CHAPTER 13 PRACTICE AND PROCEDURE

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§ 15:12 Turnover of motor vehicle or other property repossessed prepetition

When a creditor with a security interest in personal property, usually a motor vehicle, takes possession of it (or seizes the property through legal process) before the debtor files a Chapter 13 case, the debtor often wants to obtain possession of it and pay the allowed amount of the secured claim under the plan pursuant to Code § 1325(a)(5)(B).[1] If the secured creditor has already disposed of the collateral at the time of filing, of course, the debtor cannot recover possession because the debtor no longer has an interest in it.[2]

If the creditor has not disposed of collateral in its possession, the general rule under the Supreme Court's decision in *U.S. v. Whiting Pools, Inc.*,[3] is it is property of the estate.[4] Code § 542(a) provides that an entity in "possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522] shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." In a Chapter 13 case, the debtor is entitled to possession of property of the estate[5] and has the rights of a trustee under § 363(b) to use property of the estate under Code § 363(b).[6] Accordingly, § 542(a) requires turnover to the debtor in a Chapter 13 case.[7]

This section discusses the creditor's obligation to turn over repossessed or seized property to the debtor and the debtor's remedies to obtain possession if the creditor refuses. Analysis includes consideration of the creditor's rights to adequate protec-

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[Section 15:12]

[1]See § 5:10.

[2]E.g., *In re Ratliff*, 260 B.R. 526 (Bankr. M.D. Fla. 2000); *Matter of Brown*, 210 B.R. 878, 881 (Bankr. S.D. Ga. 1997).

[3]*U.S. v. Whiting Pools, Inc.*, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[4]In some jurisdictions, courts have held that the debtor's interest in a motor vehicle repossessed prepetition property is limited to her right to redeem and that the repossessed collateral itself is not property of the estate. See § 14:5.

[5]11 U.S.C.A. § 1306(b). See § 16:2.

[6]11 U.S.C.A. § 1303. See §§ 16:3, 16:4.

[7]E.g., *In re Denby-Peterson*, 941 F.3d 115, 128 n.66, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019).

tion[8] of its interest in the collateral. The issue involves the extent to which adequate protection is an appropriate consideration in a turnover proceeding in view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection.

Turnover and the automatic stay

In its 2021 decision in *City of Chicago v. Fulton,*[9] the Supreme Court ruled that a creditor's retention of property in its possession at the time of the filing of a Chapter 13 case does not violate the provision of the automatic stay in Code § 362(a)(3) that prohibits "any act to obtain possession of property of the estate or of property from the estate or *to exercise control* over property of the estate."[10]

The Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits had concluded that a creditor's retention of property was an act to exercise control over property of the estate in violation of Code § 362(a)(3) and that the creditor had an affirmative obligation to turn it over.[11] Agreeing with the contrary

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[8]See § 15:8.

[9]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[10]11 U.S.C.A. § 362(a)(3) (emphasis added).

[11]E.g., *In re Fulton*, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 83412 (7th Cir. 2019), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 449 (2019) and vacated and remanded, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021); *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Rozier*, 376 F.3d 1323, Bankr. L. Rep. (CCH) P 80137 (11th Cir. 2004); *In re Del Mission Ltd.*, 98 F.3d 1147, 1151-52, 29 Bankr. Ct. Dec. (CRR) 1155, 36 Collier Bankr. Cas. 2d (MB) 1658, Bankr. L. Rep. (CCH) P 77176, 36 Fed. R. Serv. 3d 512 (9th Cir. 1996) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *In re Knaus*, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999).

The obligation to surrender possession of a motor vehicle included the obligation to disable any locking devices the creditor attached to the vehicle to prevent its operation if the debtor defaulted. *In re Horace*, 74 Collier Bankr. Cas. 2d (MB) 391, 2015 WL 5145576 (Bankr. N.D. Ohio 2015); *In re Dawson*, 2006 WL 2372821 (Bankr. N.D. Ohio 2006), aff'd, 2006 WL 3827459 (N.D. Ohio 2006); *In re Hampton*, 319 B.R. 163 (Bankr. E.D. Ark. 2005).

A creditor's failure to turn the vehicle over promptly subjected the creditor to damages for violation of the automatic stay, including the debtor's attorney's fees. Case law did not define a deadline. E.g., *In re Terry*, 2019 WL

rulings of the Third and Tenth Circuits,[12] the Supreme Court in *Fulton* concluded that the language of Code § 362(a)(3) "halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition"[13] and therefore held that "mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code."[14]

The *Fulton* Court declined to consider how the turnover obligation in Code § 542(a) operates or the meaning of other provisions of the automatic stay in paragraphs (4) and (6) of Code § 362(a).[15]

Paragraph (4) of Code § 362(a) prohibits "any act to create, perfect, or enforce any lien against property of the estate," and paragraph (6) prohibits "any act to collect, assess, or recover a claim against the debtor" that arose prepetition. *Fulton* involved the City of Chicago's enforcement of parking fines by impounding motor vehicles and its assertion of a possessory lien under Illinois law. In one of the four cases consolidated on appeal in Fulton,[16] the bankruptcy court had concluded that the City violated Code § 362(a)(6) by demanding payment of the debt and

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7169095 (Bankr. N.D. Tex. 2019) (Withholding property for over a month was "unquestionably egregious," warranting punitive damages.); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (nine days an unreasonable delay); *In re Smith*, 2016 WL 3765839 (Bankr. N.D. Ohio 2016) (making the vehicle available three days postpetition not unreasonable).

[12]*In re Denby-Peterson*, 941 F.3d 115, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Cowen*, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017).

[13]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 590, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[14]*City of Chicago, Illinois*, 141 S. Ct. 585, 592.

[15]*City of Chicago, Illinois*, 141 S. Ct. 585, 592. The Supreme Court noted that the Seventh Circuit had not addressed the issues, either. 141 S.Ct. at 592, n. 2. The Court vacated the judgment of the Seventh Circuit and remanded "for further proceedings consistent with this opinion." 141 S.Ct. at 592.

On remand, the Seventh Circuit determined that two of the four debtors in the consolidated appeal had presented arguments in the bankruptcy courts that the City had violated 11 U.S.C.A. § 362(a)(4) and (6) and remanded them to the bankruptcy courts that decided them "for further proceedings consistent with the Supreme Court's decision." *In re Fulton*, 2021 WL 1345416 at *2 (7th Cir. 2021). In the other two cases in which the debtors argued only a violation of § 362(a)(3), the Seventh Circuit remanded with instructions to the bankruptcy courts to vacate the judgments. 2021 WL 1345416 at *2.

The two cases the Seventh Circuit remanded for determination of the § 362(a)(4) and (6) issues were *In re Shannon*, 590 B.R. 467 (Bankr. N.D. Ill. 2018), and *In re Fulton*, 2018 WL 2392854 (Bankr. N.D. Ill. 2018), opinion *amended and superseded*, 2018 WL 2570109 (Bankr. N.D. Ill. 2018). The bankruptcy court opinion in *Fulton* did not address § 362(a)(4) and (6).

[16]*Fulton* involved four separate bankruptcy court rulings that the Seventh Circuit considered in a consolidated appeal. The cases were: *In re Shannon*, 590 B.R. 467 (Bankr. N.D. Ill. 2018); *In re Peake*, 588 B.R. 811 (Bankr. N.D. Ill.

that continued possession of the vehicle, combined with the demand for payment, was a violation of Code § 362(a)(4) as an act to enforce its lien under Illinois law.[17]

Although the Supreme Court in *Fulton* did not address the (a)(4) and (a)(6) issues, the bankruptcy court's rulings seem inconsistent with *Fulton*'s reasoning that the automatic stay preserves the status quo and that a violation of it requires an affirmative act.[18] Moreover, in noting that the phrase, "to exercise control over property of the estate" was added to the original 1978 statute in 1984, the *Fulton* Court observed that the debtors did not dispute that § 362(a)(3) had imposed no turnover obligation before the amendment.[19] A possible implication is that nothing else in § 362(a) imposed such an obligation either.

In any event, it is difficult to conclude that a creditor's continued possession of collateral violates either (a)(4) or (a)(6) if the creditor holds a consensual security interest whose validity and perfection does not depend on possession.

Possession is not an act to "create, perfect, or enforce" a lien that violates Code § 362(a)(4), and it is not an act to collect a prepetition claim that violates Code § 362(a)(6) unless, perhaps, it is accompanied by a demand for payment. A well-advised creditor can avoid operation of § 362(a)(6) by declining a turnover request without demanding payment simply by giving no reason for its decision.

Turnover under Code § 542(a)

The fact that the automatic stay may not require a creditor to surrender possession of collateral does not mean that the creditor need not turn it over to the debtor. Code § 542(a) provides that a creditor must turn over property of the debtor unless it is of inconsequential value or benefit to the estate.

Code § 542(a) applies to property "that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522]." In a Chapter 13 case, the debtor is entitled

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2018); *In re Fulton*, 2018 WL 2392854 (Bankr. N.D. Ill. 2018), *amended and superseded*, 2018 WL 2570109 (Bankr. N.D. Ill. 2018); *In re Howard*, 2018 WL 1830910 (Bankr. N.D. Ill. 2018).

[17]*In re Shannon*, 590 B.R. 467, 477 (Bankr. N.D. Ill. 2018), aff'd on other grounds, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 83412 (7th Cir. 2019), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 449 (2019) and vacated and remanded on other grounds, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[18]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 590, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[19]*City of Chicago, Illinois,* 141 S. Ct. at 591.

to possession of property of the estate,[20] has the rights of a trustee to use property of the estate under Code § 363(b),[21] and may claim an exemption.[22] If the creditor has possession of property that the debtor owns, Code § 542(a) applies.

Code § 542(a) does not, however, require turnover of property that is of "inconsequential value or benefit to the estate." If the encumbered property is worth less than the amount of the debt, it has "inconsequential value" to the estate in the sense that its sale will produce nothing for the benefit of creditors.

But the property itself may have significant value or be important to the estate. For example, a debtor typically requires a motor vehicle for transportation, among other things, to and from work to earn income to make plan payments. Indeed, Justice Sotomayor in her concurring opinion in *Fulton*[23] recognized the critical importance of a motor vehicle to debtors and their creditors.[24] Furthermore, the debtor has the right to retain encumbered property under a Chapter 13 plan by paying the creditor the allowed amount of its secured claim,[25] a primary purpose of Chapter 13 and often an important objective of the debtor.[26] Thus, even fully encumbered property may have consequential value or be of benefit to the estate.

In the usual situation, therefore, Code § 542(a) requires the secured creditor to deliver repossessed or seized property to the Chapter 13 debtor. The result could be different if, for example, a repossessed motor vehicle is one that the debtor does not need, such as a recreational vehicle, that has no equity.

The creditor's turnover obligation

The question is how a debtor enforces her right to possession under Code § 542(a) if a creditor declines to turn over repossessed or seized property. The initial issue is whether Code § 542(a) is self-operative and requires turnover without a court order, an issue that *Fulton* did not address.[27]

As Justice Sotomayor noted in her concurring opinion in *Ful-*

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[20]11 U.S.C.A. § 1306(b). See § 16:2.

[21]See §§ 16:3, 16:4.

[22]See § 14:22.

[23]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 593, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[24]*City of Chicago, Illinois,* 141 S. Ct. at 593-94.

[25]See § 5:10.

[26]See § 2:3.

[27]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

ton,[28] the court in *In re Larimer*[29] held that the turnover obligation under Code § 542(a) is automatic. In *Larimer,* the court entered a declaratory judgment that the Internal Revenue Service had an obligation to deliver the estate's share of a tax refund to the Chapter 7 trustee, reasoning that Code § 542(a) does not require a demand, a court order, or any other action.[30] The *Larimer* court further observed that failure of an entity to comply with Code § 542(a) is "probably contumacious."[31] Several courts have similarly stated that Code § 542(a) is self-operative and mandatory.[32]

Most courts, however, conclude that Code § 542(a) does not require turnover of repossessed or seized property without a court order.[33] These courts reason that enactment of Code § 542(a) as part of the Bankruptcy Code in 1978 did not change the pre-Code practice that conditioned turnover on entry of a court order for it and that it does not deprive a creditor of its rights to assert that the statute does not require turnover or to obtain adequate protection of its interest in connection with turnover.[34] Some note

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[28]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 594, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[29]*Matter of Larimer*, 27 B.R. 514, 516, 10 Bankr. Ct. Dec. (CRR) 105 (Bankr. D. Idaho 1983).

[30]*Matter of Larimer*, 27 B.R. at 516.

[31]*Matter of Larimer,* 27 B.R. at 516.

[32]*In re McKeever*, 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017); *In re Spence*, 2009 WL 3756621, *5 (Bankr. W.D. Tex. 2009); *In re Drew*, 2007 WL 4879278 (Bankr. N.D. Ind. 2007); *In re Calvin*, 329 B.R. 589, 54 Collier Bankr. Cas. 2d (MB) 1443 (Bankr. S.D. Tex. 2005); *In re U.S.A. Diversified Products, Inc.*, 196 B.R. 801 (N.D. Ind. 1996), aff'd, 100 F.3d 53, 30 Bankr. Ct. Dec. (CRR) 91 (7th Cir. 1996); *In re Lucas*, 100 B.R. 969, 972 (Bankr. M.D. Tenn. 1989), aff'd and adopted, 110 B.R. 335 (M.D. Tenn. 1989), rev'd on other grounds, 924 F.2d 597, 21 Bankr. Ct. Dec. (CRR) 408, 24 Collier Bankr. Cas. 2d (MB) 804, 13 Employee Benefits Cas. (BNA) 1445, Bankr. L. Rep. (CCH) P 73790 (6th Cir. 1991); *In re McCary*, 60 B.R. 152, 154, 14 Bankr. Ct. Dec. (CRR) 505 (Bankr. N.D. Ill. 1986). These cases generally state the principle in the context of turnover disputes that involve issues distinct from the turnover of repossessed or seized property.

[33]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Dillard*, 2001 WL 1700026 (Bankr. M.D. N.C. 2001); *In re Barringer*, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999); *In re Nash*, 228 B.R. 669 (Bankr. N.D. Ill. 1999) (abrogated by, Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009)); *In re Fitch*, 217 B.R. 286, 32 Bankr. Ct. Dec. (CRR) 152 (Bankr. S.D. Cal. 1998); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Massey*, 210 B.R. 693 (Bankr. D. Md. 1997); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996).

[34]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31 n.72, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Young*, 193 B.R.

that in *U.S. v. Whiting Pools, Inc.*,[35] the bankruptcy court conditioned turnover of property in the creditor's possession on the provision of adequate protection and that none of the courts deciding the issue in *Whiting Pools* had intimated that the turnover obligation was self-operative.[36]

Whether or not Code § 542(a) is self-operative, the debtor must seek an order from the court to enforce turnover if the creditor refuses to surrender the property. Later text discusses why the self-operative issue matters in the analysis of two questions: (1) whether a creditor is entitled to adequate protection in connection with turnover; and (2) whether a debtor may recover attorney's fees and damages due to a creditor's failure to turn over property.

Procedure to compel turnover

The threshold issue regarding a turnover proceeding is whether a debtor may seek turnover by filing a motion, which initiates a contested matter under Bankruptcy Rule 9014, or whether she must file a complaint, which initiates an adversary proceeding. Section 23:4 discusses the two types of proceedings, section 23:5 discusses procedures in adversary proceedings, and section 23:6 discusses how procedures in contested matters differ from those in adversary proceedings. For the most part, the same procedures applicable in adversary proceedings are available to the parties in a contested matter, except that an adversary proceeding requires the issuance of summons.[37] In particular, a creditor must be served with a complaint in an adversary proceeding (together with summons) or with a motion in a contested matter in the same way under Bankruptcy Rule 7004.[38]

Procedures in a contested matter tend to be less formal and more expeditious (and, therefore, less expensive) than those in an adversary proceeding. The primary impact on the debtor of requiring an adversary proceeding is the additional fees required

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620 (Bankr. D. D.C. 1996). See generally *James L. Buchwalter*, Contempt and Arrest Proceedings Resulting from Statutory Turnover Obligations in Bankruptcy—21st Century Cases, 38 A.L.R. Fed. 3d Art. 10, § 2 (2019); Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?, 33 No. 9 Bankr. L. Letter NL 1 (Sept. 2013).

[35]*U.S. v. Whiting Pools, Inc.*, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[36]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31 n.72, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996).

[37]See §§ 23:4, 23:6.

[38]See § 23:7.

for the attorney to prepare the additional paperwork that an adversary proceeding involves (e.g., summons and civil cover sheet) and additional pleadings necessary for emergency relief. A Chapter 13 debtor does not have to pay a fee to file an adversary proceeding.

Bankruptcy Rule 7001(1) defines an adversary proceeding as "a proceeding to recover money or property," with certain exceptions.[39] The prevailing view is that Rule 7001(1) requires a debtor to commence an adversary proceeding to require turnover of repossessed property under Code § 542(a).[40]

A requirement of an adversary proceeding for turnover is a departure from practice in jurisdictions that had permitted a debtor to seek turnover on the ground that the creditor's retention of property violated the automatic stay. Because a party may seek to enforce the automatic stay and obtain remedies for its violation in a contested matter, a debtor could file a motion for turnover as a remedy for the stay violation.[41] *City of Chicago v. Fulton*[42] removes this basis for permitting a debtor to seek turnover by motion.

As a practical matter, neither the debtor's nor the creditor's interests are served by litigating a turnover matter in an adversary proceeding rather than in a contested matter initiated by a simple motion for turnover. As later text discusses, the only issue in a turnover proceeding in most Chapter 13 situations is adequate protection. Bankruptcy Rule 4001(a)(1) provides for determination of adequate protection by motion.

The parties to a turnover proceeding do not need to deal with the more formal and in some ways cumbersome procedures that an adversary proceeding requires. Other than the fact that an adversary proceeding requires the issuance of summons, the procedures for determination of a contested matter are the same

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[39]The exceptions are proceedings to compel a debtor to deliver property to the trustee or a proceeding under 11 U.S.C.A. § 554(b) (request for order for trustee to abandon property); 11 U.S.C.A. § 725 (disposition by Chapter 7 trustee of property in which entity other than the estate has an interest); Bankruptcy Rule 2017 (examination of debtor's attorney's fees); and Bankruptcy Rule 6002 (accounting by prior custodian of property of the estate).

