WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	BK. No. 18-00395-LT13
LISA A. STEFANI,	
Debtor.	MEMORANDUM DECISION RE PUNITIVE DAMAGES

On September 27, 2018, the Court issued an Order to Show Cause Re: Imposition of Sanctions for Continued Violation of the Automatic Stay and provided deadlines for briefing. The Order to Show Cause related to stay violative activity of Webb & Carey (the "Firm") and its name partner Patrick Webb.[1] The Firm previously represented Debtor Lisa A. Stefani as a plaintiff in a legal malpractice action. The Firm filed a proof of claim asserting a secured claim in Debtor's chapter 13 case.

Before an October 22, 2018, hearing and after reviewing all briefing in the case and the relevant caselaw and statutory authority, the Court issued a lengthy tentative ruling. Dkt. No. 94. At the hearing, it adopted its tentative ruling and held that actual and punitive damages were appropriate under § 362(k)(1) and should be assessed jointly against

[1] The Order to Show Cause originally also named the other name partner in the Firm as a Respondent. The Court, however, subsequently received evidence that satisfies it that Mr. Carey was not sufficiently responsible for the actions of the Firm and in no way responsible for the actions of Mr. Webb; sanctions against him individually are not appropriate. As a result, the OSC was

Mr. Webb and the Firm. The Court then scheduled and held an October 26, 2018 status conference as a prequel to a hearing to quantify actual and punitive damages. Dkt. No. 95. Before the status conference, the Firm filed a conditional withdrawal of its secured claim. See Dkt. No. 87.

At the status conference, the Court learned that the parties had reached a settlement that: quantified actual damages; established a schedule for their payment; required the Firm to waive all claims against Debtor and to withdraw a pending objection to Debtor's plan; and provided for the exchange of mutual releases. In the settlement, the parties also correctly reserved to this Court the issue of whether and to what extent punitive damages would be awarded. See Dkt. No. 101. The Court took the punitive damages issues under submission but refrained from further consideration of the propriety of such an award until the parties documented the settlement and Mr. Webb and the Firm had an opportunity to provide additional briefing. The parties docketed a copy of an executed settlement agreement on November 30, 2018. Dkt. No. 104. The Firm concurrently withdrew its opposition to Debtor's chapter 13 plan (Dkt. No. 105), and the Court confirmed the Plan on December 12, 2018. See Dkt. No. 122.

The Court has now concluded its final review of the facts relevant to this case and the law related to punitive damages under § 362(k)(1) and concludes that an award of punitive damages in the amount of $17,000.00 is appropriate. The award will be joint and several as to Mr. Webb and the Firm.

In reaching this conclusion, the Court makes the following findings of fact and conclusions of law.

Facts

1. Prepetition, the Firm represented Debtor through trial in a state court malpractice action against her former attorney. Unfortunately for all concerned, except the state court defendant, the Firm did not obtain judgment on behalf of Debtor. Instead, she emerged from the litigation facing a $300,000 cost bill (the "Cost Bill Claim").

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discharged as to Mr. Carey in his individual capacity. See Dkt. No. 93.

2. This significant claim was the impetus for Debtor's chapter 13 filing on October 19, 2017 (the "First Case"). See Case No. 17-6341. While the First Case was pending, the Debtor successfully negotiated a resolution of the Cost Bill Claim and allowed her chapter 13 case to be dismissed. The order dismissing the First Case did so "without prejudice." See First Case Dkt. No. 15. Thus, the Court did not make a finding at the time it dismissed the First Case that dismissal operated as a 180-day bar to refiling under § 109(g).

3. But Debtor's financial problems were not fully resolved through settlement of the Cost Bill Claim. Notwithstanding the litigation loss, the Firm made a substantial claim against her under its contingent fee retention agreement; it sought repayment of advanced costs. It rapidly began collection activity. Thus, Debtor's anticipated reprieve after resolution of the Cost Bill Claim proved to be a pipedream.

4. In fact, the Firm initiated a civil action that made clear that it intended to seek recovery from Debtor's home.

5. Faced with the potential loss of her dwelling, the Debtor filed a second chapter 13 case on January 28, 2018 (the "Current Case"). She listed a possible malpractice claim against the Firm on her Schedule A at ¶ 34. Dkt. No. 1. She listed the Firm as holding a largely disputed claim of $101,000 in her Schedule F. *Id.*

6. The Firm received notice of the bankruptcy through numerous means. First, it received notice from the Bankruptcy Noticing Center sent on January 31, 2018. See Dkt. No. 10.

7. Debtor's attorney also sent notice on January 28, 2018. Dkt. No. 80 at ¶ 2.

8. The Firm's own billing records establish that it had notice as of January 29, 2018; the Firm through Mr. Webb conducted "research re relief from stay" on that date, and, on January 30, 2018, he prepared a motion for stay relief. See Dkt. No. 80 at 3 and 80-1. And on February 5, 2018, the Firm moved to dismiss the Current Case. See Dkt. No. 12.

9. Thus, the Firm knew about the Current Case and the automatic stay from its earliest days and no later than the day after its filing. The evidence establishes that the Firm

and Mr. Webb knew about the bankruptcy when they took all stay violative actions after the Current Case petition date. See Dkt. No. 78.

10. Notwithstanding knowledge of the bankruptcy, the Firm through Mr. Webb moved aggressively in the Superior Court in an attempt to obtain a post-petition lien on Debtor's home. Post-petition, on February 1, 2018, the Firm through Mr. Webb attended hearings in the Superior Court and obtained a temporary protective order. Dkt. Nos. 82 at ¶ 2 & 82-1 (Ex. A).

11. It also recorded a *lis pendens* and a copy of the temporary protective order on February 2, 2018. Dkt. No. 82 at ¶ 2.

12. And further, the Firm's own billing records provide evidence through admission that on February 7, 2018, the Firm prepared 17 documents for service on Debtor including documents in support of a temporary protective order, a copy of a temporary protective order "as recorded", a "notice of pendency of action as recorded", and documents related to a request for an appointment of an elisor to execute a trust deed. Dkt. No. 82-2.

13. It is clear from the numerous statements made by the Firm through Mr. Webb over the course of the Current Case that the goal of all this Superior Court activity was to create a lien on Debtor's home and to impede her ability to convey any interest in the home through lien or otherwise.

14. And on February 7, 2018, two days after moving to dismiss the bankruptcy case, the Firm through Mr. Webb served this mound of documents on the Debtor at her place of employment and while she was conducting a class. Dkt. No. 82 at ¶ 3. This post-petition and stay-violative service caused Debtor great emotional distress. *Id.* at ¶ 4.

