U.S. 111, 119  
22 (1925); *Tivon v. England*, 484 F. 2d 639, 641 (9th Cir. 1973). Because APJL bears the burden of  
23 proof as a fiduciary, it may have committed defalcation simply by withholding Debtor's funds  
24 without completing an accounting to prove its claim of offsets. *See Pemstein v. Pemstein (In re*  
25 *Pemstein)*, 492 B.R. 274, 282 (B.A.P. 9th Cir. 2013) (defalcation includes the failure by a  
26 fiduciary to account for money or property that has been entrusted to the fiduciary); *see also Otto*  
27 *v. Niles (In re Niles)*, 106 F.3d 1456, 1462 (9th Cir. 1997) (burden is placed on the fiduciary to  
28

1 render an accounting, "once the principal has shown that funds have been entrusted to the  
2 fiduciary and not paid over or otherwise accounted for").

3       Apart from its failure to seek stay relief, APJL's actions were not justified in light of its  
4 fiduciary duties.

5       **V.     Sanctions for Contempt**

6               **A. Inability to Comply**

7       APJL defends the OSC by claiming it is unable to comply with the Court's order because  
8 at the time the Court entered the OSC on April 2, 2013, the credit card fees and manager salary  
9 had already been paid out to creditors and the sales taxes had not been segregated. Inability to  
10 comply with a Court order can be a proper defense to contempt sanctions. *United States v.*  
11 *Rylander*, 460 U.S. 752, 757 (1983); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th  
12 Cir. 1999); *In re Count Liberty, LLC*, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007). To  
13 successfully assert this defense, though, APJL, as the alleged contemnor, must establish  
14 "categorically and in detail" its inability to comply with the Court's order. *Affordable Media*,  
15 179 F.3d at 1241; *Count Liberty*, 370 B.R. at 275. And, "[t]he defense is not available, however,  
16 when the person charged is responsible for the inability to comply." *Count Liberty*, 370 B.R. at  
17 275.

18       APJL has not met this burden here. As noted above, the stay violation occurred on  
19 October 1, 2012, not the later date of the OSC since the automatic stay statutorily serves as the  
20 applicable court order. *Dyer*, 322 F.3d at 1191-92. While there were insufficient funds in the  
21 Augmentation Account on June 17, 2013 when only \$27,958.75 remained, there were sufficient  
22 funds available on October 1, 2012 in the amount of \$161,096.86. This sum, together with other  
23 sums paid to Debtor after that date, demonstrates that APJL was fully capable of complying with  
24 Debtor's turnover demand.

25       APJL is accountable to the estate for this insufficiency. APJL's failure to turn over or  
26  
27  
28

1 safeguard the funds was within its control since it was the sole signatory on the Augmentation  
2 Account. Although it has spent the money, it has not claimed it lacks resources to turn over the  
3 funds from other sources. Had it so chosen, APJL could also have frozen the account on October  
4 1, 2012, or requested Debtor to assert the automatic stay against the credit card companies. *See*  
5 *Moratzka v. Visa USA (In re Calstar, Inc.)*, 159 B.R. 247 (Bankr. D. Minn. 1993) (recovery of  
6 chargebacks from post-petition deposit is a violation of § 549 and the automatic stay); *Sherman*  
7 *v. First City Bank (In re United Sciences of Am., Inc.)*, 84 B.R. 79, 82 (Bankr. N.D. Tex. 1988)  
8 ("To allow parties who dealt with a debtor-in-possession, prepetition, to continue subjectively  
9 crediting or off-setting these credit card settlements post-petition would defeat the definition of  
10 property of the estate and the policy of the automatic stay."). APJL also could have, indeed, as a  
11 fiduciary should have, segregated the funds in the Augmentation Account to enable the sales  
12 taxes to be paid.

13  
14 All of APJL's claims that it was impossible to comply with the automatic stay, even taken  
15 at face value, ignore that it alone was "responsible for the inability to comply." *Count Liberty*,  
16 370 B.R. at 275. As such, they provide no defense to contempt sanctions.