[40]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *Matter of Perkins*, 902 F.2d 1254, 1258, 60 Ed. Law Rep. 447, Bankr. L. Rep. (CCH) P 73385 (7th Cir. 1990) (collecting cases); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996); *In re Estes*, 185 B.R. 745 (Bankr. W.D. Ky. 1995).

[41]See § 5:16.

[42]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

as those for an adversary proceeding.[43] Both the debtor and the creditor can save time and money by proceeding by motion.

If a debtor seeks turnover by motion, the court can rule on the motion in the absence of an objection that an adversary proceeding is required because a party may waive that right.[44] Moreover, courts have held that determination of an issue raised by motion in a contested matter rather than by a complaint in an adversary proceeding is harmless error.[45] Finally, a court may convert a contested matter to an adversary proceeding or, at worst, dismiss the motion without prejudice so that the debtor can file an adversary proceeding.[46] In any event, if the court enters an order in a contested matter when an adversary proceeding is required, the order is nevertheless effective, provided that constitutional due process requirements of notice and an opportunity to be heard have been met, under the Supreme Court's ruling in *United Student Aids Funds, Inc., v. Espinosa*.[47]

Because the litigation of a turnover proceeding as a contested matter rather than an adversary proceeding is simpler, more expeditious, and less expensive, parties and courts may seek creative ways to avoid the application of Bankruptcy Rule 7001(1). It is arguable that a proceeding to "recover" property within the meaning of Rule 7001(1) does not include a proceeding to "require turnover," which is limited to the issue of possession under Code § 542(a).[48] A debtor might seek an order under Code

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[43]See § 23:4.

[44]E.g., *Matter of Village Mobile Homes, Inc.*, 947 F.2d 1282, 22 Bankr. Ct. Dec. (CRR) 529, Bankr. L. Rep. (CCH) P 74347 (5th Cir. 1991). See § 23:4.

[45]E.g., *In re Cannonsburg Environmental Associates, Ltd.*, 72 F.3d 1260, 28 Bankr. Ct. Dec. (CRR) 465, Bankr. L. Rep. (CCH) P 76754, 1996 FED App. 0009P (6th Cir. 1996); *In re Munoz*, 287 B.R. 546, 68 Cal. Comp. Cas. (MB) 421, 40 Bankr. Ct. Dec. (CRR) 196 (B.A.P. 9th Cir. 2002). See also *In re Copper King Inn, Inc.*, 918 F.2d 1404, 23 Collier Bankr. Cas. 2d (MB) 1547, 12 U.C.C. Rep. Serv. 2d 1155 (9th Cir. 1990) (holding contested matter was essentially an adversary proceeding because motion and objection were filed and an evidentiary hearing was held).

[46]See § 23:4.

[47]*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 52 Bankr. Ct. Dec. (CRR) 254, 63 Collier Bankr. Cas. 2d (MB) 428, Bankr. L. Rep. (CCH) P 81716, 76 Fed. R. Serv. 3d 364 (2010) (discussed in § 10:4). See § 23:4.

[48]The distinction is based on the concept that turnover is appropriate when the property is indisputably property of the estate but not when the debtor's interest is subject to dispute. *See In re McKeever*, 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017) ("[T]urnover proceedings are strictly limited to actions to recover property that is indisputably part of the estate; in other words, a turnover action is not the appropriate tool for acquiring the right to use or possess property if the debtor's right to use or possess the property is subject to dispute."). Put

§ 105(a)[49] for the court to require the creditor to show cause why it should not turn over the property in compliance with its § 542(a) obligations, or assert that the motion is to enforce the provisions of Code § 542(a) under Code § 105(a) and not to "recover property." Another possibility is to present the matter as a motion to determine adequate protection necessary for turnover. The difficulty with all of these theories is that, as noted earlier, the prevailing view in the case law is that a turnover request is a proceeding to recover property under Rule 7001(1), although the cases do not address these arguments.

In deciding whether to proceed by motion, a debtor must consider whether she will seek damages and attorney's fees because of the creditor's failure to comply with its turnover obligations.

A debtor seeking turnover by motion to enforce the automatic stay could combine a request for damages and attorney's fees with the request for turnover because Code § 362(k) authorizes their recovery for a willful violation of the stay and courts permitted debtors to seek them by motion.[50] As later text discusses, Code § 542(a) contains no remedies for its enforcement. Accordingly, a request for damages and attorney's fees appears to be a proceeding to recover money for which Bankruptcy Rule 7001(1) requires an adversary proceeding.

Expedited consideration of debtor's request for turnover

As Justice Sotomayor observed in her concurring opinion in *City of Chicago v. Fulton,*[51] the average time an adversary proceeding for turnover under § 542 filed after July 2019 and concluding before June 2020 was pending was over 100 days, a long time for a debtor to wait for return of a motor vehicle.[52] Justice Sotomayor noted that some courts may permit debtors to seek turnover through a motion where the creditor has received adequate notice or may expedite proceedings or order preliminary relief requiring temporary turnover.

Delay of at least 30 days is inherent in an adversary proceeding, because the defendant has that long from the date of issu-

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another way, a motion in a contested matter is an appropriate way for a debtor to require *turnover* of property that she indisputably owns, but an adversary proceeding is necessary to *recover* it if her ownership is subject to dispute.

[49]11 U.S.C.A. § 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

[50]See § 15:6.

[51]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[52]*City of Chicago, Illinois*, 141 S. Ct. 585.

ance of summons to answer the complaint.[53] Moreover, trial on the merits does not occur until the parties complete discovery. A debtor in urgent need of property such as a vehicle, therefore, must find a way to expedite the process.

The adversary rules provide for a party to obtain preliminary relief on an expedited basis. A complaint for turnover under § 542(a) requests an order requiring the creditor to turn over the property in its possession. A turnover order is in the nature of an injunction,[54] and Federal Rule of Civil Procedure 65, applicable in an adversary proceeding under Bankruptcy Rule 7065, governs a request for an injunction.[55]

Federal Rule 65(a) permits a debtor to seek emergency relief by filing a motion for a preliminary injunction[56] pending final determination of the adversary proceeding on the merits.[57] The court may advance the trial on the merits and consolidate it with the hearing on the motion for a preliminary injunction.[58] Bankruptcy Rule 7065 permits the issuance of a preliminary injunction requested by a debtor without compliance with Federal Rule 65(c), which requires the moving party to provide security to pay costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Alternatively, and perhaps more simply, a debtor might file a motion in the adversary proceeding contemporaneously with the complaint that seeks emergency relief based on the circumstances and requests an expedited hearing. Although the adversary rules do not contemplate such motions, Code § 105(a) provides a basis for the court to hear and determine the right to possession on an interim basis.

If the debtor elects to proceed by motion in a contested matter instead of filing an adversary proceeding, the debtor should request an expedited hearing and state the need for emergency relief. A separate motion to schedule an emergency hearing will assist in bringing it to the attention of the court.

Depending on local practice, a debtor may need to contact the

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[53]Fed. R. Bankr. P. 7012(a).

[54]See *In re Van Vleet*, 461 B.R. 62 (D. Colo. 2010); *In re Wildlife Center, Inc.*, 102 B.R. 321, 323, 23 Collier Bankr. Cas. 2d (MB) 251 (Bankr. E.D. N.Y. 1989).

[55]The court may make Federal Rule 65 applicable in a contested matter. Fed. R. Bankr. P. 9014(c).

[56]A debtor may also seek a temporary restraining order under Fed. R. Civ. P. 65(b), which the court may issue without notice to the creditor. It is unlikely in most circumstances that a bankruptcy court will issue a turnover order without notice.

[57]See, e.g., *In re Reid*, 423 B.R. 726, 70 U.C.C. Rep. Serv. 2d 755 (Bankr. E.D. Pa. 2010).

[58]Fed. R. Civ. P. 65(a)(2).

court's staff about the scheduling of an emergency hearing regardless of the type of proceeding the debtor files.

Issues in a turnover proceeding; adequate protection

Whether the debtor files a contested matter or an adversary proceeding, the issues are the same. Earlier text explains that in most situations it is undisputed that the debtor owns the property and that it is not of inconsequential value or benefit. Unless the creditor contends that it no longer has the property (perhaps because it disposed of it) or raises other defenses to turnover, the only issue before the court, absent unusual circumstances, is adequate protection.[59]

A secured creditor's right to adequate protection of its interest in encumbered property arises from Code § 363(e). It provides that, upon request of the creditor, the court "shall prohibit or condition" the use of property in the case as is necessary to provide adequate protection.[60]

The Bankruptcy Code requires adequate protection to protect a secured creditor from the diminution of value that may occur during the case. In the Chapter 13 context, adequate protection typically consists of periodic payments equal to the estimated depreciation that will occur.[61] When the collateral is a motor vehicle, an additional component of adequate protection is insurance on it to protect the creditor from damage or destruction due to a collision.[62]

Code § 542(a) does not condition turnover on the provision of adequate protection to the creditor. Under the view that the turnover obligation under Code § 542(a) is self-operative, a creditor cannot properly refuse to turn over property based on a lack of adequate protection. Instead, it must request adequate protection in accordance with Code § 363(e). To enforce the self-operative nature of § 542(a), a court must decline to consider adequate protection in connection with a turnover request. Otherwise, the court by addressing adequate protection issues effectively authorizes the creditor to retain the property until that issue is

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[59]For example, if a creditor's repossession efforts have been thwarted by the debtor's concealment of the collateral or by multiple bankruptcy filings that call the debtor's good faith into question, the creditor might resist turnover on the ground that the court should lift the stay or dismiss the case for those reasons, which would permit the creditor to retain possession. In such circumstances, a sympathetic court might defer a ruling on turnover and permit the creditor to retain possession pending determination of a motion for stay relief or for dismissal of the case due to bad faith so that the creditor does not bear the burden and expense of a second repossession.

[60]See § 15:8.

[61]See §§ 5:15, 5:18.

[62]See §§ 5:15, 15:8.

addressed, the effect of which is that § 542(a) is not self-operative.

The prevailing view, however, is that Code § 542(a) is not self-operative and that a creditor is entitled to adequate protection in connection with the turnover of property, as earlier text discusses. The issue is what type of adequate protection is appropriate in the context of a turnover request in a Chapter 13 case.

Most Chapter 13 turnover requests involve a motor vehicle and occur early in the case when the debtor has an urgent and compelling need for it, as Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton* demonstrates.[63] It is, therefore, important that the court consider the two adequate protection issues in turnover matters—periodic payments and insurance—in ways that permit their prompt determination and encourage consensual resolution in a manner consistent with the adequate protection rights of creditors under the statutory scheme of Chapter 13.

With regard to insurance, most courts under pre-*Fulton* practice ruled that a creditor violated Code § 362(a)(3) by conditioning turnover on the debtor's provision of proof of insurance,[64] while some courts permitted a creditor to do so.[65] After *Fulton,* a creditor's retention of a motor vehicle alone does not violate Code § 362(a)(3), and its insistence on insurance is an act to protect its collateral, not to collect a prepetition debt in violation of Code § 362(a)(6) or to create, perfect, or enforce its lien in violation of Code § 362(a)(4). It is unlikely that a court will permit a debtor to take possession of a vehicle that is not insured, and a

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[63]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[64]E.g., *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); see *In re Yates*, 332 B.R. 1, 7, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005) (abrogated by, In re Cowen, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017)); *In re Stephens*, 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013); *In re Rutherford*, 329 B.R. 886 (Bankr. N.D. Ga. 2005); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999).

[65]E.g., *In re Massey*, 210 B.R. 693 (Bankr. D. Md. 1997); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Kolberg*, 199 B.R. 929 (W.D. Mich. 1996); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996); see *Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2004) (failure to turn over vehicle to Chapter 13 debtor after debtor has made demand and has provided proof of insurance is violation of the automatic stay); *In re House*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) (Willful stay violation after lender failed to turn over vehicle when "good faith negotiation" broke down).

debtor should not have a different expectation.

A court can promptly determine whether insurance exists, and existence of the insurance requirement makes proof of it an expected and routine part of consensual resolution of a turnover request. Accordingly, a court properly conditions turnover on its existence.

Consideration of the amount and timing of adequate protection payments in a turnover context at the outset of a Chapter 13 case, on the other hand, is inconsistent with Chapter 13's provisions for adequate protection for creditors secured by personal property. In addition, factual issues relevant to determination of the amount of the payments, such as the value of the collateral and its expected depreciation, may not be capable of prompt determination.[66] Addressing adequate protection payments in connection with a turnover matter introduces an additional subject for negotiation and therefore makes consensual resolution more difficult.

A court's consideration of adequate protection payments on an expedited basis at the outset of the case in connection with an emergency turnover request is inconsistent with what might be called Chapter 13's "default rules" for dealing with adequate protection for a security interest in personal property. In general, the default rules provide for the debtor to propose adequate protection payments, for a dissatisfied creditor to request an increase, and for the court to determine the dispute at a hearing in accordance with the court's usual practice for hearing such matters. This is, of course, consistent with Code § 363(e), which conditions adequate protection on a creditor's request for it.

One default provision is Code § 1325(a)(5)(B)(iii). It requires that a Chapter 13 plan provide for monthly payments to a secured creditor with a security interest in personal property that are sufficient to provide adequate protection to the creditor.[67] If the amount of the payment is not satisfactory, the creditor can either object to confirmation, file a motion for the court to determine adequate protection pursuant to Code § 363(e), or both.

The second default provision addresses adequate protection payments when the creditor's security interest is a purchase money security interest. Code § 1326(a)(1)(C) requires that adequate protection payments to such a creditor begin not later than 30 days after the filing of the case, unless the court orders

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[66]Valuation and related depreciation issues may require expert testimony. See § 5:6.

[67]11 U.S.C.A. § 1325(a)(5)(B)(iii). See § 5:15.

otherwise.[68] Code § 1326(a)(1)(C) permits the debtor to establish the amount of the adequate protection payments in the plan, unless the court, after notice and hearing, modifies, increases, or reduces the payments pursuant to Code § 1326(a)(3). A dissatisfied creditor may either file a motion requesting an increase in adequate protection payments under Code § 1326(a)(3), request an increase under § 363(e), or both.

The court will hear requests for adequate protection under Code § 363(e) or objections to a plan's proposal for adequate payments under Code § 1326(a)(3) in accordance with its usual procedures for such matters, which may include expedited consideration of them.

Because Code § 1325(a)(5)(B)(iii) and Code § 1326(a)(1)(C) specifically address adequate protection payments and permit the debtor to set their amount in the first instance, subject to later review by the court at the creditor's request, addressing the amount of adequate protection payments at the outset of the case in the context of a turnover request seems inappropriate. In view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection, a court absent unusual circumstances properly addresses adequate protection payments at a later time in accordance with Code § 363(e) and the default rules just discussed.

Arguably, consideration of adequate protection payments and turnover at the same time promotes judicial economy because another hearing will not be necessary. But a procedure that defers the issue makes it more likely that the more urgent issue of turnover is resolved consensually upon proof of insurance so that only a hearing on the adequate protection payments is required. Moreover, whereas a debtor's need for a motor vehicle involves an emergency measured in days, the amount of adequate protection payments involves no such urgency.

On balance, postponement of the payment issue promotes prompt turnover and consensual resolution without unduly impairing the creditor's interest. Determination of adequate protection payments under the two default rules under the court's ordinary procedures puts a creditor who has possession of collateral in the same position as any other creditor secured by personal property with regard to adequate protection payments at the outset of the case.

Under this approach, a creditor can insist on proof of insurance before turning the property over to the debtor but cannot refuse turnover because of a dispute over adequate protection payments. In a jurisdiction that adopts the self-operative view of Code

[68]See § 5:16.

§ 542(a), however, a creditor may need to promptly bring the insurance matter to the attention of the court in a motion requesting that the court require insurance in connection with turnover.

Bankruptcy judges have discretion under the Bankruptcy Code and Bankruptcy Rules to determine how to address adequate protection payments in connection with a turnover request. Section 363(e) permits a court to require adequate protection without a hearing. The Bankruptcy Rules do not specify how much notice is required for a hearing on adequate protection, and Bankruptcy Rule 9006(c)(1) generally permits the court to reduce the time for notices.[69] Thus, courts have flexibility in deciding how to balance Justice Sotomayor's concerns in *Fulton*[70] about a debtor's need for the prompt return of a motor vehicle with a creditor's right to adequate protection.

Enforcement of turnover order and sanctions

If the court issues an order for turnover and the creditor fails to comply, the bankruptcy court may enforce its order through its civil contempt powers.[71] Bankruptcy Rule 9020 provides that

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[69]Fed. R. Bankr R. P. 9006(c)(2) states certain time periods that the court cannot reduce, but notice with regard to a hearing on adequate protection is not one of them.

[70]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[71]E.g., *In re Hercules Enterprises, Inc.*, 387 F.3d 1024, 43 Bankr. Ct. Dec. (CRR) 228, Bankr. L. Rep. (CCH) P 80183 (9th Cir. 2004); *In re Van Vleet*, 461 B.R. 62 (D. Colo. 2010); *In re Wildlife Center, Inc.*, 102 B.R. 321, 323, 23 Collier Bankr. Cas. 2d (MB) 251 (Bankr. E.D. N.Y. 1989); see *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002) (debtor may be found in contempt for failure to turn over assets to trustee).