15. As a result of 11 U.S.C. § 362(c)(3) and the fact that Debtor filed two cases in a one-year period, the stay in the Current Case would terminate 30 days after filing unless the Court ordered otherwise. The Debtor, thus, moved for stay extension. See Dkt. No. 13. The Firm through Mr. Webb strongly opposed this motion (See Dkt. No. 19) and appeared at the hearing. At that time, the Court allowed the Firm through Mr. Webb to cross-examine the Debtor. The Court eventually allowed an extension of the stay after considering

evidence from the Debtor and her answers on cross-examination. In short the Court concluded that: (1) significant life problems related to Debtor's care for a seriously disabled grandchild[2] and her very real risk of loss of employment if she participated in an early meeting of creditors, as initially scheduled, made it impossible for her to attend a §341(a) meeting on the scheduled date; (2) the resolution of the Cost Bill Claim left her with the impression that bankruptcy was no longer necessary to protect her home; and (3) thus, the dismissal, in effect, was consensual as allowed under § 1307(b). The chapter 13 trustee did not take a contrary position.

16. As a result of this determination, the Court endorsed its "without prejudice" dismissal of the First Case and expressly concluded at an early point in the current case that 11 U.S.C. § 109(g)(1) was not a bar to Debtor's second bankruptcy, that Debtor filed the Current Case in good faith as to the Firm, and that the automatic stay should be continued beyond 30 days notwithstanding 11 U.S.C. § 362(c)(3)(A). See Dkt. Nos. 25-1 at ¶¶ 3-5 and Ex. A, 28, and 36:6:6-9:15; 16:22; 23:11-31:21; and 32:1-35:17.

17. During the course of the hearing on the stay extension motion, issues related to potential stay violations came to the Court's attention. The Court stated its expectations that stay violations would be remedied. Dkt. No. 36 at 34:13-35:16. Mr. Webb responded: "Understood, Your Honor." *Id.* at 37:17. The Court granted the stay extension motion by order entered on February 28, 2018 and included in that order language requiring the Firm to take actions to remedy any stay violations. In particular, the Court stated as follows:

> Because the stay commenced on the petition date, any collection actions including any orders obtained in the Superior Court of California or any liens filed in the San Diego County Recorder's Office, after the date of bankruptcy filing are void. *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992) and appropriate corrective action is required.

Dkt. No. 28.

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[2] She was in the process of adopting the child when she filed the Current Case. The Court understands that the adoption is now final. Her testimony regarding developmental and physical disabilities and conditions can be found at Dkt. No. 36 at 16:16-20:5.

The Court's order based on these determinations is final, not appealed, and nonappealable.

18. Thus, there is no question that the Firm and Mr. Webb, who appeared at hearings on behalf of the Firm, not only knew about the pendency of the automatic stay but also knew of the need for corrective action in connection with the stay-violative recordation of documents in the public record.

19. Not satisfied with the stay extension, the Firm through Mr. Webb aggressively defended its position.

a. On March 6, 2018, the Firm through Mr. Webb brought a motion seeking relief from stay to, in its words, procure its state remedies and secure payment. See Dkt. No. 32-2 at 16:11. On reply, the Firm through Mr. Webb continued to press for relief in order to promptly proceed with Superior Court litigation and so as to procure (not retroactively validate) state remedies. Dkt. No. 45 at 1:19-22 & 11:11-13. It did not seek retroactive relief. Dkt. No. 32 passim.[3] The Court denied this motion at a March 29, 2018 hearing and by order entered on March 30, 2018. Dkt. Nos. 46-49. And while it did so without prejudice, it made clear that it was not likely to terminate the stay in a manner that allowed the Firm to obtain an advantage over other unsecured creditors.[4] Dkt. No. 49. It further noted

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[3] At the hearing on stay extension, the Court noted that the Firm needed to either remedy stay violative activity or seek *nunc pro tunc* relief validating it. Dkt. No. 36 at 34:13-35:17. The Firm did neither.

[4] The Court made crystal clear that it did not believe that the Firm had a lien and that it was not going to allow it to improve position:

> In the final analysis, the Court is highly unlikely at this point in the case (if ever) to allow the Firm stay relief that allows it to improve its position as to lien status beyond that which existed at the initiation of the case. Section 362(d) requires the Court in circumstances where stay relief is appropriate to provide relief, but it gives the Court discretion; termination for all purposes is an option not a requirement. The Court would not, at least at this early point in the case, allow the creation of a new lien through attachment or judgment. Given this truth, the Court is unclear how the Firm benefits from stay relief. It admits that it does not have a mortgage or trust deed that provides for a power of sale and non-judicial foreclosure.

that the Firm failed to establish a colorable claim to lien; that equitable or judicial estoppel probably barred its claim of lien; and that the Firm could revisit stay relief **when it established a colorable claim to lien.** *Id.* It never addressed the post-petition documents and actions of the Firm because the Firm did not attempt to rely on them as a basis for a lien. And, again, the Firm did not seek *nunc pro tunc* relief.

b. The Firm also continued its effort to have the Current Case dismissed. See Dkt. No. 12. The Court denied the dismissal request on March 20, 2018. See Dkt Nos. 43 and 44.

c. And it objected to the Debtor's plan. See Dkt. No. 54. (The plan has since been confirmed. Dkt. No. 122).

20. And the Firm's post-petition activities were not limited to those in the bankruptcy court. Again, the Firm obtained orders in the Superior Court and recorded documents post-petition. And on March 8, 2018, Debtor appeared in the Superior Court through counsel to attempt to compel the Firm through Mr. Webb to engage in stay violation corrective action. The Firm apparently was not supportive of this endeavor. See Dkt. No. 82 at ¶ 6.

21. At the point of its initial decisions, the Court had only an incomplete picture regarding the stay violative activity and had no reason to believe that the Firm would not clear the public record of stay violative documents. It was unaware that the Firm had served the Debtor in violation of the stay. And the timing of activity in the Superior Court was not known to the Court. Eventually, however, the complete inaction of the Firm and Mr. Webb required the Order to Show Cause and resulted in the submission of evidence establishing that serious stay violations occurred and continued months into the case.

22. In connection with the stay violative activity, the Debtor suffered. In a declaration, she discusses the impact of the post-petition service in front of her students and

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It appears that unless it improves its position through a new lien or some act of perfection, it has no present ability to foreclose.

the impact of the Firm's failure to clear the public record of stay violative documents. See Dkt. No. 82 at ¶¶ 4, 8,11-12, and ex. D.

23. On September 4, 2018, the Court held a hearing on the Firm's objection to confirmation and Debtor's objection to the Firm's claim. Mr. Webb and Mr. Carey appeared for the Firm. The Court began the hearing by addressing the fact that the *lis pendens* and a copy of a state court order which were recorded post-petition were still pending. The Court again made clear that the *lis pendens* and the temporary restraining order should have been expunged and had to be removed immediately:

> COURT: I'M GOING TO GIVE YOU A WEEK TO VOLUNTARILY REMOVE THOSE. IF YOU DON'T, I'M GOING TO ISSUE AN ORDER TO SHOW CAUSE. AND AT THAT POINT, I WILL PROBABLY ISSUE A COERCIVE SANCTION OF SOMETHING LIKE A THOUSAND DOLLARS A DAY UNTIL YOU DO IT. YOU JUST CAN'T DO THAT....
>
> I READ YOUR CASE. IT DOESN'T STAND FOR THE PROPOSITION YOU ADVANCED EVEN REMOTELY....
>
> [DEBTOR'S] HOME IS VERY MUCH IN THIS ESTATE. IT'S WHAT WE'RE ALL ARGUING ABOUT.
>
> SO BY RECORDING THAT DOCUMENT, YOU WILLFULLY VIOLATED THE STAY. WILLFUL STAY VIOLATION IS AN EXTREMELY LOW STANDARD. YOU KNEW ABOUT THE STAY, AND YOU INTENDED THE ACT THAT YOU TOOK. NO QUESTION, YOU KNEW ABOUT THE STAY; NO QUESTION YOU INTENDED THAT ACT. AND 362(K) SAYS IF THEY'RE INJURED, I MUST. I MUST MAKE YOU COMPENSATE THEM FOR ANY INJURY.