### 17 18 **B. Damages**

19 The Court must now turn to quantification of the damages. As part of his compensatory  
20 damages, the Chapter 7 Trustee has asserted attorneys' fees incurred by Debtor's counsel in the  
21 amount of \$33,400.36, fees of Debtor's financial advisor OSAS Inc. ("OSAS") in the amount of  
22 \$15,662.50, and fees of his own counsel in the amount of \$29,000 and \$13,112.50. In total,  
23 attorneys' fees in the amount of \$91,175.36 are requested at this time. These "attorneys' fees are  
24 an appropriate component of a civil contempt award," *Dyer*, 322 F.3d at 1196, and all of these  
25 fees were appropriately detailed pursuant to the lodestar method, *Youssef v. Union Adjustment*  
26 *Co. (In re Youssef)*, 2011 Bankr. LEXIS 886, at \*17 n.5 (B.A.P. 9th Cir. Feb. 1, 2011)  
27 (unpublished) (citing *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987)). *See*  
28

1 also *Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002)  
2 (endorsing the use of the principles used in § 330 as a guide for awarding attorneys' fees as  
3 damages for a violation of the automatic stay).

4 APJL did not specifically object to any part of the fees. Nevertheless, the Court must  
5 review them and find them reasonable to exercise its discretion to award them. *Roman*, 283 B.R.  
6 at 11 (analyzing award of attorneys' fees for reasonableness under the abuse of discretion  
7 standard). The Court has therefore reviewed the fees and concludes that some of them are not  
8 related to the stay violation but instead to other matters. This portion of the fees will be  
9 disallowed.  
10

11 Taking each of the professional fees in turn, OSAS spent approximately 75 hours  
12 attempting to evaluate APJL's accounting records and negotiate with APJL over the stay  
13 violation. OSAS has an accounting specialty and the Court finds a need for such specialty in  
14 reviewing these records due to APJL's poor bookkeeping. Approximately 11 of these hours  
15 (\$2,550.00) occurred post-conversion and appear related to the adversary proceeding filed by the  
16 Chapter 7 Trustee, however. Accordingly, the Court cannot find that these fees are damages from  
17 result of APJL's violation of the stay, and awards only \$13,102.50 as the reasonable damages  
18 resulting from APJL's violation of the automatic stay.  
19

20 Debtor's attorney spent approximately 66.60 hours on this matter, totaling \$33,400.36.  
21 Because the Court does not find that APJL had knowledge of the automatic stay by clear and  
22 convincing evidence until October 1, 2012, the Court deducts the time counsel spent on or before  
23 October 1, 2012, in the amount of \$2,691.00. Because this is a complicated matter and Debtor's  
24 attorney was the party responsible for bringing this issue to the Court's attention, the Court will  
25 award a portion of the requested fees. However, \$30,709.36 is excessive given that the Court  
26 drafted its own orders to show cause and spent a great deal of time reviewing the underlying  
27 accounting itself. Debtor's attorney also failed to upload the orders as directed after the  
28

1 November 28, 2012 hearing which resulted in a two-month delay and possible additional  
2 dissipation of funds. For these reasons, the Court will award approximately 75% of Debtor's  
3 attorneys' requested fees or \$23,000.

4 The Chapter 7 Trustee requests his attorneys' fees in the amount of \$29,000. After  
5 reviewing the attorneys' billing, it appears that the fees were largely incurred in efforts to remedy  
6 the violation of the automatic stay. However, a few entries appear related to the adversary  
7 proceeding on this topic (dated January 18, 2013 in the amount of \$487.50; January 22, 2013 in  
8 the amount of \$112.50; April 12, 2013 in the amount of \$262.50; May 21, 2013 in the amount of  
9 \$112.50; totaling \$975.00), and the Court is not inclined to award those. The Court awards the  
10 remaining \$28,025 in Chapter 7 Trustee's attorneys' fees as damages for the stay violation, but  
11 reserves issues as to the \$975 of the Chapter 7 Trustee fees as part of the contract dispute.  
12