The bankruptcy court's civil contempt powers arise primarily from 11 U.S.C.A. § 105(a); some courts also conclude that bankruptcy courts have inherent civil contempt power. E.g., *Law Solutions of Chicago LLC v. Corbett*, 971 F.3d 1299, 69 Bankr. Ct. Dec. (CRR) 60 (11th Cir. 2020); *In re Kalikow*, 602 F.3d 82, 52 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81728 (2d Cir. 2010); *In re White-Robinson*, 777 F.3d 792, 60 Bankr. Ct. Dec. (CRR) 156 (5th Cir. 2015); *Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 613, 37 Collier Bankr. Cas. 2d (MB) 1166, Bankr. L. Rep. (CCH) P 77327 (5th Cir. 1997); *In re McLean*, 794 F.3d 1313, 61 Bankr. Ct. Dec. (CRR) 95, Bankr. L. Rep. (CCH) P 82853 (11th Cir. 2015); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284, 28 Bankr. Ct. Dec. (CRR) 871, 35 Collier Bankr. Cas. 2d (MB) 620, Bankr. L. Rep. (CCH) P 76830 (9th Cir. 1996); *In re Ragar*, 3 F.3d 1174, 1179, 24 Bankr. Ct. Dec. (CRR) 1036, 29 Collier Bankr. Cas. 2d (MB) 1005, Bankr. L. Rep. (CCH) P 75417 (8th Cir. 1993); *In re Skinner*, 917 F.2d 444, 447, 21 Bankr. Ct. Dec. (CRR) 49, 23 Collier Bankr. Cas. 2d (MB) 1559, Bankr. L. Rep. (CCH) P 73664 (10th Cir. 1990); *In re Walters*, 868 F.2d 665, 18 Bankr. Ct. Dec. (CRR) 1484, 22 Collier Bankr. Cas. 2d (MB) 263, Bankr. L. Rep. (CCH) P 72693 (4th Cir. 1989). See also Norton Bankruptcy Law and Practice 3d § 13:5; Drake & Visser, Bankruptcy Practice for the General Practitioner § 4:9.

Bankruptcy Rule 9014,[72] which states procedures for contested matters, governs a motion for contempt. Remedies for civil contempt include sanctions in the form of attorney's fees and damages, as well as coercive penalties designed to compel compliance with the order.

Most courts conclude that a bankruptcy court does not have criminal contempt powers.[73] A court imposes noncompensatory punitive damages pursuant to its criminal contempt powers. Thus, courts have ruled that a bankruptcy court may not impose punitive damages,[74] although some have noted that a bankruptcy court might be able to award relatively mild or nonserious punitive damages.[75]

If Code § 542(a) is mandatory and self-operative, a creditor who refuses to turn over property until ordered to do so has violated Code § 542(a) regardless of whether it complies with the court's order when issued. The question is whether the debtor may recover attorney's fees incurred in obtaining the turnover order and damages resulting from the delay in obtaining possession.

Even if Code § 542(a) is not self-operative, the question arises when a recalcitrant creditor refuses to turn over property until the court orders it but did not oppose the motion or produced no legitimate basis for its refusal.

Under the principles discussed above, a Chapter 13 debtor is ordinarily entitled to possession of repossessed or seized personal property under Code § 542(a); in the case of a motor vehicle, the debtor may need to provide proof of insurance. The argument is that it is an abuse of the bankruptcy process for a creditor to require litigation to resolve an issue that requires immediate attention and is not complicated. Sanctions in the form of attorney's fees and damages may be appropriate to compensate a debtor harmed by a creditor's unwarranted refusal to comply with Code § 542(a) and to deter others from engaging in the same type of behavior.

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[72]See § 23:6.

[73]E.g., *In re John Richards Homes Bldg. Co.*, 552 Fed. Appx. 401, 415 (6th Cir. 2013); *Matter of Hipp, Inc.*, 895 F.2d 1503, 20 Bankr. Ct. Dec. (CRR) 418, 22 Collier Bankr. Cas. 2d (MB) 876, Bankr. L. Rep. (CCH) P 73293 (5th Cir. 1990). Contra, e.g., *In re Ragar*, 3 F.3d 1174, 24 Bankr. Ct. Dec. (CRR) 1036, 29 Collier Bankr. Cas. 2d (MB) 1005, Bankr. L. Rep. (CCH) P 75417 (8th Cir. 1993); see *In re McLean*, 794 F.3d 1313, 61 Bankr. Ct. Dec. (CRR) 95, Bankr. L. Rep. (CCH) P 82853 (11th Cir. 2015) (Remanding issue of punitive damages to bankruptcy court.).

[74]E.g., *In re Dyer*, 322 F.3d 1178, 1193, 41 Bankr. Ct. Dec. (CRR) 64, Bankr. L. Rep. (CCH) P 78816 (9th Cir. 2003).

[75]E.g., *In re John Richards Homes Bldg. Co.*, 552 Fed. Appx. 401, 415 (6th Cir. 2013); *In re Dyer*, 322 F.3d 1178, 41 Bankr. Ct. Dec. (CRR) 64, Bankr. L. Rep. (CCH) P 78816 (9th Cir. 2003).

Under pre-*Fulton* practice, bankruptcy courts awarded attorney's fees and damages, including punitive damages when appropriate, to debtors when they concluded that the creditor had violated Code § 362(a)(3) by refusing to turn over property. Code § 362(k) specifically authorizes such relief as a remedy for individuals for a creditor's violation of the automatic stay.[76] The remedy under § 362(k) is no longer available after *Fulton.*

Unlike Code § 362, Code § 542(a) contains no remedies for a creditor's violation of its turnover obligation. And under the view that § 542(a) is not self-operative, a creditor has no turnover obligation until the court orders it.

A possible source for remedies is Code § 105(a). It provides, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." In explaining that bankruptcy courts do not need the automatic stay to enforce turnover under Code § 542(a), one court observed that bankruptcy courts have "broad equitable powers under [Code § 105(a)] and can provide equitable relief as necessary or appropriate to carry out the provisions of § 542(a). Moreover, § 105(a) grants bankruptcy courts the power to sanction conduct abusive of the judicial process."[77]

The Supreme Court stated in *Marrama v. Citizens Bank of Massachusetts*[78] that Code § 105(a) gives a bankruptcy court "broad authority" to "take any action that is necessary or appropriate to prevent an abuse of process." The Court qualified this statement in *Law v. Siegel,*[79] stating that, in exercising its statutory and inherent powers, "a bankruptcy court may not contravene specific statutory provisions." Courts will have to determine whether, based on a conclusion that a creditor's response to a debtor's turnover request violated Code § 542(a) or abused the bankruptcy process, Code § 105(a) permits an award of attorney's fees and damages or whether doing so contravenes other provisions of the Bankruptcy Code.

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[76]See § 15:6.

[77]*In re Cowen*, 849 F.3d 943, 950, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017) (citations and interior quotations omitted), quoting *In re Scrivner*, 535 F.3d 1258, 1263, Bankr. L. Rep. (CCH) P 81332, 47 A.L.R. Fed. 2d 571 (10th Cir. 2008).

[78]*Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375, 127 S. Ct. 1105, 166 L. Ed. 2d 956, 47 Bankr. Ct. Dec. (CRR) 221, 57 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 80850 (2007) (quoting 11 U.S.C.A. § 105(a)).

[79]*Law v. Siegel*, 571 U.S. 415, 420–21, 134 S. Ct. 1188, 188 L. Ed. 2d 146, 59 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) P 82592 (2014).

635 B.R. 321
United States Bankruptcy Court, N.D. Illinois, Eastern Division.

IN RE: Emelida CORDOVA, Debtor.
Emelida Cordova, Sabrina M. Hightower, Kaila Selice Hill, Demiko J. Little, Shelia Holman, Tony R. Jones, Joyce L. Johnson, Annie B. Williams, Larry Bernard Cherry, Gloria Jean Lewis, Stephen Randall Banks, III, Christina C. Thirston, Krystle Chalmers, Natasha Marie McDonald, Andrew Christopher Ferrell, Leo Paul Reeder, Jr., Calvin Dixon, Breonca Hyles, Preal Jones, Tevida B. Nocentelli, Roshelle Kinchen, Felix Rivera, Craig E. Payne & Harriett Payne, Larry J. Outlaw, Stephen D. Collum, Bernard Powell, Marilyn Pagan, Helen E. Henning, Christopher Campbell, Tyrone Williams, Tabitha Chatmon, Magic J. Jones, Dwayne E. Kennedy, Tatiana Marshall, Kendric Sandifer, Dontrea S. Jones, Adrienne L. Butler, Trevor E. Baxter, Taquesha Newton, Ronald B. Williams, Lamont McBride, Larry B. Purnell, Laterence Mitchell, Rashanda Hogan-Mitchell, Ira Haymore, Brandon W. Brown, Camelia Binder, Ameshia Odom, Montine Osbey, Deion Sanders, Victor G. Perez, Nutasha L. Davis, Steven A. Williams, August Lenora Brown and Maricela Barrera-Perez, Plaintiffs,
v.
City of Chicago, Defendant.

Case No. 19bk06255
|
Adv. No. 19ap00684
|
Signed December 6, 2021

Synopsis

Background: Debtors whose vehicles had been impounded prepetition by city for unpaid vehicle infraction fines brought putative class action, alleging that city violated the automatic stay and turnover provisions in the Bankruptcy Code by not returning their vehicles when they filed for Chapter 13 bankruptcy. City filed motion to dismiss.

Holdings: The Bankruptcy Court, Timothy A. Barnes, J., held that:

[1] the Supreme Court's ruling in *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, did not foreclose debtors' claims under the subsections of the Code prohibiting any act to create, perfect, or enforce any lien against property of the estate, prohibiting any act to collect, assess, or recover a claim against a debtor that arose before commencement of the case, or staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor;

[2] city was immune from debtors' claim for punitive damages;

[3] the complaint sufficiently pleaded claims under the subsections of the Code prohibiting any act to create, perfect, or enforce any lien against property of the estate and prohibiting any act to collect, assess, or recover a claim against a debtor that arose before commencement of the case;

[4] debtors failed to state a claim for violation of the subsection of the Code staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor; and

[5] city had express statutory obligation to return estate property under the Code's turnover provision, even in the absence of an adversary proceeding against it to compel turnover.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim; Request or Application for Class Certification.

West Headnotes (62)

[1] **Bankruptcy** Proceedings, Acts, or Persons Affected

Violation of the subsection of the Bankruptcy Code's automatic stay requires an affirmative act beyond mere retention of bankruptcy estate property. 11 U.S.C.A. § 362(a)(3).

[2] **Bankruptcy** Parties

Bankruptcy Pleading; dismissal

Class certification is not properly raised in a motion to dismiss; instead, it is a matter for consideration in a separate motion. Fed. R. Civ. P. 12(b)(6), 23; Fed. R. Bankr. P. 7012, 7023.

[3] **Bankruptcy** Core, Non-Core, or Related Proceedings in General; Nexus

Bankruptcy judge to whom a case has been referred has statutory authority to enter final judgment on any proceeding arising under the Bankruptcy Code or arising in a case under the Code. 28 U.S.C.A. § 157(b)(1).

[4] **Bankruptcy** Determination of jurisdictional questions

Bankruptcy judges must determine, on motion or sua sponte, whether a proceeding is a core proceeding or is otherwise related to a case under the Bankruptcy Code, in order to assess whether they have statutory authority to enter final judgment. 28 U.S.C.A. § 157(b)(1).

[5] **Bankruptcy** Core or non-core proceedings

Bankruptcy Related proceedings

Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

As to core proceedings, the bankruptcy court may hear and determine such matters; as to "related to" proceedings, the court may hear the matters, but may not decide them without the consent of the parties. 28 U.S.C.A. §§ 157(b)(1), 157(c).

[6] **Bankruptcy** Bankruptcy judges

Bankruptcy judge must have constitutional authority to hear and determine a matter.

[7] **Bankruptcy** Bankruptcy Jurisdiction

Bankruptcy Core, Non-Core, or Related Proceedings in General; Nexus

Bankruptcy Consent to or Waiver of Objections to Jurisdiction or Venue

Constitutional authority of bankruptcy judge to hear and determine a matter exists when a matter originates under the Bankruptcy Code or, in non-core matters, where the matter is either one that falls within the public rights exception, or where the parties have consented, either expressly or impliedly, to the bankruptcy court hearing and determining the matter.

[8] **Bankruptcy** Particular proceedings or issues

Bankruptcy Stay enforcement

Request for sanctions for alleged violations of the automatic stay may only arise in a case under the Bankruptcy Code and, therefore, is a core proceeding and within the bankruptcy court's constitutional authority. 11 U.S.C.A. §§ 362(a), 363(k); 28 U.S.C.A. § 157(b)(2)(O).

[9] **Bankruptcy** Turnover proceedings

Action for turnover arises only under the Bankruptcy Code and, therefore, is a core proceeding and within the bankruptcy court's constitutional authority. 11 U.S.C.A. § 542(a); 28 U.S.C.A. § 157(b)(2)(E).

[10] **Bankruptcy** Stay enforcement

Bankruptcy Turnover proceedings

Motion to dismiss action for turnover and action for sanctions for violation of the automatic stay is a matter within the bankruptcy court's jurisdiction and constitutional authority. 11 U.S.C.A. §§ 362(a), 363(k), 542(a); 28 U.S.C.A. § 157(b)(1); Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[11] **Bankruptcy** Pleading; dismissal

All well pleaded facts are taken as true for the purposes of determining a motion to dismiss. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[12] **Bankruptcy** Plan

Under Chapter 13, a debtor proposes a plan that repays creditors a portion of the debt owed out of the debtor's income as earned. 11 U.S.C.A. § 1322(a)(1).

[13] **Bankruptcy** Claims and assets; propriety and feasibility in general

To effectuate a Chapter 13 plan, debtors may propose to retain assets that might under another chapter of the Bankruptcy Code be liquidated with the proceeds going to creditors.

[14] **Bankruptcy** Automatic Stay

Bankruptcy Collection and Recovery for Estate; Turnover

To afford debtors the breathing room to reorganize and creditors as a whole the right to an equitable recovery, the commencement of a bankruptcy case automatically implements several protective measures, including the automatic stay and the provision requiring turnover of estate property. 11 U.S.C.A. §§ 362(a), 542(a).

[15] **Bankruptcy** Automatic Stay

Commencement of a bankruptcy case gives rise to an automatic stay that protects both debtors individually, but also assets of debtors and bankruptcy estates. 11 U.S.C.A. § 362(a).

[16] **Bankruptcy** Collection and Recovery for Estate; Turnover

On the commencement of a bankruptcy case, any entity in possession of property that a trustee may use, sell, or lease is required by statute to deliver to the trustee that property, or the value thereof, and account for the same. 11 U.S.C.A. § 542(a).

[17] **Bankruptcy** Pleading; dismissal

On motion to dismiss, in taking into account whether plaintiff has stated plausible claim, bankruptcy court considers complaint itself, as well as documents that are attached to complaint, documents that are central to complaint and are referred to in it, and information that is properly subject to judicial notice. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[18] **Bankruptcy** Evidence; witnesses

Court may take judicial notice of its own docket. Fed. R. Evid. 201.

[19] **Bankruptcy** Evidence; witnesses

Judicial notice extends beyond court taking judicial notice of its own docket; for example, court may take judicial notice of a fact not subject to reasonable dispute that is generally known within the trial court's territorial jurisdiction. Fed. R. Evid. 201, 201(b)(1).

[20] **Bankruptcy** Evidence; witnesses

Court may take judicial notice sua sponte and at any stage in a proceeding. Fed. R. Evid. 201, 201(c)(1), 201(d).

[21] **Bankruptcy** Pleading; dismissal

When considering whether to dismiss under the standard espoused in *Neitzke v. Williams*, 109 S.Ct. 1827, a court is not limited to the facts alleged in the complaint, but may hypothesize a set of facts consistent with the allegations of the complaint that might establish the requisites for a claim.

[22] **Bankruptcy** Pleading; dismissal

Court is empowered to dismiss frivolous or transparently defective suits.

[23] **Bankruptcy** Pleading; dismissal

Dismissal for failure to state claim should be without prejudice unless it is certain from face of complaint that any amendment would be futile or otherwise unwarranted. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012.

[24] **Bankruptcy** Enforcement of Injunction or Stay

Bankruptcy Form and nature; adversary proceeding or application or motion

Bankruptcy court would not require Chapter 13 debtors to replead their adversary complaint against city for its alleged violation of the automatic stay and turnover provisions in the Bankruptcy Code where, although debtors did not follow guidance offered in the Federal Rules of Civil Procedure to state each claim in a separate count to promote clarity but, instead, stated essentially all of their claims in Count I of the complaint, city had not objected on that basis and the complaint, while muddled, was not incomprehensible. 11 U.S.C.A. §§ 362(a), 542(a); Fed. R. Civ. P. 10(b); Fed. R. Bankr. P. 7010.

[25] **Bankruptcy** Automatic Stay

While automatic stay provides debtors necessary breathing spell from creditors, creditors also benefit; by preventing a "race to the courthouse" and providing procedures for the fair allocation of the debtor's assets, the stay precludes one creditor from pursuing a remedy to the disadvantage of other creditors. 11 U.S.C.A. § 362(a).

[26] **Bankruptcy** Proceedings, Acts, or Persons Affected

Because, although each subsection of the Bankruptcy Code's automatic stay provision prohibits different kinds of acts, there are cases of clear overlap between the provisions, creditor action may violate multiple sections of the automatic stay. 11 U.S.C.A. § 362(a).

[27] **Bankruptcy** Construction and Operation

Just because an action is addressed in one provision of the Bankruptcy Code does not mean that another might not apply.

[28] **Bankruptcy** Mortgages or Liens

Bankruptcy Liens and Transfers; Avoidability

Just because an invalid affixing of a lien might be avoided under the section of the Bankruptcy Code governing postpetition transactions does not mean the affixing is not also a stay violation. 11 U.S.C.A. §§ 362(a), 549.

[29] **Bankruptcy** Property of Estate in General

Scope of the section of the Bankruptcy Code governing property of the estate is broad; it includes all kinds of property, including tangible or intangible property, causes of action, and all other forms of property currently specified. 11 U.S.C.A. § 541.

[30] **Bankruptcy** Property of Estate in General

Every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of the section of the Bankruptcy Code governing property of the estate. 11 U.S.C.A. § 541.

[31] **Bankruptcy** Proceedings, Acts, or Persons Affected

Just because property is involved does not mean that creditor's actions are not as against debtor personally, for purposes of subsection of Bankruptcy Code's automatic stay provision prohibiting any act to collect, assess, or recover a claim against a debtor that arose before commencement of the case. 11 U.S.C.A. § 362(a)(6).