Dkt. No. 83.

24. At the hearing Mr. Webb alleged that he was not sure if the *lis pendens* was filed pre- or post-petition petition:

> MR. WEBB: I'M HAPPY TO TAKE CARE OF THAT. IF THAT WAS THE

> CASE, I'LL GO BACK AND DOUBLECHECK WHEN THE FILING OF THE LIS PENDENS HAPPENED. I THOUGHT WE GOT IT BETWEEN THE TWO.

Dkt. No. 83.

25. This is simply not believable and is belied by Mr. Webb's prior declaration in which he explained:

> . . . [O]n February 1, 2018, when the *lis pendens* and the temporary restraining order were obtained and recorded, [the Firm] did not willfully violate the automatic stay because it reasonably believed based upon a non-specious reading of 11 U.S.C. 109, that the January 28, 2018 petition was void ab initio and had not created a lawful automatic stay….

Dkt. No. 78 at ¶ 12.

26. The Court's Tentative in connection with the OSC discussed a multitude of issues relevant to the stay violation issues. In the main these issues were resolved through settlement and the withdrawal of the Firm's claim. The Court, however, adopts the conclusions outlined in the Tentative to the extent necessary and briefly notes as follows:

a. As discussed in the Tentative, the Firm took the initial position that it held a claim secured by Debtor's home. The Court concluded at the initial stay relief hearing that the Firm failed to meet its burden of establishing a colorable claim of lien. See Dkt. Nos. 46 & 49. In particular, the Firm never obtained a trust deed, its assertion is inconsistent with its retention agreement (the document allegedly creating a lien on the home), the assertion is inconsistent with representations Mr. Webb made to the Debtor in connection with the execution and delivery of the retention agreement (See Dkt. No. 68-2), and the assertion is inconsistent with the Firm's actions in feverishly attempting to obtain a lien after it failed to prevail in the Superior Court malpractice action – actions that continued during the pendency of the automatic stay.

b. The bankruptcy court was the appropriate forum for determination of this issue notwithstanding the arbitration provision in the retention agreement and notwithstanding whether federal or state law controlled.[5]

c. The Firm and Mr. Webb violated the stay and these violations were willful. In the Tentative, the Court outlined the stay violations as follows:

- The Firm through Mr. Webb Violated § 362(a)(1). The Firm through Mr. Webb continued actions adverse to the Debtor in the Superior Court action after he was aware that the Debtor filed the Current Case.
- The Firm and Mr. Webb violated § 362(a)(3). A *lis pendens* is a document advising the world that the party filing the document asserts a right to possession, control, or ownership of real property. The temporary restraining order, as filed, was also a document intended to assert a claim to the Debtor's home. The recordation of these documents by the Firm through Mr. Webb violated the automatic stay as they were filed in an attempt to control Debtor's home, an asset of the bankruptcy estate.
- The Firm and Mr. Webb violated § 362(a)(4). The Firm through Mr. Webb repeatedly took post-petition action in an attempt to obtain or perfect a lien against the Debtor's home.[6]
- The Firm and Mr. Webb violated § 362(a)(6). The Court, when initially confronted with evidence of these actions, declined to conclude that they were intended for collection; it limited its stay violation finding to the above cited sections given the admission by the Firm and

[5] The Court acknowledges that Debtor also opposed payment to the Firm on an unsecured basis. The Court did not reach a conclusion as to the appropriate forum for resolution of these issues. These issues were resolved through settlement and withdrawal of the Firm's claim.

[6] As the Court noted at the September 4, 2018 hearing, the Firm through Mr. Webb stipulated, in effect, to a violation of § 362(a)(3) & (4) as it attempted to argue against a § 362(a)(6) stay violation. See Dkt. No. 83:5:6-6:19 discussing Dkt. No. 77 at 5:6-9 and other admissions.

Mr. Webb that they were intended to give notice to the world of their lien claim. Dkt. No. 83 at 9:10-14. Having had a more robust opportunity to review the record, evidence, and argument, the Court came to the inescapable conclusion that the Firm through Mr. Webb acted with the, at least partial, goal of collection. Were this the only basis for punitive damages, the Court might pause as this is a state of mind determination to some extent.[7] As it is not, the Court makes this finding only as additive; the Court's analysis on punitive damages is the same with or without this finding.

- Violations of the automatic stay were continuing as the Firm and Mr. Webb were aware of the stay violative activity and took no steps to expunge the void documents from the public record or to correctly and completely clarify the record in the Superior Court.
- In addition to these violations, the Firm violated § 362(a)(1), (3), and (6) (and probably § 362(a)(4)) when it caused postpetition service on Debtor of various documents including the Superior Court temporary restraining order and an order to show cause as to why it should not continue. Debtor teaches at a local community college. The Firm through Mr. Webb, with full knowledge of the bankruptcy case, chose to serve her with 17 documents while she was teaching a class. See Dkt. No. 82 at ¶ 3 and Ex. B. This choice suggests malicious and despicable conduct and intent to maximize the Debtor's embarrassment and pain. If this was the goal, the Firm through Mr. Webb appears to have achieved it. See Dkt. No. 82 at ¶¶ 3-4. The Court notes that neither the Firm nor Mr. Webb even attempted to explain why this aggressive form of service was necessary or appropriate.

[7] The Court, however, also would consider the Firm's failure to request an evidentiary hearing; the Court offered on the record to conduct one as to Mr. Webb's state of mind.

27. The Court acknowledges that the Firm and Mr. Webb argue that they notified the Superior Court of this Court's determinations that the stay issued in the Current Case and continued to bar stayed activities. But the Court agrees that this action was insufficient to shield them from sanctions based on willful stay violations. Most obviously, the *lis pendens* and court order were not expunged for months. Second, they gave an incomplete notice that ignored the void nature of the Superior Court's post-bankruptcy determinations. Their actions smack of gamesmanship and an attempt to be less than candid with one court as to the actions, determinations, and controlling law of another court (and this type of behavior is a constant in the storyline of this bankruptcy case). The record leads inescapably to the conclusion that they were interested in preserving their stay barred success. And even when the Court declined to grant immediate stay relief, they did nothing for months to clear the public record or to set the Superior Court record straight.