13 The Chapter 7 Trustee also requests \$13,112.50 for his attorneys' fees in attempting to get  
14 an accounting from APJL, preparing for and attending the June 2013 hearing, and responding to  
15 APJL's Supplemental Briefing. APJL has not opposed this amount. Because APJL continues to  
16 be in violation of the automatic stay by failing to comply in full with the turnover order of the  
17 OSC, the Chapter 7 Trustee continues to compile damages by attempting to enforce it against  
18 APJL's unsuccessful defense of impossibility and its improper collateral attack on the OSC. *See*  
19 *Schwartz-Tallard v. America's Servicing Co. (In re Schwartz-Tallard)*, 473 B.R. 340, 349  
20 (B.A.P. 9th Cir. 2012) (finding additional attorneys' fees justified for debtor when debtor was  
21 forced to continue to defend her stay on appeal). The Court awards the \$13,112.50 as damages  
22 to the Chapter 7 Trustee as well.  
23  
24

25 APJL's noncompliance with its automatic stay obligations and expenditure of the funds in  
26 the Augmentation Account for its own purposes has also caused actual damages to the estate in  
27 the amount of the deficiency between the funds on hand on October 1, 2012 and what was left  
28 when the funds were finally turned over. In its Supplemental Briefing on July 17, 2013 in

1 response to the OSC, APJL admitted \$133,265.98 was in the Augmentation Account when  
2 counsel initially requested it be frozen on September 25, 2012, and \$116,702.74 was in the  
3 Augmentation Account on October 1, 2012 when Debtor's counsel informed APJL that it was in  
4 violation of the automatic stay. After October 1, 2012, an additional \$44,394.12 was also  
5 deposited in the Augmentation Account. Had APJL frozen the account on October 1, 2012,  
6 \$161,096.86 of Debtor's funds would have been preserved. After October 2012, APJL paid  
7 Debtor \$64,539.62. By June 17, 2013, when APJL turned over the remaining funds in the  
8 Augmentation Account to the Chapter 7 Trustee, the balance had dwindled to \$27,958.75. Of the  
9 original \$161,096.86 that was available and could have been turned over to Debtor as of October  
10 1, 2012, \$68,598.49 is unaccounted for. These are the actual damages the Court awards to the  
11 estate.  
12

#### 13 **VI. Conclusion**

14 This Memorandum Decision constitutes this Court's findings of fact and conclusions of  
15 law under Bankruptcy Rule 7052. The Court finds APJL in contempt for knowingly violating the  
16 automatic stay by not turning over the Debtor's funds in the Augmentation Account on October  
17 1, 2012.  
18

19 The contempt sanctions awarded are \$77,240.00 in attorneys' fees and \$68,598.49 in  
20 actual damages, for a total of \$145,838.49. For each day that APJL refuses to return the  
21 \$68,598.49 to the Chapter 7 Trustee, which should have been in the Augmentation Account if it  
22 had been frozen on October 1, 2012 as required, APJL will be assessed an additional fine of  
23 \$100, plus additional attorneys' fees incurred in rectifying its continuing contumacious conduct  
24 as an appropriate coercive sanction. The Ninth Circuit has explained:  
25

26 Whether contempt is criminal or coercive civil is determined by  
27 the purpose of the sanction. If the sanction is intended to punish  
28 past conduct, and is imposed for a definite amount or period  
without regard to the contemnor's future conduct, it is criminal.  
If the sanction is intended to coerce the contemnor to comply

1 with the court's orders in the future, and the sanction is  
2 conditioned upon continued noncompliance, it is civil.

3 *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1481 (9th Cir. 1992). The Court  
4 finds APJL needs coercion to comply with this Court's orders to turn over the funds, as no other  
5 approach has worked in the year since the disputes under the Agreement arose in September  
6 2012. APJL can also avoid these additional fees to the Court by simply paying the Chapter 7  
7 Trustee the \$68,598.49 in funds it should have turned over in October 2012 within 14 days of  
8 entry of this Contempt Order.  
9

10 The Court will not award coercive sanctions in regard to the \$77,240 in total attorneys'  
11 fees contempt damages at this time, but will give APJL an opportunity to comply voluntarily.

12 IT IS SO ORDERED.  
13

14 Dated: September 10, 2013

15   
16 MARGARET M. MANN, JUDGE  
17 United States Bankruptcy Court  
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