[32] **Bankruptcy** Set-offs and counterclaims; cross claims

For purposes of the subsection of the Bankruptcy Code's automatic stay provision staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor, there are four elements for a setoff to occur: (1) a decision to effectuate setoff, (2) some action accomplishing setoff, (3) a recording of the setoff, and (4) creditor's intent that the setoff be permanent. 11 U.S.C.A. § 362(a)(7).

[33] **Bankruptcy** Collection and Recovery for Estate; Turnover

Bankruptcy Proceedings

By its express terms, section of Bankruptcy Code governing turnover is self-executing, and does not require that trustee take any action or commence proceeding or obtain court order to compel turnover. 11 U.S.C.A. § 542(a).

[34] **Bankruptcy** Collection and Recovery for Estate; Turnover

Trustee must prove three elements to successfully argue turnover obligation, namely, that (1) property in question belongs to estate, (2) entity had control or possession of property during pendency of bankruptcy case, and (3) property is not of inconsequential value or benefit to estate. 11 U.S.C.A. § 542(a).

[35] **Bankruptcy** Powers, Duties and Fiduciary Capacity

Bankruptcy Debtor's duties in general

Trustee's duties in Chapter 13 are mainly administrative and in role of safeguarding process; it is debtor who is responsible for administering bankruptcy estate. 11 U.S.C.A. §§ 1302, 1303.

[36] **Bankruptcy** Collection and Recovery for Estate; Turnover

Bankruptcy Parties; Standing

Turnover is an automatic remedy for the bankruptcy estate as a whole but enforced only by the trustee or possibly the debtor. 11 U.S.C.A. § 542(a).

[37] **Bankruptcy** Enforcement of Injunction or Stay

Automatic stay is enforceable by creditors as well as debtors and trustees. 11 U.S.C.A. § 362.

[38] **Contempt** Civil contempt

Contempt Nature and grounds in general

Contempt Indemnity to Party Injured

Civil contempt proceedings are coercive and remedial, but not punitive, in nature, and sanctions for civil contempt are designed to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy.

[39] **Contempt** Indemnity to Party Injured

Damages awarded from civil contempt are either "coercive" in an attempt to push a violating party into compliance with a court order, or "remedial" in an attempt to restore losses from a violation of a court order.

[40] **Contempt** Nature and grounds in general

Regardless of the nature of the award, that is, as either coercive or remedial, a civil contempt sanction must relate to or have been caused by a violation of a court order.

[41] **Bankruptcy** Damages and attorney fees

If there was a violation of the automatic stay, the court must determine whether the violation was willful and whether a debtor is entitled damages therefrom. 11 U.S.C.A. §§ 362, 362(k).

[42] **Bankruptcy** Damages and attorney fees

If there is a willful violation of the automatic stay for which the debtor is entitled to collect damages, the court must determine what damages are appropriate. 11 U.S.C.A. §§ 362, 362(k).

[43] **Bankruptcy** Carrying out provisions of Code

Power of the bankruptcy court to issue any order, process, or judgment that is necessary or appropriate to carry out provisions of the Bankruptcy Code is not without its limits. 11 U.S.C.A. § 105(a).

[44] **Bankruptcy** Proceedings, Acts, or Persons Affected

Supreme Court's ruling in *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, that violation of the automatic stay provision prohibiting any act to exercise control over property of the estate requires an affirmative act beyond mere retention of bankruptcy estate property, was limited to that subsection, and did not apply to other stay provisions prohibiting any act to create, perfect, or enforce any lien against property of the estate, prohibiting any act to collect, assess, or recover a claim against a debtor that arose before commencement of the case, or staying the setoff of any

debt owing to the debtor that arose prepetition against any claim against the debtor; a wider determination was not procedurally before the Court, and the Court itself expressly noted the limited nature of its determinations. 11 U.S.C.A. §§ 362(a), 362(a)(3), 362(a)(4), 362(a)(6), 362(a)(7).

[45] **Bankruptcy** Protection Against Discrimination or Collection Efforts in General; "Fresh Start."

Bankruptcy cases are intended to be conducted expeditiously; the need for a quick remedy is essential to a debtor's fresh start, a central tenet of the Bankruptcy Code.

[46] **Bankruptcy** Hearing

Hearings to determine relief from stay are meant to be summary in character; the Bankruptcy Code requires that the bankruptcy court's action be quick. 11 U.S.C.A. § 362(d).

[47] **Bankruptcy** Who May File, and Time for Filing

Under the Bankruptcy Code, debtors are afforded a limited period of time to reorganize their affairs.

[48] **Creditors' Remedies** Debtor-Creditor Relationship

Other than with respect to sovereign immunity and where Congress has specifically legislated outcome, government entities should be treated no differently than any other creditor when they engage in commerce.

[49] **Creditors' Remedies** Debtor-Creditor Relationship

When government acts with pecuniary purpose, it is subject to rules applicable to all creditors.

[50] **Bankruptcy** Bankruptcy power generally

Bankruptcy Code arises out of the express grant of legislative authority to Congress in the Bankruptcy Clause of the Constitution. U.S. Const. art. 1, § 8, cl. 4.

[51] **Bankruptcy** Application of state or federal law in general

When state attempts to circumvent effects of federal bankruptcy laws, it is incumbent upon courts to tread carefully before foreclosing remedies of debtors and other creditors.

[52] **Bankruptcy** Exemplary or punitive damages; fines

Bankruptcy Governmental claims; immunity waiver

In adversary proceeding against city in which Chapter 13 debtors sought, inter alia, punitive damages for city's alleged violation of the automatic stay and turnover provisions in the Bankruptcy Code in failing to return their impounded vehicles after they filed for bankruptcy relief, city was immune from debtors' claim for punitive damages; although Congress determined in the section of the Code governing waiver of sovereign immunity that states are amenable to proceedings under the Code's automatic stay and turnover provisions, so, too, did it determine that states remain

immune from punitive damages. U.S. Const. Amend. 11; U.S. Const. art. 1, § 8, cl. 4; 11 U.S.C.A. §§ 106(a)(1), 106(a)(3), 362(a), 542(a).

[53] **Bankruptcy** Application of state or federal law in general

Bankruptcy law is, for all intents and purposes, exclusively federal in nature.

[54] **Bankruptcy** Governmental claims; immunity waiver

When a state or subdivision thereof is affected by federal bankruptcy law, courts are charged with scrutinizing whether the affected entity is immune under the principles of sovereign immunity. U.S. Const. Amend. 11; 11 U.S.C.A. § 106.

[55] **Bankruptcy** Pleading; dismissal

Unless jurisdictional in nature, affirmative defenses must be asserted in accordance with rules of civil procedure and brought by way of motion for judgment on pleadings. Fed. R. Civ. P. 8(c), 12(c); Fed. R. Bankr. P. 7008, 7012.

[56] **Bankruptcy** Parties

Standing is affirmative defense, which must be raised at appropriate time and prosecuted in appropriate manner.

[57] **Bankruptcy** Acts excepted from stay

Bankruptcy Administrative Proceedings and Governmental Action

Chapter 13 debtors stated complaint against city for violating the subsections of the Bankruptcy Code's automatic stay provision prohibiting any act to create, perfect, or enforce any lien against property of the estate and prohibiting any act to collect, assess, or recover a claim against a debtor that arose before commencement of the case, by alleging that city impounded debtors' vehicles prepetition due to unpaid vehicle infraction fines, that city continued to retain the vehicles even after debtors filed for bankruptcy, and that city demanded an upfront payment as a precondition for release of the vehicles and retained them to perfect its lien. 11 U.S.C.A. §§ 362(a)(4), 362(a)(6).

[58] **Bankruptcy** Set-offs and counterclaims; cross claims

Chapter 13 debtors failed to state a claim against city for violation of the subsection of the Bankruptcy Code's automatic stay provision staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor; although debtors alleged that city impounded their vehicles prepetition due to unpaid vehicle infraction fines and refused to return the vehicles even after debtors filed for bankruptcy, debtors' allegation that city's action constituted a setoff was without support, and bankruptcy court could find no statutory or case law supporting conclusion that mere possession of estate property is a "setoff." 11 U.S.C.A. § 362(a)(7).

[59] **Bankruptcy** Set-offs and counterclaims; cross claims

While "setoff," that is, offsetting debt owed to the debtor against a debt owed by the debtor, is preserved under the Bankruptcy Code, it remains stayed under the subsection of the Code's automatic stay provision staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor. 11 U.S.C.A. §§ 362(a)(7), 553(a).

[60] **Bankruptcy** Set-offs and counterclaims; cross claims

Creditor's refusal to return estate property after debtor's bankruptcy filing is not a "setoff," if only temporary, for purposes of the subsection of the Bankruptcy Code's automatic stay provision staying the setoff of any debt owing to the debtor that arose prepetition against any claim against the debtor. 11 U.S.C.A. § 362(a)(7).

[61] **Bankruptcy** Collection and Recovery for Estate; Turnover

Bankruptcy Form and nature; adversary proceeding or application or motion

City, which had impounded Chapter 13 debtors' vehicles prepetition due to unpaid vehicle infraction fines, had express statutory obligation to return estate property under the Bankruptcy Code's turnover provision, even in the absence of an adversary proceeding against it to compel turnover. 11 U.S.C.A. § 542(a).

[62] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Contempt

Bankruptcy court may enforce compliance with a party's statutory obligations under the section of the Bankruptcy Code authorizing the court to issue any order, process, or judgment that is necessary or appropriate to carry out provisions of the Code, or via the court's inherent power to enforce statutory violations by way of civil contempt. 11 U.S.C.A. § 105(a).

Attorneys and Law Firms

***328** Attorney for Plaintiffs: Ross H. Briggs, Firm 13, LLC., St. Louis, Missouri

Attorneys for Defendant: Celia Meza and Charles A. King, The City of Chicago, Chicago, Illinois

MEMORANDUM DECISION

TIMOTHY A. BARNES, Judge.

This matter comes on for consideration on the Motion to Dismiss Ninth Amended Adversary Complaint [Adv. Dkt. No. 118] (the "Motion") brought by defendant City of Chicago (the "City") seeking dismissal of the Ninth Amended Class Action Adversary Complaint for Actual and Punitive Damages for Violation of the Automatic Stay and Failure to Turnover Property [Adv. Dkt. No. 113] (the "Complaint"), brought by plaintiff Emelida Cordova and other joined plaintiffs (collectively, the "Plaintiffs"), alleging and requesting relief for the City's violation of sections 362(a)(4), (6), (7) and 542(a) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). The Motion is opposed by the Plaintiffs.

This matter consists of a putative class action complaint against the City regarding the refusal to release impounded cars to debtors in bankruptcy, acts that were recently before the Supreme Court in *City of Chicago v. Fulton*, —— U.S. ——, 141 S. Ct. 585, 208 L.Ed.2d 384 (2021). In the Complaint, the Plaintiffs allege that the ***329** acts in question violate the automatic stay and turnover provisions in the Bankruptcy Code. They seek actual and punitive damages, attorneys' fees, costs of litigation, the value of the Plaintiffs' loss of property and any further relief and/or equitable sanctions as may be just and proper. The Plaintiffs seek to certify their claims as a class action.

****2** **[1]** The City seeks with the Motion to have the matter dismissed in its entirety. The Motion is largely predicated on the presumption that the Supreme Court's ruling in *Fulton* forecloses the Plaintiffs' claims under sections 362(a)(4), (6) and (7). The Court in *Fulton* ruled that violation of the automatic stay under section 362(a)(3) requires an affirmative act beyond mere retention of bankruptcy estate property. By extension, the City argues that violation of other automatic stay provisions, sections 362(a)(4), (6) and (7), also require an affirmative act. The City asserts that its retention of estate property is not such an affirmative act, and therefore, the Court's ruling in *Fulton* forecloses the Plaintiffs' claims.

The Court in *Fulton*, however, made clear that its ruling was limited to section 362(a)(3). As a result and for the reasons more fully explained below, *Fulton* does not expressly nor impliedly foreclose the Plaintiffs' claims under sections 362(a)(4), (6) and (7), as a matter of law. Further, the City's arguments in relation to section 542(a) are unavailing. Section 542(a) compels compliance without the need for a court order and the Plaintiffs' allegations sufficiently plead a cause of action entitled to proceed.

Notwithstanding the foregoing, the Plaintiffs' claim under section 362(a)(7) must be dismissed without prejudice and with leave to amend. While the Plaintiffs have sufficiently alleged claims under sections 362(a)(4), (6) and 542(a), they have failed to do so for their section 362(a)(7) claim. As a result, only the claims under section 362(a)(4), (6) and 542(a) survive the Motion. As the court cannot find that amendment of the section 362(a)(7) claim would be futile, however, dismissal of the claim will be without prejudice and with leave to amend.

The Motion also raises the propriety of imposing punitive damages against the City. In this regard, the motion is well taken, and the Plaintiffs' request for punitive damages is dismissed. Section 106(a) of the Bankruptcy Code is a valid exercise of congressional authority under the Bankruptcy Clause and the abrogation of State sovereign immunity and the terms and conditions regarding the same set forth in section 106 govern this matter. Section 106(a)(3) expressly excludes from abrogation punitive damages against a governmental unit, which the City unquestionably is. As a result, the City is immune from the Plaintiffs' punitive damages claim.

[2] Finally, the Motion seeks to dismiss the Plaintiffs' request for class certification. Class certification is, however, a matter for consideration in a separate motion and not properly raised in a motion to dismiss. In that respect the Motion will be denied, but the court will set separate deadlines for a motion to certify class and any opposition to the same. Each party will be afforded a full and fair opportunity to be heard in the appropriate manner.

For the reasons more fully set forth below, upon review of the parties' respective filings, the City's Motion will therefore be, by separate order entered concurrently herewith, GRANTED IN PART and DENIED IN PART in the manner described herein.

JURISDICTION

The federal district courts have "original and exclusive jurisdiction" of all cases under ***330** the Bankruptcy Code. 28 U.S.C. § 1334(a). The federal district courts also have "original but not exclusive jurisdiction" of all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. 28 U.S.C. § 1334(b). District courts may refer these cases to the bankruptcy judges for their districts. 28 U.S.C. § 157(a). In accordance with section 157(a), the District Court for the Northern District of Illinois has referred all of its bankruptcy cases to the Bankruptcy Court for the Northern District of Illinois. N.D. Ill. Internal Operating Procedure 15(a).

****3** **[3]** **[4]** **[5]** A bankruptcy judge to whom a case has been referred has statutory authority to enter final judgment on any proceeding arising under the Bankruptcy Code or arising in a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(1). Bankruptcy judges must therefore determine, on motion or *sua sponte*, whether a proceeding is a core proceeding or is otherwise related to a case under the Bankruptcy Code. 28 U.S.C. § 157(b)(3). As to the former, the bankruptcy court may hear and determine such matters. 28 U.S.C. § 157(b)(1). As to the latter, the bankruptcy court may hear the matters, but may not decide them without the consent of the parties. 28 U.S.C. §§ 157(b)(1), (c). Absent consent, the bankruptcy court must "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1).

[6] **[7]** In addition to the foregoing considerations, a bankruptcy judge must also have constitutional authority to hear and determine a matter. *Stern v. Marshall,* 564 U.S. 462, 464, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Constitutional authority exists when a matter originates under the Bankruptcy Code or, in noncore matters, where the matter is either one that falls within the public rights exception, *id.*, or where the parties have consented, either expressly or impliedly, to the bankruptcy court hearing and determining the matter. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 669, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015) (parties may consent to a bankruptcy court's jurisdiction); *Richer v. Morehead*, 798 F.3d 487, 490 (7th Cir. 2015) (noting that "implied consent is good enough.")

[8] **[9]** **[10]** All counts in the Complaint are based either on alleged violations of the automatic stay under section 362(a) or the turnover obligation under section 542(a). A request for sanctions for alleged violations of the automatic stay may only arise in a case under the Bankruptcy Code and, therefore, is a core proceeding and within the court's constitutional authority. 11 U.S.C. § 363(k); 28 U.S.C. § 157(b)(2)(O); *Gecker v. Gierczyk* (*In re Glenn*), 359 B.R. 200, 203 (Bankr. N.D. Ill. 2006) (Black, J.) ("[T]he cause of action for violating the automatic stay under section 362(k)(1) does not appear to have had a counterpart in eighteenth century England."). Likewise, an action for turnover under section 542 also arises only under the Bankruptcy Code, and therefore, is a core proceeding and within the court's constitutional authority. 11 U.S.C. § 542(a); 28 U.S.C. § 157(b)(2)(E); *see Boston Reg'l Med. Ctr., Inc. v. Reynolds* (*In re Boston Reg'l Med. Ctr.*), 265 B.R. 645, 650 (Bankr. D. Mass. 2001). It follows that a motion to dismiss such actions is also a matter within the court's jurisdiction and constitutional authority. *Handler v. Moore* (*In re Moore*), 620 B.R. 617, 625 (Bankr. N.D. Ill. 2020) (Barnes, J.). Further, no party has contested ***331** the jurisdiction or authority of this court in entering final orders in this matter.

Accordingly, the court has the jurisdiction, statutory authority and constitutional authority to hear and determine the Motion.

BACKGROUND

[11] The Plaintiffs are each residents of the City who had their vehicles impounded by the City for unpaid vehicle infraction fines between 2016 to 2019.[1] After their vehicles were impounded, each Plaintiff commenced a case under chapter 13 of the Bankruptcy Code.[2]

1 The facts herein are drawn from the Complaint but also from the court's docket and papers filed in this case in order to produce a readable narrative. *See In re Prate*, Case No. 19bk9980, 634 B.R. 72, 75 n.2 (Bankr. N.D. Ill. Nov. 5, 2021) (Goldgar, J.). All well pleaded facts are taken as true for the purposes of determining a motion to dismiss. *Anchorbank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

2 The Complaint contains the same factual allegations for all joined Plaintiffs. Compl. at ¶¶ 6–59.

****4** **[12]** **[13]** Under chapter 13, a debtor proposes a plan that repays creditors a portion of the debt owed out of the debtor's income as earned. *See, e.g.*, 11 U.S.C. § 1322(a)(1). To effectuate that plan, debtors may propose to retain assets that might under another chapter of the Bankruptcy Code be liquidated with the proceeds going to creditors. *Harris v. Viegelahn*, 575 U.S. 510, 512, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015). As vehicles are in most cases central to a debtor's ability to earn the income on which a plan is predicated, *see* *In re James*, Case No. 12-23121, 2014 WL 5785316, at *1 (Bankr. D. Kan. Nov. 4, 2014) ("Ninety-one percent of adults commute to work using their personal vehicles."), a chapter 13 debtor's ability to retain her vehicle is a crucial factor that may determine the success of the case and thus may determine whether creditors as a whole have their recoveries maximized.