28. And the Firm even went so far as to request the Superior Court to appoint an elisor on a post-petition basis; while concurrently arguing in the bankruptcy court that it held a lien on Debtor's home, it was engaged in a feverish attempt to obtain a compelled lien through the Superior Court action and was willing to ignore the stay to do so. See Dkt. No. 82-2.[8]

29. And the stay violations were not benign. As discussed hereafter, this is not a case where the creditor obtained relief prepetition or filed documents in the public record prepetition and then refused to cede ground. Here the Firm through Mr. Webb repeatedly took stay violative actions postpetition and failed to take any remedial action for months. And the evidence is clear; this caused harm to the Debtor. While the settlement agreement allows the Firm to disclaim any responsibility for damages, the fact remains that the Debtor documents serious personal injury in the form of emotional distress and reputational injury caused by the post-petition service and filings; the settlement pays $34,000 on account of

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[8] The Firm through Mr. Webb argued that it had a lien on Debtor's home pursuant to the retention agreement but aggressively sought an attachment lien in the Superior Court solely against the Debtor's home. Put bluntly, the Firm had no need (or legal ability) to attach if it honestly believed it

personal injury; and the Firm walked away from any claim of lien and an unsecured claim that at one point it alleged to be in excess of $200,000.

Analysis of Stay Violation Issues; Serious Violations of the Automatic Stay Occurred.

The stay violations were willful.

The threshold question under § 362(k) when considering a damages award involves a finding of willfulness. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d at 1178, 1191 (9th Cir. 2003). (*Dyer* involved the predecessor statute to § 362(k), § 362(h), but the statutory provisions are consistent.) In this context:

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

Id. (citations omitted). A finding of subjective intent to violate the stay or bad faith is not required. *Id.* Instead, the focus is on whether the conduct complied with the automatic stay. *Id.*

In their initial response to the OSC, the Firm and Mr. Webb make glancing reference to this standard, but then largely ignored it. Instead, they threw out quotes from cases not squarely focused on a damages award under § 362(k). In particular, they grabbed hold of cases involving sanctions awards in other contexts to argue for a more exacting state of mind requirement. But these cases were inapposite.

Here, the analysis is simple. The Firm and Mr. Webb knew about the Debtor's bankruptcy at all relevant times. A party with knowledge of the bankruptcy is charged with knowledge of the automatic stay. *Id.* (The Firm and Mr. Webb cited *Dyer* and other cases for the point that in a contempt context knowledge of the stay cannot be inferred. But this requirement does not apply when one considers a stay violation under § 362(k), and the contrast between the low standard for a willfulness finding in a § 362(k) context and the

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already had such a lien.

higher standard in other contexts involving contempt was one of the main points the Ninth Circuit was making in *Dyer*.) And there is no question that the Firm and Mr. Webb intended to take actions in the Superior Court, to serve Debtor in front of her students, and to record documents in the public record. They have never argued to the contrary, and the record here is clear.

Even where a party violates the stay inadvertently (though as discussed throughout, the Court finds no level of inadvertence here), once it becomes clear that a stay violation has occurred it is the duty of the party violating the stay to remedy the stay violation. *See Eskanos & Adler v. Roman (In re Roman)*, 283 B.R. 1, 12 (9th Cir BAP 2002) (Creditor has the burden of both establishing safeguards to prevent stay violations and restoring status quo when violations occur) *See also Dyer*, 322 F.3d at 1192. As noted in *Dyer*, as here, knowledge of a stay violation created "an affirmative duty to remedy [the] automatic stay violation" by "undo[ing] the recordation process." *Id.*

In this case, remediation required expungement of the stay violative documents and clarification of the record in the Superior Court so as to undo the effects of stay violative activity. And these obligations were the obligation of the Firm and Mr. Webb. Their failure, for months, to take all appropriate corrective actions constitutes a continuing stay violation.

Punitive damages are appropriate.

Section 362(k) expressly allows for an award of punitive damages in relation to a willful violation of the automatic stay. 11 U.S.C. § 362(k); *In re Velichko*, 473 B.R. 64, 68 (Bankr. S.D.N.Y. 2012). But the statute also provides that punitive damages are only awardable in appropriate circumstances. In the Ninth Circuit, thus, something more than mere willfulness is required, but punitive damages are appropriate where there is a showing of "reckless or callous disregard for the law or rights of others." *Goichman v. Bloom (In re Bloom)*, 875 F. 2d 224, 228 (9th Cir. 1989).

Other Circuits note that a finding of maliciousness or bad faith on the part of the offending creditor warrants the imposition of punitive damages. *Crysen/Montenay*

Energy v. Esselen Assoc (Crysen/Montenay Energy Co.), 902 F.2d 1098, 1105 (2d Cir. 1990).

And the Ninth Circuit Bankruptcy Appellate Panel notes that an award of punitive damages may be appropriate where conduct was malicious, wanton, or oppressive, *Ramirez v. Fuselier (In re Ramirez),* 183 B.R. 583, 590 (9th Cir. BAP 1995), or if the violator engaged in "egregious, intentional misconduct." *McHenry v. Key Bank (In re McHenry),* 179 B.R. 165, 168 (9th Cir. BAP 1995).

Courts have also imposed punitive damages for arrogant defiance of the automatic stay. *E.g., In re Jean-Francois*, 532 B.R. 449, 459 (Bankr. E.D.N.Y. 2015); *see also, Diviney v. NationsBank of Texas (In re Diviney)*, 211 B.R. 951 (Bankr. N.D. Okla. 1997) (abrogated on other grounds).

The Court in considering an award of punitive damages, thus, needs to find that the violator did more than violate the stay through mere negligence or inattention.

The amount of a punitive damage award is also fact-specific and within the discretion of a Bankruptcy Court. *Curtis v. LaSalle National Bank (In re Curtis)*, 322 B.R. 470, 486 (Bankr. D. Mass. 2005). The following comments have been made about the importance of tailoring the punitive damage award to the conduct of a particular creditor:

> What would be sufficient to deter one creditor may not even be sufficient to gain notice from another. Punitive damages must be tailored not only based upon the egregiousness of the violation, but also based upon the particular creditor in violation.

*Id.*at 487.

In determining whether to impose punitive damages under § 362(k), bankruptcy courts have identified factors that guide the decision. They are the nature of the creditor's conduct, the creditor's ability to pay, the motives of the creditor, any provocation by the debtor, and the creditor's level of sophistication. *In re Jean-Francois*, 532 B.R. at 459. Other courts suggest that the stay violation should cause actual damages before a punitive damages award is made. *See e.g., Stinson v. BiRite Restaurant Supply Inc. (In re Stinson)*,

295 B.R. 109, 122 (9th Cir. BAP 2003)(Affirmed in part and reversed in part 128 Fed.Appx. 30 (9th Cir.Cal. 2005) (citing *McHenry*, 179 B.R. at 168).

Here, the Court finds more than enough support for a punitive damages award. The behavior of the Firm through Mr. Webb was shocking. The number of stay violations was high. The refusal to remedy the situation was intentional. And Mr. Webb's attempts to mislead the Court in connection with stay violative activity constituted egregious misconduct that is not an independent basis for sanction under § 362(k) but supportive of the state of mind or bad faith finding that justifies § 362(k) punitive damages.

Here the actions did not result from mere negligence. In their totality they constitute a grossly reckless and callous disregard for the Debtor's rights and the law. Indeed, having observed the behavior of the Firm through Mr. Webb from the start of the Current Case, the Court finds punitive damages appropriate under *Bloom* and all of the above tests to the extent there are nuanced distinctions. When the factors suggested for review by other courts are considered, all factors justify a punitive damage award.

Mr. Webb self-identifies himself as an experienced attorney. Mr. Webb self-identifies as an experienced attorney (Dkt. No. 57-2 at ¶ 82) and asserted a claim in the Current Case that included a claim for fees at a rate higher than typical in a chapter 13 case (Dkt. No. 57-2 at ¶ 52). The Court is entitled to take this experience and legal sophistication into account when determining if a punitive damages award is appropriate.

Neither the Firm nor Mr. Webb provided evidence of an inability to pay punitive damages if awarded. The Court allowed two opportunities for briefing in relation to punitive damages. It received no argument or evidence that a punitive damages award would impose a financial hardship. Given that the Firm was capable of paying actual damages of $40,000 and given that the Court is assessing punitive damages of less than this amount, as opposed to utilizing a multiplier, financial considerations do not warrant an elimination of punitive damages. The Court, however, will allow time before required payment to allow the Firm to address any liquidity concerns.

The Debtor did nothing to provoke the stay violations. There is no evidence or argument that the Debtor provoked or caused the stay violations here. She promptly gave notice of the Current Case and did not invite the stay violative behavior.

Looking at provocation through the lens of animus inducing behavior, she is also blameless. True, she objected to the Firm's claim and listed a potential malpractice claim on her Schedules. But there was a reasonable basis for the claim objection, and under the circumstances the failure to list a potential malpractice claim might have been subject to serious question. But in this fraught situation, she never dwelt on the possibility of a malpractice recovery. Her attorneys' mantra was that if the Firm had a claim, which was disputed, it would be paid as necessary to protect her home.

Actual damages occurred here. Some cases, including some cited by the Firm, decline to award punitive damages where there were no actual damages. Here, however, there is no question that actual damages resulted. The Debtor was forced to incur attorneys' fees not only to defend against the stay violative activity and also to battle for a purging of the public record. The Firm and Mr. Webb should have remedied the stay violations immediately and without prompting. The Debtor also provided evidence of emotional distress and reputational injury damages.

The Firm through Mr. Webb acted, at a minimum, with gross recklessness and a complete disregard for the obligations of an officer of the court, Debtor's rights, and the law.

The other two factors appropriate for special notice in a case by case assessment of the appropriateness of a § 362(k) punitive damages award also balance strongly in favor of such an award.

The argument that Mr. Webb reasonably relied on § 109(g) is meritless. The Firm through Mr. Webb argues that, because the Current Case was Debtor's second bankruptcy in a 180-day period and followed a dismissal of the First Case related to nonattendance at a 341(a) meeting, Debtor was not qualified to be a debtor in the Current Case; they rely on § 109(g)(1). Section 109(g) provides that a person cannot be a debtor in

a second case if, within the prior 180 days, the court dismissed the first case for "willful failure…to abide by orders of the court, or to appear before the court in proper prosecution of the case." The Firm and Mr. Webb allegedly discovered this statute and then allegedly made an unsupportable leap in logic and determined that this meant that when Debtor filed the Current Case not only was she unqualified to be a debtor but also that the automatic stay never came into existence. The relevant statute, § 362, not § 109, makes this argument entirely unsupportable.

In short, the Firm through Mr. Webb focused on a provision of the bankruptcy code, § 109(g), in isolation, chose to disregard or failed to read and consider the language of the dismissal order in the First Case, allegedly relied on caselaw that is factually distinguishable, disregarded warnings in the cases it allegedly read, apparently failed to cite check the cases so as to discover that they were of questionable authority given changes in the law, and failed to read the operative statute. If this case involved a lay person of little education and no legal sophistication these omissions might be merely negligent, but here the actions were undertaken by an attorney who owed the Court a duty as an officer of the Court and who owed his former client continuing duties of a type under California law. Parties are required to take reasonable steps (establish safeguards) to avoid stay violations. *See In re Roman,* 283 B.R. at 12. For an attorney, this means, at the bare minimum, utilization of basic legal skills. The attorney must read all relevant statutes and relevant orders and make sure that it relies on case law that discusses the relevant statutes and that is not factually distinguishable in a material way. The Firm and Mr. Webb cannot hide behind an alleged lack of awareness created by a decision not to do what an even marginally competent lawyer would do.

- **The Court dismissed the First Case without prejudice; § 109(g) was not a bar to filing.** In making its § 109(g) argument, the Firm through Mr. Webb ignored the language of the dismissal order in the First Case.[9] The Court dismissed it "without

[9] The Firm received service of this order through order through the Bankruptcy Noticing Center. See Case No. 17-6341: Dkt. No. 15-2.

prejudice". This language might be opaque to an unsophisticated lay person, but Mr. Webb is an experienced attorney. He is appropriately charged with the knowledge that: (1) the order did not include a finding of willful misconduct; (2) to the contrary, the order was without prejudice; (3) such without prejudice language could only relate to the ability to refile; and (4) an attorney cannot credibly argue that a debtor whose case is dismissed without prejudice to refiling is automatically barred from refiling under §109(g).

And the magnitude of this failure in candor and care is underscored by the fact that Mr. Webb actually cited to caselaw that made this point. On January 5, 2018, the Firm filed documents requesting dismissal of the Current Case, cited to § 109(g), and relied on several cases. But the cited case law, if read with an eye to context and substance as opposed to as a vehicle for out of context sound bites, underscores that the Firm and Mr. Webb had no legitimate basis for weaponizing § 109(g) and using it as a justification for stay violative activity.

The Firm through Mr. Webb cited *Casse v. Key Bank N.A. (In re Casse)*, 198 F.3d 327 (2d Cir. 1999) where the bankruptcy court dismissed Mr. Casse's third bankruptcy case "with prejudice." *Id.* at 331. In a fourth bankruptcy case filed in the teeth of foreclosure, the bankruptcy court interpreted its "with prejudice" order as barring filing. *Id.* The bankruptcy court, as a result, refused to invalidate a post-petition foreclosure and, instead, dismissed the fourth case *nunc pro tunc* to the filing date. *Id.* at 331-32. The Second Circuit affirmed the conclusion that the "with prejudice" order barred the filing. *Id. passim.* In *Rowe v. Ocwen Fed. Bank & Tr.,* 220 B.R. 591, 592 (E.D. Texas 1997), a Texas District Court came to exactly the same type of conclusion.