[14] To afford debtors the breathing room to reorganize and creditors as a whole the right to an equitable recovery, the commencement of a bankruptcy case automatically implements several protective measures.

[15] First, the commencement of the case gives rise to an automatic stay that protects both debtors individually but also assets of debtors and bankruptcy estates. 11 U.S.C. § 326(a).

[16] Second, any entity in possession on the commencement of a case of property that a trustee may use, sell, or lease is required by statute to deliver to the trustee that property, or the value thereof, and account for the same. 11 U.S.C. § 542(a).

Accordingly, upon commencement of their chapter 13 case, the Plaintiffs requested that the City deliver the Plaintiffs' vehicles to them. The City refused.

The Plaintiffs allege, and the City does not dispute, that the City demanded an upfront lump sum amount, often over $1,000.00, and treatment of its claim in the Plaintiffs' plan as fully secured in exchange for turnover of the vehicles. The Plaintiffs further allege that this amount bore no relation to the fair market value of the impounded vehicle, or its diminution of value as a result of passage of time. For those that could not afford to make the upfront payment, the City continued to retain the vehicles.

On May 6, 2019, the Plaintiffs commenced this proceeding. At that time, controlling law of the Court of Appeals for the Seventh Circuit dictated that the actions ***332** alleged by the Plaintiffs would violate the automatic stay, specifically section 362(a)(3) of the Bankruptcy Code. Section 362(a)(3) provides that "a petition filed [under the Bankruptcy Code] operates as a stay, applicable to all entities, of any act ... to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). With respect to such acts to exercise control, the Seventh Circuit found in *Thompson v. GMAC, LLC*, 566 F.3d 699, 703 (2009), that "the act of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3) of the Bankruptcy Code."

While the clear language of *Thompson* might have led to an expedited judgment in favor of the Plaintiffs in this matter, the City was actively challenging the propriety of *Thompson* in other matters when this adversary proceeding was commenced. As a result, the court at the request of the parties stayed this proceeding pending an outcome of those challenges in the higher courts.

In response to those challenges, in 2020, the Supreme Court narrowed that holding of *Thompson*. *Fulton*, 141 S. Ct. at 590 (2021) ("[T]he language of [section] 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision."). At the same time, the majority ruling recognized that exercise of control does not rule out omissions that might qualify as "acts" in certain contexts, "control" meaning "to have power over." *Id.* Still, the Supreme Court found that any ambiguity must be resolved in favor of the City because a separate remedy against the City existed under section 542(a) of the Bankruptcy Code. *Id.*

****5** As a result, on May 20, 2021, the Plaintiffs amended further their original, as already amended, complaint by filing the Complaint at bar. The Complaint alleges that the City's refusal to turn over the vehicles violated other provisions of the automatic stay, namely sections 362(a)(4), (6) and (7). The Complaint also alleges that the City has violated the turnover requirements in section 542(a).

The Complaint consists of three Counts, as follows:

In Count I, the Plaintiffs request an order declaring that the City's conduct violated the automatic stay and turnover provisions. Specifically, the Plaintiffs allege that the City's conduct violates sections 362(a)(4), (6) & (7) and 542(a) of the Bankruptcy Code. They request actual damages, attorney's fees, costs of litigation, accounting for the value of Plaintiffs' loss of property and any further relief as may be just and proper.

In Count II, the Plaintiffs request punitive damages of five million dollars and any further equitable remedies. The Plaintiffs' request is based on the allegation that the City devised a scheme to collect from the Plaintiffs in order to alleviate its budgetary crisis by enacting an ordinance amendment to grant the City a possessory lien in the impounded vehicles. The Plaintiffs argue that the City intentionally and strategically refuses to file a motion for relief from the automatic stay or a motion for adequate protection so that chapter 13 debtors fail to complete their plans and the City may then proceed to collect the entire debt owed to it.

In Count III, the Plaintiffs seek to certify their claims as a class action.

On June 17, 2021, the City filed the Motion, seeking to dismiss all of the Plaintiffs' claims. Briefing on the Motion was set by this court in an order dated June 24, 2021 [Adv. Dkt. No. 126] (the "Briefing Order"). In accordance with the Briefing Order, the Plaintiffs filed Plaintiffs' Response in Opposition to to [sic] Defendant's Motion to Dismiss Ninth Amended Adversary ***333** Complaint [Adv. Dkt. No. 128] (the "Response") on June 30, 2021, and the City filed its Reply in Support of Motion to Dismiss Ninth Amended Adversary Complaint [Adv. Dkt. No. 131] (the "Reply") on July 16, 2021. The briefing concluded with the Reply.

Without authorization of this court, however, and in violation of the terms of the Briefing Order, both parties conducted what was essentially another round of briefing on the Motion. On July 19, 2021, the Plaintiffs filed the Plaintiffs' Motion to Strike New Defense Raised in Reply of Defendant or, Alternatively[,] for Leave to File a Sur Reply [Adv. Dkt. No. 132] (the "Strike Motion"). The City filed on July 20, 2021, a Notice of Objection [Adv. Dkt. No. 133] and on July 21, 2021, a Response in Opposition to Plaintiffs' Motion to Strike New Defense Raised in Reply of Defendant or, Alternatively[,] for Leave to File a

Sur Reply [Adv. Dkt. No. 134]. Finally, the Plaintiffs' Reply to Defendant City's Response in Opposition to Plaintiffs' Motion to Strike [Adv. Dkt. No. 135] was filed by the Plaintiffs on July 22, 2021.

A hearing on the City's Motion (the "Hearing") was conducted on August 5, 2021, where this court announced to the parties the essence of its decision, taking the matter under advisement with this Memorandum Decision to follow. This Memorandum Decision was, quite obviously, delayed but nonetheless constitutes this court's actual ruling on the Motion. Irrespective of what may have been outlined to the parties at the Hearing, this Memorandum Decision governs in all respects.

****6** In making this determination, the court has reviewed and considered the Complaint, the Motion, the Response and the Reply, including any exhibits attached to each of the foregoing. Though these items do not constitute an exhaustive list of the filings in the above-captioned bankruptcy case, the court has taken judicial notice of the contents of the docket in this matter. *See* *Levine v. Egidi*, Case No. 93C188, 1993 WL 69146, at *2 (N.D. Ill. Mar. 8, 1993) (authorizing a bankruptcy court to take judicial notice of its own docket); *In re Brent*, 458 B.R. 444, 455 n.5 (Bankr. N.D. Ill. 2011) (Goldgar, J.) (recognizing same).

For the reasons more fully stated below, however, the court has not considered the Strike Motion and filings related thereto, other than for the purposes of explaining why each is improper.

APPLICABLE STANDARDS

A. Motion to Dismiss

Rule 12 of the Federal Rules of Civil Procedure (the "Civil Rules") provides, in pertinent part, that a party may seek dismissal of a complaint for the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6) (made applicable to this adversary proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules")). As this court has stated:

> A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 [129 S.Ct. 1937, 173 L.Ed.2d 868] (2009) (*citing* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 [127 S.Ct. 1955, 167 L.Ed.2d 929] (2007)). In assessing sufficiency, the court views the complaint "in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from the allegations in the plaintiff's favor." ' ***334** *Anchorbank, FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011).

Muhammad v. Reed (*In re Reed*), 532 B.R. 82, 87–88 (Bankr. N.D. Ill. 2015) (Barnes, J.).

The requirement that a complaint must state a plausible claim means that the allegations must raise a plaintiff's right to relief above a "speculative level." *Brandt v. PlainsCapital Leasing, LLC* (*In re Equip. Acquisition Res., Inc.*), 502 B.R. 784, 791 (Bankr. N.D. Ill. 2013) (Barnes, J.) (*citing* *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955). Thus the standard for evaluating the sufficiency of the complaint "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Anchorbank,* 649 F.3d at 614 (citation omitted); *see also* *Doe v. Smith,* 429 F.3d 706, 708 (7th Cir. 2005).

[17] **[18]** **[19]** **[20]** In taking into account whether a plaintiff has stated a plausible claim, the court considers the complaint itself, as well as "documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). As to judicial notice, there is no question that a court may take judicial notice of its own docket. *Egidi*, 1993 WL 69146, at *2.

Judicial notice extends beyond that, however. Federal Rule of Evidence 201 permits a court to take judicial notice of a fact not subject to reasonable dispute that is generally known with the trial court's territorial jurisdiction. Fed. R. Evid. 201(b)(1); *see also Amling v. Harrow Indus. LLC*, 943 F.3d 373, 376 (7th Cir. 2019) (a court may take notice of the docket of related federal cases). That notice can be taken *sua sponte* and at any stage in a proceeding. Fed. R. Evid. 201(c)(1) & (d). [3]

[3] The court takes judicial notice here solely for the purpose of providing the narrative contained herein to afford uninformed readers the context of this Memorandum Decision. Nothing so noticed has affected the outcome set forth in this Memorandum Decision. As to the taking of such notice with respect to the ultimate conclusion in this matter, both parties may be heard on the propriety of the court so doing at the appropriate time. Fed. R. Evid. 201(e).

****7** Further, the court considers the rules of pleading set forth in the Civil Rule 8 and, as applicable, Civil Rule 9 (made applicable to this adversary proceeding by Bankruptcy Rules 7008 and 7009, respectively).

The City points out that this court may dismiss a claim on the basis of a dispositive issue of law under the Civil Rule 12(b)(6). *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). In *Neitzke*, the Supreme Court stated, "[i]f, as a matter of law, 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Id.* at 327, 109 S.Ct. 1827. The Motion is, in large part, predicated on *Neitzke*. The City argues that no legal theory could prevail even if the facts alleged in the Complaint are true.

[21] While *Neitzke* might apply in a general sense, *Neitzke* appears on its face to govern dismissal of *in forma pauperis* complaints as frivolous under 28 U.S.C. § 1915(d). Even were it to apply, the City's description of the standard in *Neitzke* is incorrect. *Neitzke* expressly provides that a claim must be dismissed if it is clear that no relief could be granted under *any* set of facts consistent with the allegations, not just those facts in a complaint. *Neitzke*, 490 U.S. at 327, 109 S.Ct. 1827. In short, when considering whether to dismiss under the standard espoused in *Neitzke*, a ***335** court is not limited to the facts alleged in the Complaint but may hypothesize a set of facts consistent with the allegations of the Complaint that might establish the requisites for a claim.

[22] While it does not appear to the court that *Neitzke* is directly relevant here, the standard articulated in *Neitzke* works well when considering whether to dismiss with prejudice. The court is already empowered to dismiss "frivolous or transparently defective suits." *Hoskins v. Poelstra*, 320 F.3d 761, 763 (7th Cir. 2003).

[23] Such dismissal should be without prejudice "[u]nless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted." *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004). If the standard in *Neitzke* is met, that no formulation of the facts and law could result in actionable relief, dismissal with prejudice would be appropriate as no amendment would cure the defect. The court will therefore consider *Neitzke* when determining whether to dismiss with prejudice.

B. The Underlying Counts

As discussed briefly above, the Complaint consists of three Counts. The legal standards as applied to those Counts are as follows:

1. *Count I: The Automatic Stay and Turnover Provisions*

[24] At the outset, the court notes that the Plaintiffs have done themselves no favors here in the construction of the Complaint. Rather than follow the guidance offered in the Federal Rules of Civil Procedure, *see, e.g.*, Fed. R. Civ. P. 10(b) (urging a party to state each claim in a separate count to promote clarity), the Plaintiffs have stated essentially all of their claims in Count I of the Complaint. This makes ruling on the Motion more difficult than it should be.

Still, the City has not objected on this basis and the Complaint, while muddled, is not incomprehensible. As the Motion demonstrates, the City was still capable of understanding what the Plaintiffs seek. As such, the court will not require the Plaintiffs to replead the Complaint on this basis.

****8** It does mean, however, that the court must consider Count I of the Complaint in multiple parts.

As noted above, when a debtor files for bankruptcy, there are two automatic consequences that are at play here. First, the Bankruptcy Code implements an automatic stay that protects both debtors individually, but also assets of debtors and bankruptcy estates. 11 U.S.C. § 362(a). Second, any entity in possession on the commencement of a case of property that a trustee may use, sell, or lease is required by statute to deliver that property to the trustee that property, or the value thereof, and account for the same. 11 U.S.C. § 542(a).

The Plaintiffs have alleged in Count I that the City's conduct has violated each of these statutory provisions. The court will therefore consider each of these causes of action in turn.

(a) The Automatic Stay: Section 362(a)

As noted above, commencement of a bankruptcy case gives rise to an automatic stay, 11 U.S.C. § 362(a), which, as the Seventh Circuit has stated, is a "powerful tool." *Fox Valley Const. Workers Fringe Ben. Funds v. Pride of the Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998). That stay is set forth in section 362(a) in a series of subsections, which, in pertinent part, are as follows:

> [A] petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of—
>
> ***336** ...
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> ...
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor;
>
> ....

11 U.S.C. §§ 362(a)(4), (6) & (7).[4] As noted above, while the original complaint contained allegations under section 362(a)(3), after the Supreme Court in *Fulton* reversed in part the Seventh Circuit's ruling in *Thompson*, the Complaint was amended to omit that cause of action.

4 Section 362(a)(2) also provides that a creditor is stayed from enforcing against property of the estate a judgment obtained before the commencement of the bankruptcy case. 11 U.S.C. § 362(a)(2). A number of judges in this District have determined that the City's lien at issue here is in the nature of a judicial lien for the purposes of applying section 544 of the Bankruptcy Code. *See, e.g., In re Mance*, 611 B.R. 857 (Bankr. N.D. Ill. 2020) (Cox, J.); *In re Wigfall*, 606 B.R. 784 (Bankr. N.D. Ill. 2019) (Doyle, J.). To the court's knowledge, however, such rulings have not been broadened to encompass section 362(a)(2) and the Complaint here makes no allegations in that regard.

[25] Often seen narrowly as a tool to protect debtors, the automatic stay is actually both that and a broader protection in favor of creditors. While the stay does provide debtors a necessary "breathing spell from ... creditors," H. Rep. No. 95-595, 95th Cong., at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6297, "creditors also benefit." *Wood v. U.S. Dep't of Hous. & Urban Dev. (In re Wood)*, 993 F.3d 245, 249 (4th Cir. 2021). "The stay preempts a 'race to the courthouse' and provides procedures for the fair allocation of the bankrupt's assets." *Id.* As such, the stay "preclude[s] one creditor from pursuing a remedy to the disadvantage of other creditors ...." *Fox Valley*, 140 F.3d at 666 (*quoting A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 998 (4th Cir. 1986)).

****9** So fundamental is this latter protection that both the Seventh Circuit and the Supreme Court have allowed to stand bankruptcy court orders extending the scope of the stay to nondebtor suits when allowing them to proceed might allow individual creditors to interfere with the bankruptcy's collective process. *See, e.g., Celotex Corp. v. Edwards*, 514 U.S. 300, 310, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (quoting the bankruptcy court's determination that the failure to enjoin would result in a "carrion feast by the victors in a race to the courthouse." *In re Celotex Corp.*, 140 B.R. 912, 915 (Bankr. M.D. Fla. 1992)); *Fisher v. Apostolou*, 155 F.3d 876, 883 (7th Cir. 1998) (affirming a bankruptcy judge's decision to enjoin a lawsuit that might "derail the bankruptcy proceedings" with "a race to the courthouse."). Recently the Seventh Circuit affirmed the essential nature of the automatic stay by permitting bankruptcy courts to enjoin such third-party actions when appropriate to carry out the provisions of the Bankruptcy Code. *Caesars Ent. Operating Co., Inc. v. BOKF, N.A. (In re Caesars Ent. Operating Co., Inc.)*, 808 F.3d 1186, 1188 (7th Cir. 2015).

[26] While each subsection under section 362(a) prohibits different kinds of acts, there are cases of clear overlap between the provisions. *Daff v. Good (In re Swintek)*, 906 F.3d 1100, 1104 (9th Cir. 2018). As such, a creditor action might violate multiple sections of the automatic stay. ***337** *See, e.g., In re Oakhurst Lodge, Inc.*, 582 B.R. 784, 796 (Bankr. E.D. Cal. 2018) ("[A] single act can violate both the *in rem* rights of the estate and the *in personam* rights of the debtor.").

[27] **[28]** Such is the same with the Bankruptcy Code as a whole. Just because an action is addressed in one provision of the Bankruptcy Code does not mean that another might not apply. *Compare, e.g.*, 11 U.S.C. § 362(a)(4) (staying the creation and enforcement of liens in estate property postpetition) *with* 11 U.S.C. § 549(a) (allowing a trustee to avoid transfers or property of the estate occurring postpetition without court authority). Put another way, just because an invalid affixing of a lien might be avoided under section 549 does not mean the affixing isn't also a stay violation.

Each subsection of section 362(a) does, however, have its own unique wording and therefore its own unique predicates. As such, the court considers each subsection addressed by the Plaintiffs in Count I.

(i) *Section 362(a)(4)*

Section 362(a)(4) prohibits "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4).

[29] **[30]** Here what is protected is "property of the estate." The filing of a bankruptcy case creates a bankruptcy estate consisting of "all legal and equitable interests of the debtor in property" and "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." 11 U.S.C. §§ 541(a)(1) & (6). As Congress has stated, "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action, and all other forms of property currently specified ...." H.R. Rep. No. 595, 95th Cong., 1st Sess., 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 989, 95th Cong., 2nd Sess., 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868. As the Seventh Circuit has noted, "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [section] 541." *In re Carousel Int'l Corp.*, 89 F.3d 359, 362 (7th Cir. 1996) (internal quotation and citation omitted). The City does not dispute that the Plaintiffs' vehicles fall within this broad scope and were therefore property of each of the Plaintiffs' respective bankruptcy estates.