But *Casse* and *McKay* in no way support the Firm and Mr. Webb's stay violative activity. Instead, these cases underscore the inapplicability of § 109(g) to the Current Case. Here, the Court dismissed the First Case **without prejudice**. The dismissal order in the First Case, thus, plainly advised that the filing of the Current Case was not barred by § 109(g). The Firm and Mr. Webb, who cited these cases, cannot in good faith suggest to the contrary.

- **The Firm and Mr. Webb apparently failed to read, much less appropriately consider, the relevant statute.** Had Mr. Webb or anyone at the Firm read 11 USC § 362(a), the automatic stay statute, they would have seen that the stay arises when a petition is filed **except as provided in [11 U.S.C. § 362(b)].** And had they then read § 362(b), as required to identify any exceptions, they would have seen that § 109(g) provides an exception to **imposition** of the stay only in narrow cases that are not relevant here. In other words, they would have seen that a filing, even if in contravention of § 109(g), is not an automatic barrier to imposition of the stay.

Section 362(b)(21) contains an express exception relevant to § 109(g); the stay does not bar actions to **enforce** a lien if a debtor filed in violation of § 109(g). But as the Firm and Mr. Webb boldly admit here, the actions they took were not lien enforcement; they involved provisional remedies and an attempt at lien creation and collection. Indeed, the Firm and Mr. Webb claim that they were "entitled to seek provisional remedies in the [Superior Court]" while they sought case dismissal. Dkt. No. 77 at 5:6-9.

The failure of a seasoned attorney to read the operative statute is more than merely negligent; it is grossly negligent, reckless, and lacking in good faith. This behavior evidences that the attorney put his financial interests well before his obligation to the Court, the Debtor, and the law. He did not seek the relevant law; he merely mined for sound bites. And he then used them liberally in an attempt to excuse conduct far below the level appropriate for an officer of the court.

- **The canons of statutory construction do not support the Firm and Mr. Webb.** The canons of statutory construction also are relevant here; the Firm and Mr. Webb were required to read the relevant statute and statutory scheme as a whole and so as not to render any provision surplusage. *See, e.g.*, *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) (there is need to keep in view also the structure of the statute, and the relation, physical and logical, between several parts). Here, if § 109(g) in

isolation prevents the stay from going into effect, then § 362(b)(21) is unnecessary.[10] And the statutory scheme is turned on its head if this is the case; the Firm and Mr. Webb want no stay to arise, but § 362(b)(21) merely carves out a specific action from operation of the stay.

- **The Firm and Mr. Webb attempt to justify their behavior and the legitimacy of their reliance on § 109(g) by citation to caselaw; it is not helpful to their cause.** If anything, a review of the caselaw relied upon by the Firm and Mr. Webb underscores the recklessness of their behavior and their lack of good faith in taking the actions they chose to pursue. A lawyer who did not bother to read the operative statute might be legitimately confused if he only read § 109(g), but the caselaw cited by the Firm and Mr. Webb also should have restrained the Firm's stay-violative-behavior and compelled caution.

The Firm through Mr. Webb took serious stay violative actions and never sought permission from the Court. But in the cases cited by the Firm through Mr. Webb, the creditor obtained a "with prejudice" dismissal of the prior case, stay relief, or confirmation that the stay did not come into effect – based on the Debtor's ineligibility for a bankruptcy filing – **before** taking otherwise stay violative actions. *See In re Casse,* 198 F. 3d at 331 (bankruptcy court dismissed previous case "with prejudice"); *Rowe,* 220 B.R. at 592 (automatic stay did not come into effect when previous case was dismissed "with prejudice"); *McKay v. Alliance Mortgage Corp. (In re McKay),* 268 B.R. 908, 909-10 (Bankr. W. D. Va. 2001) (§ 109(g)(2) – not § 109(g)(1) which the Firm and Mr. Webb rely on - barred refiling because the debtor dismissed the prior case after multiple stay relief motions were filed); *In re Hollberg,* 208 B.R. 755 (Bankr. D.D.C. 1997) (court notes that where dismissal is expressly with prejudice under § 109(g) it will bar a later filing for 180 days and preclude imposition of the stay); *In re Prud'homme,* 161 B.R. 747, 750-51 (Bankr. E.D. N.Y. 1993) (court orders that if new case is filed, real property at issue will not be part of the estate, so this determination in dismissed case would render stay issues in second case void). In short, none of the cases cited by the Firm through Mr. Webb support his position

[10] And so is § 362(c)(3).

that after a without prejudice dismissal § 109(g)(1) either barred refiling or rendered the automatic stay a nullity.

- **There was never a dispute in the law in this area.** And there was never a dispute in the law in this regard. True, for a time, there was a question as to the consequences of a "with prejudice" dismissal; if the debtor refiled during the 180 days following such a dismissal what were the consequences? Section 362(b)(21) resolved this dispute. And this issue, well aslant of the issue here, was resolved before the Firm through Mr. Webb violated the stay. And the resolution was adverse to Mr. Webb's position. And, again, the old dispute was also irrelevant; here the dismissal of the First Case was expressly without prejudice.

- **If the Firm and Mr. Webb had cite checked the cases they relied on in the § 109(g) area they would have been further alerted to their peril.** A lawyer who proceeds in good faith in an area where a stay violation is possible checks his authority. This commonsense practice would have led the Firm and Mr. Webb to cases that urged **caution even in the case of a "with prejudice" dismissal. But all the Firm and Mr. Webb** appeared interested in is a disembodied soundbite that they could twist as part of a weak attempt to justify a clear stay violation.

- **The *McKay* case contains a direct warning.** In the *McKay* case, the court, in a footnote, ponders the need for stay relief when a previous case was dismissed with prejudice. It goes on to note that: "[b]y filing a motion to lift the stay, a creditor allows the court to determine eligibility under § 109(g), thereby precluding sanctions for actions taken in violation of the stay, if it is in operation." 268 B.R. 908 at n. 7. Thus, a case that the Firm and Mr. Webb relied on and cited within a week of case filing warned of the consequences of guessing wrong about whether the stay is in place. The Firm and Mr. Webb were told that the consequences for guessing wrong about the effect of a prior dismissal could be dire. They ignored the warning.

- **The Firm and Mr. Webb cannot plausibly claim a good faith belief that they were acting appropriately under the facts of this case.** The Court is entitled to

assume that an attorney acts with callous disregard for the law and the debtor's right to be free of inappropriate stay violations when he ignores the plain language of a critical court order (the dismissal order in the First Case), fails to read the applicable statute, fails to read the cases upon which he allegedly relies so as to identify key factual and legal distinctions, fails to cite any case that provides support under the facts of his case, and fails to identify contrary authority available after cite checking alleged authority. Given Mr. Webb's experience this is not a situation of honest mistake, and the cobbled together § 109(g)(1) argument is not a shield against punitive damages. And even if the Court strains credulity to the breaking point and assumes that the Firm through Mr. Webb was just confused when the initial stay violations occurred (and it cannot do so), the Court cannot expand the protections of assumed mere negligence to cover situations after the Court directly told Mr. Webb that he needed to remedy the stay violations.