For there to be a violation of section 362(a)(4), however, the City must have created, perfected or enforced *a lien* against such property of the estate. 11 U.S.C. § 362(a)(4) (emphasis added). The Bankruptcy Code defines lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). Again, the City does not appear to dispute that its interest in the Plaintiffs' vehicles was a lien, *see, e.g.*, *Baines v. City of Chicago*, 584 B.R. 723 (N.D. Ill. 2018), though the validity and nature of said lien might be in dispute. *See supra* n.4.

****10** The essential question is whether the City's continued possession is an act to create, perfect, or enforce that lien. That, the court will address in the discussion below.

(ii) *Section 362(a)(6)*

Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case ...." 11 U.S.C. § 362(a)(6).

As section 362(a)(6) expressly applies to debtors and not assets, some courts have held that purely *in rem* actions do not violate section 362(a)(6). ***338** *In re Bell*, Case No. 14-60510, 2014 WL 6913509, at *3 (Bankr. N.D.N.Y. Nov. 13, 2014) ("[Section] 362(a)(6) prevents only *in personam* actions against the debtor and does not prohibit *in rem* foreclosures on non-estate property.") (*citing* *In re Log, L.L.C.*, Case No. 10-80378, 2010 WL 4774347, at *5 (Bankr. M.D.N.C. Nov. 9, 2010) and *Everchanged, Inc. v. First Nationwide Mtg. Corp. (In re Everchanged, Inc.)*, 230 B.R. 891, 893 (Bankr. S.D. Ga. 1999)).

[31] Just because property is involved, however, does not mean that a creditor's actions are not as against the debtor personally. For example, in *In re Kuehn*, 563 F.3d 289 (7th Cir. 2009), the Seventh Circuit determined that a university violated section 362(a)(6) when it refused to provide a transcript to a student who had an outstanding tuition owed to the school. The court reasoned that the university had no other reason to deny the student's request but to collect on the student's debt. *Id.* at 292–93. As a result, the university's refusal to return the transcript, combined with some other facts shedding light into the university's motive (that the university was trying to induce the student to pay the tuition debt) amounted to violation of section 362(a)(6).

Similarly, in *In re Radcliffe*, 563 F.3d 627 (7th Cir. 2009), the Seventh Circuit ruled that a creditor violated section 362(a)(6) when it mailed a letter to a debtor that it would exercise its setoff rights until the debtor paid the prepetition debt. The court found that this letter, combined with the creditor's refusal to return to property, amounted to not just a communication but a coercive act to induce a debtor to pay, in violation of section 362(a)(6). *Id.* at 631.

Here, there is no dispute as to existence of a prepetition debt. It remains for the Plaintiffs to show that the City's acts were directed against the debtor and whether the City's act amounted to an "act to collect, assess, or recover a claim."

(iii) *Section 362(a)(7)*

Section 362(a)(7) stays "the setoff of any debt owing to the debtor that arose [prepetition] ... against any claim against the debtor." 11 U.S.C. § 362(a)(7).

[32] The Supreme Court has stated that there are three elements for a setoff to occur. "(i) a decision to effectuate setoff, (ii) some action accomplishing setoff, and (iii) a recording if the setoff." *Citizens Bank v. Strumpf*, 516 U.S. 16, 19, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995). In *Strumpf*, the Court also found that there was an implicit fourth element, that the creditor must have intended the setoff to be permanent. *See id.* (holding that a bank did not commit setoff because its administrative hold on a debtor's account was temporary while the bank sought relief from stay).

****11** A party arguing violation of a setoff under 362(a)(7) must thus therefore prove all four elements.

(b) Turnover Obligation: Section 542(a)

Section 542(a) provides, in pertinent part, that anyone who has "possession, custody, or control" of bankruptcy estate property must deliver that property to the trustee and "account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

[33] "By its express terms, section 542(a) is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover." 5 COLLIER ON BANKRUPTCY ¶ 542.02 (16th ed.); *see also Fitzgerald v. United States (In re Larimer)*, 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

[34] A trustee must prove three elements to successfully argue a turnover ***339** obligation, that (i) the property in question belongs to the estate, (ii) an entity had control or possession of the property during the pendency of the bankruptcy case, and (iii) that the property is not of inconsequential value or benefit to the estate. *Paloian v. Dordevic (In re Dordevic)*, Adv. No. 20ap00340, Case No. 20bk09807, 633 B.R. 553, 558–59 (Bankr. N.D. Ill. Sept. 22, 2021) (Cassling, J.) (citations omitted).

Here, though not raised in the context of the Motion, to be successful, the Plaintiffs must also show that a debtor in chapter 13 accedes to the rights of trustees under section 542(a).

While much of the Bankruptcy Code and Bankruptcy Rules addresses rights in terms of what a trustee may do or not do, *see, e.g.*, 11 U.S.C. § 363(b)(1) ("a trustee ... may use, sell or lease ... property of the estate ...."); Fed. R. Bankr. P. 9019(a) ("[o]n the motion of a trustee ... the court may approve a compromise or settlement."), that drafting shorthand is connected to debtors through other provisions of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 1107("a debtor in possession shall have all

the rights ..., and powers, and shall perform all the functions and duties ... of a trustee serving in a case under this chapter."); 11 U.S.C. § 1203 (same). In a case under chapter 13, however, because of the unique nature of the chapter 13 trustee and the debtor each taking on a portion of those general rights, the connecting provision is different.

[35] In chapter 13, the trustee's rights and duties are delineated in section 1302 and the debtor's rights and duties are delineated in section 1303. In short, a trustee's duties in chapter 13 are mainly administrative and in the role of safeguarding the process. It is the debtor who is responsible for administering the bankruptcy estate. *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir. 2008). Nonetheless, section 1303's express grant of authority to a debtor in a chapter 13 case contains only a reference to "the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l) ...." 11 U.S.C. § 1303.

As a result, it remains to be determined whether a chapter 13 debtor may therefore enforce the provisions of section 542. *See, e.g.*, Keith M. Lundin, *Lundin on Chapter 13*, § 50.1, at ¶¶ 4-6 (pointing out that the use of trustee in section 542(a) appears to be a drafting anomaly but leads to potentially absurd results). This problem was not addressed by the Supreme Court in *Fulton* when it assumed remedies under section 542 could compensate for a lack of remedies under section 362. *Fulton*, 141 S. Ct. at 591.

****12** **[36]** **[37]** If a chapter 13 debtor cannot exercise rights under section 542 and a chapter 13 trustee has no authority over property of the estate, *Peterson v. Wells Fargo Bank, N.A. (In re Peterson)*, 585 B.R. 1, 11 (Bankr. D. Conn. 2018) (gathering cases), having no remedies under section 362 could mean that there are no remedies at all for actions such as are alleged here in a chapter 13 case. Further, section 542 is an automatic remedy for the bankruptcy estate as a whole but enforced only by the trustee (or possibly the debtor). *Cf.* *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 11, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (finding that where the Bankruptcy Code afforded a right solely to a trustee under section 506(c), that right could not be extended to creditors). The automatic stay, in turn, has been held to be enforceable by creditors as well as debtors and trustees. *See, e.g.*, *Bandy v. DeLay (In re DeLay)*, Adv. No. 16-07040, Case No. 14-71512, 2018 WL 1596883, at *14 (Bankr. C.D. Ill. Mar. 29, 2018); ***340** *In re Biesboer*, Case No. 08bk35834, 2010 WL 2940927, at *6 (Bankr. N.D. Ill. July 27, 2010) (Doyle, J.) (each relying on *St. Paul Fire & Marine Ins. Co. v. Labuzan,* 579 F.3d 533, 538 (5th Cir. 2009)); *see also* *Cable v. Ivy Tech State Coll.*, 200 F.3d 467, 472 (7th Cir. 1999) (holding that a chapter 13 debtor has standing to commence or continue any proceeding on behalf of the estate in any tribunal) (*citing* Fed. R. Bank. P. 6009) (overruled on other grounds). Thus, having a remedy under section 542 is not the same as having a remedy under section 362 for creditors aggrieved by a violation.

Some courts have resolved this incongruity in holding that by granting chapter 13 debtors possession of estate assets and powers under section 363, such debtors must by extension have powers under section 542. *See, e.g.*, *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999) ("[Sections] 303, 363, 542 and 362 work together to require and enforce the delivery of possession of the car to the Debtor in this Chapter 13 case."), a minority of others have excluded chapter 13 debtors from exercising remedies under section 542. *Brown v. Addison (In re Brown)*, 210 B.R. 878, 882 (Bankr. S.D. Ga. 1997).

These standards will be discussed further below in the context of the Plaintiffs' Complaint.

3. *Punitive Damages and Sovereign Immunity*

(a) Punitive damages

[38] **[39]** **[40]** This court has thoroughly discussed the power of bankruptcy courts to issue punitive damages, as follows:

> Civil contempt proceedings are coercive and remedial, but not punitive, in nature and sanctions for civil contempt are designed to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy." [*Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 737 (7th Cir. 1999)] (*citing* *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826–28 [114 S.Ct. 2552, 129 L.Ed.2d 642] (1994)). Damages awarded from civil contempt are therefore either coercive in an attempt to push a violating party into compliance with a court order, or remedial in an attempt to restore losses from a violation of a court order. *Jones*, 188 F.3d at 738. Regardless of the nature of the award, the sanction must relate to or have been caused by a violation of a court order. *Id.*
>
> Without ruling on the ability of the bankruptcy court to issue punitive sanctions under section 105 of the Bankruptcy Code, the Seventh Circuit has cautioned bankruptcy courts against issuing punitive sanctions except where specifically authorized by statute. "Since punitive damages are—punitive, and it is punitive purpose that distinguishes criminal from civil contempt, section 362(h) implies that bankruptcy judges do have some criminal contempt power; but there is no corresponding grant of power in section 524 and the omission may have been deliberate. We can save the issue of the bankruptcy judges' criminal-contempt powers for another day, however." *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 917 (7th Cir. 2001).
>
> ****13** The Seventh Circuit has provided some guidance on when criminal contempt may be available where not otherwise expressly authorized. In the context of a violation of the discharge injunction, it stated that "[t]he victim ... might even be able to obtain punitive damages, though presumably only if he could prove criminal contempt, since punishment is the purpose of ***341** criminal but not of civil contempt." *Id.* at 916 (internal citations omitted).

In re Kimball Hill, Inc., 595 B.R. 84, 100 (Bankr. N.D. Ill. 2019) (Barnes, J.), *vacated in part sub nom.* *Fid. & Deposit Co. of Maryland v. TRG Venture Two, LLC*, Case No. 19 C 389, 2019 WL 5208853 (N.D. Ill. Oct. 16, 2019), and *order reinstated,* 620 B.R. 894 (Bankr. N.D. Ill. 2020).

[41] **[42]** Section 362 contains just such a statutory authorization. 11 U.S.C. § 362(k)(1) ("[A]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, *may recover punitive damages*.") (emphasis added). Damages under section 362(k), first and foremost, require a violation of the stay. If there was a violation of the automatic stay, the court must determine whether the violation was willful and whether a debtor is entitled damages therefrom. If there is a willful violation of the stay for which the debtor is entitled to collect damages, the court must determine what damages are appropriate. *In re Ludkowski*, 587 B.R. 330, 337 (Bankr. N.D. Ill. 2018) (Barnes, J.).

[43] As noted in *Kimball Hill*, another possible statutory source of this court's power to impose punitive damages is under section 105(a). Section 105(a) allows this court to "issue any order, process, or judgment that is necessary or appropriate to carry out provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). However, this power is not without its limits, as the *Kimball Hill* quote makes clear. In *Zale*, the Seventh Circuit specifically noted that "there is no corresponding grant of power in section 542 [to sanction] and [that] omission may have been deliberate." *Zale*, 239 F.3d at 917. Circuits are split on whether the bankruptcy courts can use section 105(a) power to punish a party. *Compare* *Charbono v. Sumski (In re Charbono)*, 790 F.3d 80, 87 (1st Cir. 2015) ("We therefore hold, without serious question, that bankruptcy courts possess the inherent power to impose punitive non-contempt sanctions for failures to comply with their orders.") *with* *Griffith v. Oles (In re Hipp, Inc.)*, 895 F.2d 1503, 1511 (5th Cir. 1990) (providing an exhaustive analysis of the bankruptcy court's power to

punish and cite for criminal contempt and concluding that the bankruptcy court has no punitive powers outside of the statute itself or, possibly, criminal contempt committed in the court's presence) *and* *Brown v. Ramsay (In re Ragar)*, 3 F.3d 1174 (8th Cir. 1993) (affirming the bankruptcy court's authority to hold a party in criminal contempt under section 105(a)).

(b) Sovereign immunity

Section 106 of the Bankruptcy Code states that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in ... Sections ... 362 ... [and] ... 542 ...." 11 U.S.C. § 106(a)(1). Section 106 goes on to clarify that "[t]he court may issue against a governmental unit an order, process or judgment ... including an order or judgment awarding a money recovery, *but not including an award of punitive damages* ...." 11 U.S.C. § 106(a)(3) (emphasis added).

**14 While this may appear to lead to a straightforward dismissal of the Complaint's request for punitive damages, the conclusion here is not without complications. The court will discuss sovereign immunity in the context of the Complaint, below.

DISCUSSION

Having considered the legal theories at play here, the court now turns to the propriety *342 of the Complaint in light of the Motion's arguments and the legal theories that govern.

The Motion can be viewed in two distinct categories. The first is those broad sweeping arguments that, if taken as true, might invalidate the Complaint as a whole or change the court's determination in fundamental ways. The second is the specific elements of the Complaint viewed in light of the traditional dismissal standards. The court will consider each category in turn.

A. The Broad Sweeping Issues

1. Fulton's *Effect on the Plaintiffs' Claims*

[44] As was noted above, when first commenced, this proceeding was in some respects a relatively simple one. The Seventh Circuit's controlling case law might have made the Plaintiffs' allegations that the City's refusal to return to them their vehicles violated section 362(a)(3) easy to adjudicate. *Thompson*, 566 F.3d at 703.

Under *Fulton*, the outcome is not so clear. In *Fulton*, the Supreme Court held that "the language of [section] 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision." 141 S. Ct. at 590. The City argues that the reasoning in *Fulton* should be applied to all of the other claims under section 362(a) and that all such claims should be dismissed.

The court declines to adopt the City's reasoning for three essential reasons: (a) *Fulton* is limited by its own terms to section 362(a)(3) and thus retention of the vehicles may still be a stay violation; (b) The City may have committed other acts in violation of the automatic stay; and (c) The City's interpretation leaves debtors with virtually no immediate remedy and creditors with no remedy at all.

(a) *Fulton* is limited to section 362(a)(3).

As Justice Sotomayor points out in her concurrence in *Fulton*, however, there were clear limitations on the majority's ruling. The City admits as much in its filing. As she stated, "I write separately to emphasize that the Court has not decided whether and when [section] 362(a)'s other provisions may require a creditor to return a debtor's property." *Id.* at 592 (Sotomayor, J., concurring). She states expressly that causes of action under sections 362(a)(4) and (6) may nonetheless require the return of a debtor's property. *Id.* There remains a possibility that the City's continued retention alone may violate the other automatic stay provisions under section 362(a).

That observation is borne out in the majority's ruling, which recognized that exercise of control does not definitively rule out omissions that might qualify as "acts" in certain contexts, "control" meaning "to have power over." *Id.* at 590. The Court did not decide whether other automatic stay provisions under section 362(a) are also limited to prohibiting affirmative acts that alter the *status quo*. Not only was a wider determination not procedurally before the Court, but the Court itself expressly noted the limited nature of its determinations. *Id.* ("Nor do we settle the meaning of other subsections of [section] 362(a). We hold only that mere retention of estate property after the filing of bankruptcy petition does not violate [section] 362(a)(3) of the Bankruptcy Code.").

****15** The City's expansive reading of *Fulton* is based on the applicability of the words "act" and "stay", two out of three terms that helped the Court arrive at its interpretation of section 362(a)(3) in *Fulton*, to other provisions of the automatic stay under section 362(a). It argues that the Court's interpretation of the two words must apply with full force to other provisions ***343** of the automatic stay. As a result, it argues that violation of the automatic stay under provisions other than section 362(a)(3), also requires an affirmative act which the passive retention of the estate property is not.

To be clear, however, the Court in *Fulton*, interpreted the *combination* of three key terms "act", "stay", and "to exercise control over." The phrase "to exercise control" is unique to section 362(a)(3) and does not appear in nor apply to other automatic stay provisions. The City's argument therefore misses the context within which these terms were used. As there remain plausible readings of these sections that do not preclude the Plaintiffs' Complaint and in light of the Supreme Court's own express limitations regarding the same, the court declines to dismiss the Complaint for this reason. [5]

[5] The court is aware of one pre-*Fulton* ruling where the Bankruptcy Appellate Panel for the Ninth Circuit appeared to hold that mere retention of impounded vehicles amounted to an excepted act to perfect a lien under section 362(b)(3) and thus did not violate section 362(a)(4). *Hayden v. Wells (In re Hayden)*, 308 B.R. 428, 435 (B.A.P. 9th Cir. 2004). That holding is problematic for a number of reasons, not the least of which is Congress' clear intent to create an avenue for perfecting possessory liens without interfering with a debtor's possession. 11 U.S.C. § 546(b). For those reasons and because the Supreme Court's own reservations in *Fulton*, this court would decline to follow *Hayden* even were it within this jurisdiction.

Accordingly, the effect of *Fulton* is limited to section 362(a)(3). *Fulton* does not expressly nor impliedly require dismissal of the Plaintiffs' other claims, as a matter of law. Such claims are not frivolous as there exist grounds upon which relief may be granted.

(b) The City may have committed other acts in violation of the automatic stay.