The oppositions filed by the Firm and Mr. Webb do not contain other arguments that appropriately lead to a different result. The Court afforded the firm and Mr. Webb opportunities to respond to the OSC in general and the possibility of punitive damages in particular. The initial document included a hodgepodge of cases that did not appropriately focus on statutory stay relief sanctions. The document was not helpful to the Firm, Mr. Webb, or the Court. In its more recent document, the Firm and Mr. Webb did a better, if far from perfect, job of focusing on sanctions under § 362(k). But the arguments advanced do not negate the appropriateness of sanctions in this case.

The Firm and Mr. Webb's protestations that they did not intend to violate the stay lack credibility. The general "intent" argument advanced by the Firm through Mr. Webb, to the extent it relies on more than § 109(g), is specious. They argue that they did not believe that the stay was in effect when they took multiple aggressive actions in violation of the stay. They also make a nonsensical argument that they believed they should have obtained stay relief to allow them to arbitrate; they unconvincingly argue that this somehow negates the continuing stay violations in this case. It does not.

The continuing failure to remedy stay violations was intentional, and in and of itself, justifies punitive damages. Even if one does not agree that the initially stay violative acts were done with a state of mind that justifies statutory punitive damages, the failure to remedy the stay violations suffices. The Court determined in connection with the stay extension motion that § 109(g) was not a bar to Debtor's second bankruptcy and not a bar to stay extension. The Court expressly ordered a cure of stay violative activity including expungement of documents from the public record. But neither the Firm nor Mr. Webb did anything. When later questioned, Mr. Webb either pretended not to know when he filed the documents or stated that he did not think it mattered. He was wrong. The failure to take the not difficult step of removing documents filed in violation of the stay from the public record was intentional. Again, Mr. Webb is an experienced attorney. He knew how to file in the public record; nothing made it impossible to remove documents from the public record. The pendency of these filings caused damage to the Debtor. See Dkt. No. 82 at ¶ 11. This alone justifies punitive damages.

The arguments regarding intention to seek stay relief are inapposite.

In some cases, a creditor can appropriately delay stay violation curative actions while it seeks stay relief. Recognizing their peril, the Firm and Mr. Webb offer an inapposite argument in this area to justify their flagrant disregard for their duties to the Court and former client and the clear provisions of the law. The attempt is a failure.

- **The Court denied the only stay relief motion filed in this case.** The Firm sought stay relief to return to the fray in the Superior Court case. The motion did not seek either retroactive relief or the right to compel the Debtor to JAMS arbitration. The Court denied the motion. While the denial was without prejudice given the early stage of the case, the Court noted its unwillingness to allow the Firm stay relief that would allow it to take actions to improve its position not only as to the Debtor but also as to other creditors. See Dkt. No. 49. In short, this is not a case where the Firm or Mr. Webb can justify a

failure to undertake stay violation cure by the pendency of a stay relief motion seeking retroactive approval of the stay violative activity.

- **The Firm and Mr. Webb never requested retroactive stay relief and could not meet the *Fjeldsted* test in any event.** Where a creditor takes stay violative actions, it is entitled to request retroactive stay relief to validate the actions. Typically, such motions are seen where the creditor did not know about the stay, was unable to stop the stay violative activity due to delay in notice by the debtor, or where the debtor acted inappropriately in some regard. Typically, a court balances the equities and in doing so applies the *Fjeldsted* factors when determining whether retroactive relief is appropriate. *Fjeldsted v. Lien (In re Fjeldsted)*, 293 B.R. 12 (9th Cir. BAP 2003). Here, the Firm never requested this relief and never attempted to obtain validation of its stay violative actions through a stay relief motion.[11] As a result, the orders it obtained and the documents it recorded in violation of the stay were void. *Schwartz v. United States (In re Schwartz),* 954 F.2d 569 (9th Cir. 1992). The failure to cure these violations was not excusable.

- **The Firm through Mr. Webb wrongly manipulates the facts when it states that it continued to seek stay relief up to the point of settlement.** The Firm never requested retroactive stay relief to validate its stay violative actions. It filed only one stay relief motion. And if it requested stay relief, for example, to compel arbitration this was irrelevant to the stay violation dispute. To suggest that a request for relief to address another topic justifies its willful and bad faith failure to cure stay violations is in bad faith.

The Firm's attempt to rely on *Dyer*, *Taggert*, and *Ress Financial* is in error.

The Firm is far fonder of cases not based on § 362(k) than it is of relevant authority. While *Dyer* involves a stay violation, ultimately § 105(a) controlled the sanction request

[11] Given the *Fjeldsted* factors and, in particular, factors 5 and 10, retroactive stay relief, if requested, would have been denied.

because a trustee, not an individual debtor, brought the motion. Indeed, one of the main points in *Dyer* is the difference in standards between § 362(k) and § 105(a).

The Firm cites to *Dyer* for the proposition that Bankruptcy Code "§ 105(a) does not authorize punitive sanctions for stay violations." Dkt. No. 77. However, in Dyer the court could not award damages under § 362(h), the then existing § 362(k) equivalent, because the moving party was the trustee, who was not an "individual" entitled to damages under that section. *Id.* at 1189. The Court did not hold that punitive damages are not available under § 362(h), now § 362(k). Rather, the Court in *Dyer* distinguished between §§ 105 and § 362(h):

> We have implied, in passing, that the contempt remedy is nearly identical to the remedy available to an individual under § 362(h), except for the permissive nature of the contempt authority. *Del Mission*, 98 F.3d at 1152. But careful reflection reveals important distinctions between § 105(a) and § 362(h), including, as we will develop, different availability of punitive damages.

322 F.3d at 1190.

And *Taggert* and *Ress Financial* both involve discharge violations. The Firm and Mr. Webb cite to them as on point and controlling authority. They aren't; the Firm and Mr. Webb never even attempt to explain why they provide support.

The Stay Violations here were not technical and non-intentional. Not to belabor the point, but this isn't a case where a computer sent a demand letter by mistake, or there were no actual damages as a result of the stay violation, or where the Court was silent as to its expectations, or where the creditor promptly moved to make all right. The Firm through Mr. Webb obtained orders, served documents, and recorded documents in the public record in violation of the automatic stay, and then failed for long months to remedy the situation.[12]

[12] The Court acknowledges that seeking excommunication (a bad act from one of Mr. Webb's cases) is worse than what the Firm and Mr. Webb did here. And to a certainty, their actions weren't as bad as those in *Sundquist v. Bank of America,* 566 B.R. 563 (Bankr. E.D. Cal. 2017). But neither of these cases set a floor for the point where behavior becomes appropriate for § 362(k) punitive damages. Instead, the relative malevolence of the acts factors into the amount of punitive damages.

If the Court correctly focuses on deterrence, punitive damages are appropriate here.