The City's argument that all violation of the automatic stay requires an affirmative act, even if true, is not dispositive here as the Supreme Court's ruling in *Fulton* also left open the possibility that inaction combined with other facts might nonetheless violate the automatic stay. Citing to the Seventh Circuit case *Kuehn*, 563 F.3d at 289, Justice Sotomayor's concurrence in *Fulton* raised the possibility that the City's refusal to relinquish the vehicle was to collect on the debt owed to the City in violation of section 362(a)(6). Recall that in *Kuehn*, the Seventh Circuit found that a university's refusal to provide to a student-debtor a transcript was to collect on the student's debt. The student had a contractual right to the transcript, was willing to pay the university to produce the transcript and the transcript had no intrinsic value to the university. The inaction of the university combined with facts shedding light into the university's motives for its inaction suggested that it violated section 362(a)(6), a prohibition on an act to collect prepetition debt.

The City's own municipal code appears to show the refusal to release vehicles to debtors is done in order to collect on the underlying debts. Judge Thorne walked through the municipal code sections in *In re Peake*, 588 B.R. 811, 820 (Bankr. N.D. Ill. 2018), *aff'd sub nom.* *In re Fulton*, 926 F.3d 916 (7th Cir. 2019), *vacated on other grounds and remanded sub nom.* *Fulton*, 141 S. Ct. 585, and *vacated on other grounds and remanded sub nom.* *In re Fulton*, 843 F. App'x 799 (7th Cir. 2021). She points out that the municipal code allows lienholders to obtain the release of the vehicles by paying only the towing costs, not the entire debt. *Id.* at 820 n.10. On the other hand, debtors must pay both the towing costs and the debt for the return of the vehicles. That the City seeks ***344** to collect the full amount of judgment debt from the debtor but not from others in relation to the release of the vehicle suggests that the City's refusal to return the vehicles might be to collect on the debtor's prepetition debt.

****16** Furthermore, nothing in *Fulton* forecloses a debtor from pointing out other affirmative actions of the City. For example, as previously explained, the Seventh Circuit has determined that even the threat of offset is sufficient to violate the automatic stay. *Radcliffe*, 563 F.3d at 630. Thus, even where the creditor had not actually acted with respect to the estate's asset, the threat of doing so was sufficient to constitute a stay violation.

Even if the City's broad reading of *Fulton* were to prevail, the Plaintiffs' claims are not foreclosed as a matter of law. Under the *Neitzke* standard, there still exists a set of facts which relief may be granted for conduct violating the automatic stay.

(c) The City's interpretation leaves debtors with virtually no immediate remedy.

[45] **[46]** Bankruptcy cases, for good reason, are intended to be conducted expeditiously. The need for a quick remedy is essential to a debtor's fresh start, a central tenet of the Bankruptcy Code. For example, "[h]earings to determine [relief from stay] are meant to be summary in character. The statute requires that the bankruptcy court's action be quick." *In re Vitreous Steel*, 911 F.2d 1223, 1232 (7th Cir. 1990).

[47] This is in part because debtors are afforded, by statute, a limited period of time to reorganize their affairs. Anything that interferes with that ability of the debtors to operate their estates and comply with their proposed plans can be fatal to their reorganization. This is why, as discussed above, both the Seventh Circuit and the Supreme Court have permitted bankruptcy courts to enjoin third party suits that are otherwise outside the scope of the automatic stay. *Celotex*, 514 U.S. at 310, 115 S.Ct. 1493; *Caesars*, 808 F.3d at 1188; *Fisher*, 155 F.3d at 883.

As Justice Sotomayor points out, having a car is essential to maintaining employment. *Fulton*, 141 S. Ct. at 593 (Sotomayor, J., concurring). Interference with a debtor's possession of such a car jeopardizes the debtor's chance for a fresh start and the recoveries of all creditors. *Id.* (Sotomayor, J., concurring); *see also* *James*, 2014 WL 5785316, at *1 ("An automobile is virtually essential for a worker to engage in productive and beneficial employment which, in turn, improves the chances a debtor will complete his or her chapter 13 plan.").

Eliminating the application of the automatic stay to situations such as these removes the simplest and most direct method of compelling recalcitrant creditors to comply with their statutory duties. Without a remedy under section 362, such debtors are left with either an action under section 542 (which, given the wording of the Bankruptcy Rules may require a longer, drawn out adversary proceeding to compel turnover), *see* Fed. R. Bankr. P. 7001(1), or a nebulous appeal to the general authority under section 105(a) (which in this Circuit at least has generated repeated cautions to trial courts against reliance upon unless there is a gap in statutory coverage). *See, e.g.*, *Kovacs v. United States*, 614 F.3d 666, 674 (7th Cir. 2010) (A bankruptcy court may not sanction under section 105 where the law elsewhere provides a remedy for sanctions).

Pursuing either remedy will result in delay in comparison to an action under section 362. As Justice Sotomayor points out, that delay can have a major, detrimental ***345** effect on debtors and bankruptcy cases alike. *Fulton*, 141 S. Ct. at 594 (Sotomayor, J., concurring).

Because of the essential time-sensitive nature of bankruptcy, the Seventh Circuit, in *In re Covey*, warned against the use of strategic gamesmanship to avoid the expeditious determination for bankruptcy matters. 650 F. 2d 877, 884 (1981). That caution is even more important when the creditor in question is a government entity.

****17** The court is not without sympathy for the position the City is in. It has been the subject of a well-publicized fraud involving bankruptcy and impounded cars,[6] but that issue was resolved nearly a decade ago. It has further been thwarted in its revenue collection efforts against Chicago residents when those residents are in bankruptcy. In that latter sense, the City is no different from any other creditor. But the City is different in important ways. There is no question that government entities possess powers disproportionately larger than those of debtors and other creditors. They are, as is discussed in more detail below, immune from punitive damages claims under section 106(a)(3) and thus are freer to flout basic bankruptcy requirements applicable to all creditors.

6 *See* https://www.fbi.gov/chicago/press-releases/2013/chicago-man-arrested-for-allegedly-takingcash-to-assist-with-filing-false-bankruptcy-case-to-avoid-city-auto-impound-fees (last visited December 2, 2021).

They may also, for example, when acting as an entity in commerce, legislate the outcomes they desire, binding debtors and creditors alike. The federal government has done the same. *See, e.g.*, 31 U.S.C. § 3713 (conferring upon the government, in nonbankruptcy scenarios, first priority creditor status over all other creditors). That is exactly what the City has done here when, under the guise of its home rule municipal authority, the City conferred upon itself—at least in name—possessory lien status

so as to thwart the application of the Bankruptcy Code.[7] The major difference between the federal law and the City's law here is that Congress expressly worked within bankruptcy law while the City appears to have been attempting to circumvent it.

[7] While the City's law in this regard has been held by at least one court not to be preempted by federal law generally, *Baines*, 584 B.R. at 723, it has not to the court's knowledge been determined whether such an unprecedented use of home rule municipal authority would withstand scrutiny under Illinois state law and whether the law in question, which unquestionably deprives competing creditors of some of their preexisting rights, was enacted with appropriate legislative due process for such a deprivation.

[48] **[49]** Other than with respect to sovereign immunity and where Congress has specifically legislated an outcome, government entities should be treated no differently than any other creditor when they engage in commerce. That is why courts have developed the so-called "pecuniary purpose" test. *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385–86 (6th Cir. 2001). When the government acts with pecuniary purpose, it is subject to the rules applicable to all creditors. The Seventh Circuit has determined previously that the City has just such a purpose with respect to cars impounded such as is alleged here. *In re Fulton*, 926 F.3d 916, 930 (7th Cir.), *cert. granted sub nom. City of Chicago, Illinois v. Fulton*, —— U.S. ——, 140 S. Ct. 680, 205 L.Ed.2d 449 (2019), *and vacated on other grounds and remanded sub nom. Fulton*, 141 S. Ct. at 585 ("The City's act is focused on the debtor's financial obligation, not its safety concerns, and thus fails the pecuniary purpose test.").

***346** **[50]** The Bankruptcy Code, to which government entities acting with such a pecuniary purpose such as the City here are subject, arises out of the express grant of legislative authority to Congress in the Bankruptcy Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States"). There are a variety of theories as to why the framers of the Constitution inserted the Bankruptcy Clause. By its own terms, the Clause appears to promote uniformity, which is in keeping with Full Faith and Credit, the Commerce Clause and other provisions sought by the Hamiltonians.[8] Some postulate that that uniformity was a debtor protection, while others see it "to prevent preferences to home-state creditors."[9] But, equally important, some have observed in the context of bankruptcies that when state legislatures controlled their own commerce, the federal Congress was unable to properly control the American market.[10]

[8] *See, e.g.*, Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J.L. HIST. 215–28 (Oxford Univ. Press July 1957).

[9] Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319–411 (2013).

[10] Randy. E. Barrett & Andrew Koppelman, *The Commerce Clause*, at https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/752 (last visited December 2, 2021).

****18** **[51]** When a state attempts to circumvent the effects of the federal bankruptcy laws, it is incumbent upon the courts to tread carefully before foreclosing the remedies of debtors and other creditors. As previously discussed, adopting the City's interpretation might not just delay, but given a narrow reading of section 542, may in fact extinguish both a debtor's and competing creditors' rights to remedies for violations of the stay such as are alleged in the Complaint. *See supra* Applicable Standards at B.1(b). That result, as Justice Sotomayor points out, does not comport with the spirit of the Bankruptcy Code. *Fulton*, 141 S. Ct. at 592–93 (Sotomayor, J., concurring). This court agrees with Justice Sotomayor that, presuming the City continues its present approach to debtors in bankruptcy, the ultimate fix to these issues is a legislative one. *Id.* at 595 (Sotomayor, J., concurring). But this court is not so naïve as to assume that any such fix will be implemented soon, if at all. There are clear errors in the Bankruptcy Code that Congress has yet to fix despite being known for decades. Further, though the suggestion to expedite proceedings is a fine one, *id.* at 594-95 (Sotomayor, J., concurring), this court is not empowered to do so in violation of the very rules promulgated by the Supreme Court.

What this court can do is what it does here, refuse to adopt in the context of a motion to dismiss a reading of *Fulton* that is so expansive that it eliminates clear and obvious remedies against recalcitrant creditors. For the purposes of the Motion, therefore, the court declines to adopt the City's interpretation of *Fulton* as foreclosing the Plaintiffs' claims under sections 362(a)(4), (6) and (7).

2. *Sovereign Immunity*

[52] In Count II, the Plaintiffs seek punitive damages for the City's alleged violations listed in Count I. The City argues it is immune from punitive damages under section 106(a)(3) of the Bankruptcy Code.

A question exists as to whether sovereign immunity may be raised at any time (as federal sovereign immunity is, *see* ***347** *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513, 60 S.Ct. 653, 84 L.Ed. 894 (1940)), or as an affirmative defense must be raised in accordance with applicable state law. The City here has raised it in the context of the Motion and the Plaintiffs have not objected to that procedure. The court will therefore consider it as set forth in the filings.

One might think that such an inquiry begins and ends with section 106 of the Bankruptcy Code, which states that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in ... Sections ... 362 ... [and] ... 542 ...." 11 U.S.C. § 106(a)(1). Section 106 goes on to clarify that "[t]he court may issue against a governmental unit an order, process or judgment ... including an order or judgment awarding a money recovery, but not including an award of punitive damages ...." 11 U.S.C. § 106(a)(3).

The issue is, however, slightly more nuanced.

[53] **[54]** Today bankruptcy law is, for all intents and purposes, exclusively federal in nature. There are, of course, obvious limitations. The most pressing here is the principle of sovereign immunity of the States which is espoused in the Eleventh Amendment, U.S. Const. amend. XI, and elsewhere throughout federal law. The precarious interaction between the Bankruptcy Clause and the Eleventh Amendment is one of the reasons that chapter 9 of the Bankruptcy Code (Adjustment of Debts of a Municipality) is written in such a hands-off way. Lubben, *supra* n.9, at 397. This interaction is one of the reasons that, when a State or subdivision thereof is affected by federal bankruptcy law, courts are charged with scrutinizing whether the affected entity is immune under the principles of sovereign immunity. *See, e.g.*, *In re La Paloma Generating Co.*, 588 B.R. 695, 717 (Bankr. D. Del. 2018), *aff'd sub nom. In re La Paloma Generating Co. LLC*, 607 B.R. 794 (D. Del. 2019).

In the context of bankruptcy, sovereign immunity and the propriety of section 106 have therefore been subject to a variety of different approaches.

In 1996, the Supreme Court in *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), in the context of the Indian Commerce Clause, held that a grant of authority to Congress to pass laws in Article I of the Constitution is not, in and of itself, sufficient to abrogate Eleventh Amendment sovereign immunity. *Id.* at 55–56, 116 S.Ct. 1114. It held that a "clear legislative statement" regarding Congress' intent to abrogate sovereign immunity was required. *Id.*

****19** In reliance on *Seminole Tribe*, the Seventh Circuit in *Nelson v. La Crosse Cty. Dist. Atty. (State of Wis.)*, 301 F.3d 820, 831 (7th Cir. 2002), held that "Congress did not validly abrogate State sovereign immunity when enacting [s]ection 106(a) pursuant to its Article I legislative power." *Id.* at 832. The Plaintiffs strangely rely on *Nelson* in attempting to counter

the City's claim of sovereign immunity. The court is at a loss to understand how *Nelson*, even if controlling, would help advance the Plaintiffs' position. Were *Nelson* controlling, section 106(a) would be invalidated and the City would be immune from all aspects of bankruptcy law.

Later, however, the Supreme Court clarified that bankruptcy law is not subject to the same analysis as was set forth in *Seminole Tribe*. *See* *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 379, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006); *Tenn. Student Asst. Corp. v. Hood*, 541 U.S. 440, 450, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004).

***348** In *Hood*, based on the in-depth analysis provided by the Court of Appeals for the Sixth Circuit in the matter below, *see* *In re Hood*, 319 F.3d 755, 764 (6th Cir. 2003), *aff'd and remanded sub nom.* *Hood*, 541 U.S. at 440, 124 S.Ct. 1905, the Supreme Court found that an exception to *Seminole Tribe* reasoning could be found in the bankruptcy court's *in rem* jurisdiction (akin to that in admiralty matters where the Court had previously found no Eleventh Amendment violation), stating that "[a]lthough both bankruptcy and admiralty are specialized areas of the law, we see no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction." *Hood*, 541 U.S. at 450, 124 S.Ct. 1905.

In *Katz*, the Supreme Court stated that:

> The relevant question is not whether Congress has "abrogated" States' immunity in proceedings to recover preferential transfers. *See* 11 U.S.C. § 106(a). The question, rather, is whether Congress' determination that States should be amenable to such proceedings is within the scope of its power to enact "Laws on the subject of Bankruptcies." We think it beyond peradventure that it is.

Katz, 546 U.S. at 379, 126 S.Ct. 990 (footnote omitted).

While the Seventh Circuit hasn't retracted *Nelson*, subsequent Seventh Circuit cases rely on *Katz* and make no mention of *Nelson*. *See, e.g.,* *Bulk Petroleum Corp. v. Ky. Dep't of Revenue (In re Bulk Petroleum Corp.)*, 796 F.3d 667, 679 (7th Cir. 2015); *Toeller v. Wis. Dep't of Corr.*, 461 F.3d 871, 874 (7th Cir. 2006). As *Nelson* is expressly based on *Seminole Tribe*, it is therefore no longer the law of this Circuit. As such, both the Congress' determination that States are amendable to proceedings under sections 362 and 542 is controlling, but so too is Congress' determination that the States remain immune from punitive damages.

3. *The Limits of the Court's Determination*

One broad-sweeping issue remains.

The parties are cautioned against engaging in extensive briefing of a matter before coming to the court on it. Here, the court set briefing on the Motion in the Briefing Order. Once that order was complied with, the briefing was concluded.

The Plaintiffs, however, sought to challenge the contents of the City's Reply in the Strike Motion. While this court is a self-scheduling one, the Plaintiffs' filing on short notice the Strike Motion and scheduling it for the Hearing did nothing, without further court order, than create a presentment date. The Strike Motion was not therefore before the court on its merits at the Hearing. Had the Plaintiffs wanted the Strike Motion to be considered on its merits at the Hearing, fully briefed, the Plaintiffs could have and should have, brought it to the court earlier—either on the court's earlier calls on cases of this nature or, if the circumstances including the court's availability warranted it, by application for an emergency hearing. That would have afforded

the court and all other parties adequate opportunity to consider all the new, unexpected filings and could have potentially afforded the Plaintiffs the additional round of briefing it clearly wanted.

**20 Instead, both the Plaintiff and the City presumed that the court would entertain what is essentially another round of briefing on the Motion without having been authorized by the court to enter into it. That did not happen and will not be allowed to happen in the future. When the court sets briefing on a matter, the parties are required to comply with that order. To *349 deviate from a court's order, further order of the court is needed.

The hearing on the Strike Motion was therefore stricken by the court at the Hearing. Since that time, the Plaintiffs have not renoticed the Strike Motion for hearing on normal notice and thereby have not asked for a briefing schedule to be set. As a result, the Strike Motion is deemed moot in light of the ruling contained in this Memorandum Decision and will denied for that reason. The Strike Motion and the filings pertaining to it will not be considered by the court.

[55] [56] That said, if the subject of the Strike Motion was affirmative defenses asserted by the City and if such defenses are properly before the court, the law is clear that, unless jurisdictional in nature, such defenses must be asserted in accordance with the Civil Rule 8(c) and brought by way of a motion under the Civil Rule 12(c). *Gunn v. Cont'l Cas. Co.*, 968 F.3d 802, 806 (7th Cir. 2020) ("[T]he appropriate vehicle for resolving an affirmative defense is a motion for judgment on the pleadings under Rule 12(c), not a Rule 12(b)(6) motion."). Standing, for example, is an affirmative defense. *LINC Fin. Corp. v. Onwuteaka*, 129 F.3d 917, 922 (7th Cir. 1997). It must be raised at the appropriate time and prosecuted in the appropriate manner.