The Firm through Mr. Webb argues that punitive damages should not be awarded here because there is no need for deterrence. The Court believes that the need for deterrence is only one factor, not a controlling one. But even if it was, deterrence is clearly required.

As very relevant here, the Second Circuit has stated that the punitive damages standard imposed by § 362(k) "encourages would-be violators to obtain declaratory judgments before seeking to vindicate their interests in violation of an automatic stay…." *Crysen/Montenay Energy Co.*, 902 F.2d at 1105. In other words, "[p]arties may not make their own private determination of the scope of the automatic stay without consequence." *In re Jean-Francois*, 532 B.R. at 459. Put bluntly, the system requires that a creditor ask for permission not forgiveness.

The Firm and Mr. Webb focus on the fact that they can no longer hurt the Debtor. Through the settlement, they compensated her for asserted actual damages as a result of stay violation and paid her on account of personal injury and attorneys' fees. And they also withdrew the Firm's claim for pre-petition compensation and provided a release that makes post-petition claims unavailable. The Court is willing to assume that the Debtor will not willingly or likely become a debtor of either the Firm or Mr. Webb in the future.

But where a law firm and a lawyer engage in the type of conduct seen here deterrence has a place. The behavior of the Firm through Mr. Webb was deplorable. To the extent the punitive damages deter similar behavior in other bankruptcy cases, justice is well-served and punitive damages are entirely appropriate. And as the Firm continues to exist and as Mr. Webb continues to practice law, it is well within the realm of possibility that they again will need to follow a debtor into a bankruptcy court to collect a fee.

The discussion of the arbitration issues merely raises red herrings.

For reasons, apparently clear to the Firm and to Mr. Webb but veiled in mystery as to the Court, the sanctions opposition spends considerable time discussing arbitration issues that arose many months into the chapter 13 case. From case initiation, the Firm through

Mr. Webb claimed that it held a secured claim and (1) opposed stay extension; (2) sought stay relief; (3) requested case dismissal; (4) objected to the chapter 13 plan, in large measure based on this alleged status; and (5) filed a secured claim. The Court eventually and finally decided this issue adversely to the Firm in connection with the OSC. Its reasoning is discussed both in detail in a Tentative and on the record. But it preliminarily, if not finally, reached this conclusion in connection with other matters. Given the settlement, a final order on this issue is now moot. The Court reaches the conclusions it must to evaluate the appropriateness of punitive damages under § 362(k), but this determination is not essential to a punitive damages award.

And in no way relevant to the Court's decision here is a final determination on the claim objection. The Debtor objected to the entirety of the Firm's claim. See Dkt. No. 51. The objections focused on a lack of notice regarding expenses and other issues. The Firm initially defended the claim and requested arbitration. To the extent the claim arose under the retention agreement governing the state court malpractice action, this might have been required. But before the Court reached a decision, the claim was withdrawn. And thereafter, the Debtor and the Firm and Mr. Webb settled their disputes.

The Court fails to see how the pendency of these disputes impacts its decision on punitive damages; here the stay violations had nothing to do with the claim objection and, as the case is currently positioned, they do not directly relate to the punitive damages analysis.

Recall that the stay violative actions here arose in relation to the attempts by the Firm through Mr. Webb to attempt to obtain a lien and to preserve the right to maximize recovery if they later obtained a lien. They served documents relating to an attachment of the real property and a restraining order barring the Debtor from further encumbering the Property and a *lis pendens*. They recorded documents with the apparent goal of giving notice of rights to the property in violation of the stay. And, critically, they failed to take corrective action in violation of the stay. The fact that they wanted to dispute the claim objection bears no logical connection to their failure to take the corrective action required because they

obtained, served, and filed stay violative documents in an attempt to encumber Debtor's home.

In short, the potential right to seek arbitration does not provide a defense where the issue is a violation of the automatic stay.

The Court has other options for sanctions here but will not consider points beyond § 362(k) punitive sanctions.

Because the Firm through Mr. Webb ignored a direct and specific order of the Court and failed to immediately expunge stay violative documents and on numerous occasions filed documents or made statements that appear contrary to the truth as it must have been known to Mr. Webb and, thus, the Firm, the Court could expand the OSC to consider additional sanctions under Rule 9011, § 105(a), and inherent authority. The Court, however, does not do so here. These factors are relevant to the punitive sanction request under § 362(k) to the extent they evidence the state of mind required for a punitive damages award. But in most cases, these other theories do not allow sanctions in more than limited amounts that are not compensatory or coercive. And for a coercive sanction to be appropriate, the Firm and Mr. Webb must have the ability to avoid the sanction through some type of performance. And Rule 9011 sanctions would be payable to the Court. As a result of the settlement, the Court has no inclination to issue another OSC. Thus, to the extent that the Firm through Mr. Webb relies on sanction or attorneys' fee cases arising out of these bases for sanction, the caselaw is inapposite.

The Settlement justifies a downward reduction in the amount of sanctions.

It should be clear to anyone wading through this memorandum that the Court has strong feelings about the behavior of the Firm through Mr. Webb. But the Court also recognizes that a settlement occurred here which is beneficial to the Debtor and the bankruptcy process in this case and in general. The Court takes that into consideration.

First, the settlement provided some economic benefit to Debtor. Had she been required to litigate all issues to final completion, she would have incurred significant additional fees. Further, the Court thinks it unlikely that the substantial fee reductions

agreed to by her current attorneys and their expert would have been available if litigation continued.

But there is a counterpart to this. First, the Firm and Mr. Webb also reduced their own fee exposure both in terms of out of pocket fees and the risk that they would owe additional amounts to the Debtor either under § 362(k) or otherwise. So, the agreement to end litigation was far less than an act of late-discovered altruism on the part of Mr. Webb and the Firm.

Second, the settlement allowed the Debtor to confirm her plan and the release of the Firm's claim and the general releases provided her with the peace of mind that was the goal of her bankruptcy; her home is no longer at risk.

But, again, there is a corresponding benefit to the Firm and Mr. Webb. They also got a release; a malpractice action no longer looms large.

At the time of the Tentative, the Court anticipated punitive damages of no less than $27,000. See Dkt. No. 94 at page 24. At this time, given the settlement and the strong public policy issues that make settlement desirable, the Court concludes that a reduction should be made and that a sanction of $17,000 is appropriate. The Court requires payment to Debtor of $17,000.00 in 60 days in order to allow the Firm to address any liquidity issues. The award will bear interest thereafter at the federal judgment rate.

The Firm and Mr. Webb must report this sanction to the State Bar of California.

The Court is seriously concerned about this case and the behavior of the Firm and Mr. Webb. It will independently require self-reporting within 7 days from the date of this decision; reporting is also required by applicable law and state bar rules. *See e.g.*, Cal. Bus. & Prof. Code § 6068(o).

DATED: February 15, 2019

LAURA S. TAYLOR, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re Lisa A. Stefani, Bk. No. 18-00395-LT13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

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Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on February 15, 2019.

Shawna Zucconi

Shawna Zucconi, Courtroom Deputy