The court will not entertain affirmative defenses generally on a motion to dismiss, but nor will it foreclose them for failure to state such in a motion to dismiss.

B. The Counts of the Complaint Under the Traditional Dismissal Standards

1. *Count I: Claims under Sections 362(a)(4), (6) & (7) and 542(a)*

Even if the Plaintiffs' claims are not foreclosed by *Fulton* as a matter of law, the Complaint must also sufficiently allege factual allegations in order to survive the Motion.

(a) Sections 362(a)(4) and (6)

[57] The Complaint sufficiently plead claims under sections 362(a)(4) and (6). The Complaint alleges that the City continued to retain the Plaintiffs' vehicles even after the Plaintiffs filed for bankruptcy. It further alleges that the City demanded an upfront payment as a precondition for release of the vehicles and retained them to perfect its lien.

These allegations, if taken as true, are sufficient to raise plausible claims for violation of sections 362(a)(4) and (6). Whether the City can defeat these allegations on the merits, on the facts attendant thereto or on a defense under section 362(b) or otherwise, is not before the court today for the purpose of the Motion. The Plaintiffs may proceed with both claims.

(b) Section 362(a)(7)

[58] **[59]** On the other hand, the Plaintiffs' section 362(a)(7) claim fails to meet the applicable standard. While setoff (offsetting debt owed *to the debtor* against a debt owed *by the debtor*) is preserved under the Bankruptcy Code, *see* 11 U.S.C. § 553(a), it remains stayed under section 362(a)(7).

To establish that the City's alleged actions violate section 362(a)(7), the Plaintiffs must show that a setoff in violation of that section took place. The Complaint, however, only alleges without support that the City's actions constituted a setoff.

****21** The court finds no statutory or case law supporting the conclusion that mere possession of an estate property is a setoff. In fact, the case law that does exist is in the contrary.

In *Strumpf*, 516 U.S. at 16, 116 S.Ct. 286, the Supreme Court addressed a similar problem. The Court considered whether ***350** a bank committed setoff when it imposed an administrative hold on a debtor's account. The debtor had defaulted on the bank's loan, and the bank refused to honor the debtor's withdrawal by imposing an administrative hold while the bank sought relief from stay in the debtor's bankruptcy. *Id.* at 18, 116 S.Ct. 286.

The Court ruled that the refusal was not a setoff. Setoff required an intent to *permanently* offset a debtor's debt, but the bank's administrative hold was only temporary while it sought relief from stay. The Court stated:

> A requirement of such [permanent] intent is implicit in the rule followed by a majority of jurisdictions addressing the question, that a setoff has not occurred until three steps have been taken: (i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff. *See, e.g.,* *Baker v. Nat'l City Bank of Cleveland,* 511 F.2d 1016, 1018 (6th Cir. 1975) (Ohio law); *Normand Josef Enters., Inc. v. Conn. Nat'l Bank,* 230 Conn. 486, 504–05, 646 A.2d 1289, 1299 (1994). But even if state law were different, the question whether a setoff under [section] 362(a)(7) has occurred is a matter of federal law, and other provisions of the Bankruptcy Code would lead us to embrace the same requirement of an intent permanently to settle accounts.

Strumpf, 516 U.S. at 19, 116 S.Ct. 286.

[60] The Complaint alleges nothing more than the City's refusal to return the vehicles. Under *Strumpf*, the City's refusal is not a setoff, if only temporary. As a result, the Plaintiffs' section 362(a)(7) claim fails as pleaded and must be dismissed.

However, under the standard set forth in *Neitzke* and *Barry Aviation*, the court can hypothesize a set of facts consistent with the allegations of the Complaint that might establish the requisites for a claim under section 362(a)(7). Therefore, dismissal will be without prejudice and with leave to amend.

(c) Section 542(a)

[61] The City's argument for dismissal of the Plaintiffs' claims under section 542(a) is two-fold. First, the City's argues that there was no obligation to turn over the estate property under section 542(a) in the absence of an adversary proceeding against it to compel turnover. Second, the City raises an affirmative defense that it was entitled to adequate protection and that retaining

the vehicles and bargaining for the condition of the turnover was an effort to secure adequate protection. Both of the City's arguments are problematic.

As to the first, the City had an express statutory obligation to return the estate property under section 542(a). The City's interpretation flies in the face of the express language of section 542(a) and is, quite frankly, specious. Taken at face value, the City's reading of its duties would mean that wherever a party is compelled to act by a statute, it could avoid its statutory duties until ordered to comply. Debtors would be free to fail to file the documents required under section 521. Creditors would be free to act in violation of the automatic stay. Taxpayers could avoid paying their taxes.

****22** That compliance with section 542(a) is required even absent an order is tautological. It is so fundamental that it is set forth as such in Collier's as such. 5 COLLIER ON BANKRUPTCY ¶ 542.02 ("By its express terms, [section] 542(a) is self-executing, and does not require that the trustee take any action or commence a proceeding or obtain a court order to compel the turnover."); *see also Fitzgerald v. United States* (*In re Larimer*), 27 B.R. 514, 516 (Bankr. D. Idaho 1983).

***351** The City's argument in this regard is akin to any lawbreaker claiming they are not violating the law unless caught. It also flies in the face of what the City acknowledged was the case when pleading to the Supreme Court. *Fulton*, 141 S. Ct. 585, 594 (2021) ("As even the City acknowledges, [section] 542(a) 'impose[s] a duty of turnover that is mandatory when the statute's conditions ... are met.' Brief for Petitioner 37.").

The City can and should do better.

The court equally places no stock in the City's argument that its municipal code required the City to conduct itself in a certain manner. The City enacted that code and therefore cannot shelter under it if the actions are inappropriate. To hold otherwise would empower municipalities to attempt to regulate themselves out of bankruptcy responsibility—something the City's possessory lien statute appears dangerously close to.

As to the second, whether the City has an adequate protection defense remains to be seen. It is raised prematurely for the purpose of this Motion. In the context of an express, statutorily mandated action, the City's belief that it may have a defense to enforcement is insufficient to mandate dismissal. If the City chooses to ignore its statutory duties, it will have to face the consequences of such a choice. For these purposes, that means litigating at least to a point where its claimed defenses are considered.

Accordingly, the Plaintiffs' section 542(a) claim survives.

The court does note, however, that in order for the City's defense to prevail, the City must establish it had a valid interest to be protected, whether it be under the municipal code or the common law. The court has carefully considered Judge Thorne's analysis in *Peake* and finds it only partially convincing that the City had such an interest. 588 B.R. at 820.

To the extent that the City relies on its municipal code, it must demonstrate that it was authorized to confer upon itself secured creditor status in the manner it did. As such a power appears on its face to be reserved for the Illinois legislature, the City must show where the state legislature has empowered divisions of the state to alter debtor/creditor relationships and interests in property.

Further, assuming the City is so authorized, the City must show that it afforded due process rights to the debtors and creditors in acting to deprive a portion of their property rights. As the City points out in briefs, automatic deprivation by statute is problematic.

Finally, the court has yet to determine the actual nature of the City's statutory interest. It notes that the competing courts in this jurisdiction are not agreed as to such. Given the differing levels of enforceability of the City's claimed interest in the vehicles against debtors versus secured creditors and the fact that the City appears to be bootstrapping a possessory interest over other valid interests when the City's claim is otherwise unsecured, the City will bear a heavy burden on its defense.

****23** **[62]** All that said, the law is clear that the court may enforce compliance with a parties' statutory obligations under section 105(a) or the court's inherent power to enforce statutory violations by way of civil contempt.

2. *Count II: Punitive Damages*

Count II asks for punitive damages, attorneys' fees and costs and other equitable sanctions.

However, as was discussed above, the City is immune from the Plaintiffs' request ***352** for punitive damages under the express provisions of section 106(a)(3), which controls.

As Count II's only other requests (attorneys' fees and equitable relief) are duplicated in Count I, the result here is that Count II will be dismissed in its entirety. *Van Vliet v. Cole Taylor Bank*, Case No. 10 CV 3221, 2011 WL 148059 at *6 (N.D. Ill. Jan. 18, 2011) (*citing to Norfleet v. Stroger*, 297 Fed. Appx. 538, 540 (7th Cir. 2008)).

As no repleading of Count II will cure the statutory prohibition at play, such dismissal will be with prejudice. *Barry Aviation*, 377 F.3d at 687.

3. *Count III: Class Certification*

The Plaintiffs' request certification of their claims as a class action under Civil Rules 23(b)(2) and (b)(3), and their respective counterparts in the Bankruptcy Rules. The Motion seeks dismissal of Count III based on the City's assumption that the other Counts will also be dismissed. The City does, however, reserve its right to respond to the substantive claim should the Plaintiffs' underlying claims survive. The Motion fails in this respect as the Plaintiffs' underlying claims survive.

That does not mean the class certification will be granted. While Civil Rule 23 is silent as to the procedure for class determinations (while at the same time setting forth in detail the standards for the same), the Seventh Circuit has at least implied that such certification should be brought by motion. *Priddy v. Health Care Serv. Corp.*, 870 F.3d 657, 660 (7th Cir. 2017).

As such, the court will set a deadline for the Plaintiffs to bring a motion to certify the class and a briefing with respect thereto, once the Plaintiffs are given the opportunity to amend the Complaint, and the City to respond. Now is not that time.

CONCLUSION

For the reasons stated above, as to Count I of the Complaint, the court, by separate order entered concurrently herewith, will deny the Motion as it pertains to claims under sections 362(a)(4) & (6) and 542(a), as well as the relief requested in relation to those violations in Count I. The court will nonetheless dismiss the claim under section 362(a)(7), but without prejudice and with leave to amend. As to Count II, the Motion will be granted and Count II will be dismissed, with prejudice. Count III survives, but the court will at a later date set a separate deadline for a motion to certify class and objections, if any, thereto. Finally, the Strike Motion is denied as moot.

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS [Adv. Dkt. No. 118] AND DENYING MOTION TO STRIKE [Adv. Dkt. No. 132]

This matter comes on for consideration on the Motion to Dismiss Ninth Amended Complaint [Adv. Dkt. No. 118] (the "Motion"), brought by defendant City of Chicago (the "City"), seeking dismissal of plaintiff Emelida Cordova's and other joined plaintiffs' (collectively, the "Plaintiffs") Ninth Amended Class Action Adversary Complaint for Actual and Punitive Damages for Violation of the Automatic Stay and Failure to Turnover Property [Adv. Dkt. No. 113] (the "Complaint"), alleging and requesting relief for the City's violation of sections 362(a)(4), (6) & (7)

**24 and 542(a) of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, and the Plaintiffs' motion to strike a portion of the City's reply [Adv. Dkt. No. 132] (the "Strike Motion"); the Motion having been fully briefed and the court having reviewed the Motion and all filings relating thereto; the court having conducted a hearing on *353 the Motion on August 5, 2021 (the "Hearing"), at which Hearing counsel for both the Plaintiffs and the Defendants having appeared; and for the reasons more fully stated in the Memorandum Decision issued concurrently herewith;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as to the claim in Count I of the Complaint arising under 11 U.S.C. § 362(a)(7). This claim is dismissed without prejudice and with leave to amend.

2. The Motion is GRANTED as to Count II of the Complaint. Count II is dismissed with prejudice.

3. In all other respects, the Motion is DENIED.

4. The Plaintiffs are granted limited leave to amend the Complaint to address the deficiencies in the claim dismissed in paragraph 1 of this Order only. Such amendment (the "Amended Complaint") shall be filed on or before December 31, 2021. The Amended Complaint may not, without further leave of the court, add any counts or claims or change any other aspect of the Complaint. Should the Amended Complaint not be filed on or before the deadline set forth herein, the dismissal in paragraph 1 shall become dismissal with prejudice without further order of the court.

5. The Strike Motion is DENIED as moot.

6. Further status on the Complaint is set for **January 13, 2022**, at **2:00 p.m.**

All Citations

635 B.R. 321, 2021 WL 5774400

End of Document

court's orders. We must therefore dismiss this appeal.

IN RE: Mark E. STUART, Debtor.

Mark E. Stuart, Appellant,

v.

City of Scottsdale; Russell Brown, Chapter 13 Trustee; City of Scottsdale Attorney's Office, Appellees.

BAP No. AZ-21-1063-FLS
Bk. No. 2:19-bk-05481-BKM

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Filed November 10, 2021

Background: After city obtained a prepetition state-court judgment against debtor and garnished three of his bank accounts, causing bank to freeze account funds, debtor filed Chapter 13 petition and subsequently moved for sanctions, asserting that city's refusal to lift the garnishment immediately violated the automatic stay. City objected and, following bankruptcy court's entry of minute order determining that city had violated the stay and allowing debtor to proceed with evidentiary hearing on damages, moved for reconsideration. The United States Bankruptcy Court for the District of Arizona, Brenda K. Martin, J., granted reconsideration, vacated its earlier minute order, and denied the stay violation motion. Debtor appealed.

Holdings: The Bankruptcy Appellate Panel (BAP), Faris, J., held that:

(1) under *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, city did not violate the automatic stay when, upon debtor's bankruptcy filing, it failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts;

(2) city did not "continue" a proceeding against debtor in violation of the automatic stay;

(3) city did not seek to enforce a prepetition judgment against debtor in violation of the automatic stay;

(4) city did not take any act to obtain possession of estate property in violation of the automatic stay; and

(5) city did not take any other "act" against debtor in violation of the automatic stay.

Affirmed.

1. Bankruptcy ⚿2461

Bankruptcy court's initial stay violation ruling, by which it determined that judgment creditor's failure to lift its garnishment of debtor's bank accounts upon his filing of Chapter 13 petition violated the automatic stay but left the question of damages for a later evidentiary hearing, was not a final order to which the rule governing relief from judgment or order applied; the bankruptcy court was free to review and change its own interlocutory order, whether or not the rule permitted it to do so. 11 U.S.C.A. § 362(a); Fed. R. Civ. P. 60(b); Fed. R. Bankr. P. 9024.

2. Bankruptcy ⚿3782

Bankruptcy court's determination that the automatic stay was violated was a question of law subject to de novo review. 11 U.S.C.A. § 362(a).

3. Bankruptcy ⚿3782

"De novo review" requires that the Bankruptcy Appellate Panel (BAP) consider a matter anew, as if no decision had been made previously.

See publication Words and Phrases for other judicial constructions and definitions.

4. Bankruptcy ⚿3786

Bankruptcy Appellate Panel (BAP) reviews bankruptcy court's underlying factual findings for clear error.

5. Bankruptcy ⚿3786

Bankruptcy court's factual findings are "clearly erroneous" if they are illogical, implausible, or without support in the record.

See publication Words and Phrases for other judicial constructions and definitions.

6. Bankruptcy ⚿3786

If two views of the evidence are possible, bankruptcy court's choice between them cannot be "clearly erroneous."

See publication Words and Phrases for other judicial constructions and definitions.

7. Bankruptcy ⚿2394.1

Automatic stay is designed to effect immediate freeze of status quo by precluding and nullifying postpetition actions, judicial or nonjudicial, in nonbankruptcy fora against debtor or affecting property of estate. 11 U.S.C.A. § 362(a).

8. Bankruptcy ⚿2467

"Willful" violation of automatic stay, as required for recovery of actual damages, is satisfied if party knew of stay, and its actions in violation of stay were intentional. 11 U.S.C.A. §§ 362(a), 362(k)(1).

See publication Words and Phrases for other judicial constructions and definitions.

9. Bankruptcy ⚿2395

Under *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, city, which held prepetition state-court judgment against Chapter 13 debtor and had garnished three of his bank accounts, did not violate the automatic stay when, upon debtor's bankruptcy filing, it failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts; by its inaction, city did not "exercise control over" estate property, and it had no affirmative duty to ensure the return of such property to debtor. 11 U.S.C.A. § 362(a)(3).

10. Bankruptcy ⚿2395

Where creditor has executed prepetition writ of garnishment against debtor's bank account, it is under no affirmative obligation to release funds upon debtor's filing of bankruptcy petition and, in order to avoid violating automatic stay, need only maintain status quo. 11 U.S.C.A. § 362(a)(3).

11. Bankruptcy ⚿2394.1

Nothing in subsection of Bankruptcy Code providing that filing of bankruptcy petition creates a stay of any act to, inter alia, exercise control over property of the estate requires actual or physical possession of estate property. 11 U.S.C.A. § 362(a)(3).

12. Bankruptcy ⚿2395

City, which held prepetition state-court judgment against Chapter 13 debtor and had garnished three of his bank accounts, did not "continue" a proceeding against debtor in violation of the automatic stay when, upon his bankruptcy filing, it promptly sought a stay of the parties' pending state-court action and took no further steps to advance that case, but failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts; leaving the state-court action and the garnishment in place did not disturb the status quo, and so was sufficient to avoid "continuation" of the action. 11 U.S.C.A. § 362(a)(1).

13. Bankruptcy ⚿2394.1

Creditor's failure to affirmatively release frozen bank account funds, in and of itself, is not a violation of the subsection of the Bankruptcy Code providing that filing

of bankruptcy petition creates a stay of the commencement or continuation of a prepetition action against the debtor. 11 U.S.C.A. § 362(a)(1).

14. Bankruptcy ⚭2395

City, which held prepetition state-court judgment against Chapter 13 debtor and had garnished three of his bank accounts, did not seek to enforce the judgment against debtor or estate property in violation of the automatic stay when, upon debtor's bankruptcy filing, it failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts; city took no position on whether state court should order release of the account funds, but repeatedly stated that it would not oppose such release, nor did it otherwise take any affirmative action to enforce the judgment or further the garnishment. 11 U.S.C.A. § 362(a)(2).

15. Bankruptcy ⚭2395

City, which held prepetition state-court judgment against Chapter 13 debtor and had garnished three of his bank accounts, did not take any act to obtain possession of estate property in violation of the automatic stay when, upon debtor's bankruptcy filing, it failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts; on the petition date, city already had obtained the writ of garnishment and bank had frozen the accounts, such that there was no further "act to obtain possession," and city's acts or omissions merely preserved the status quo, and did not capture any more funds postpetition. 11 U.S.C.A. § 362(a)(3).

16. Bankruptcy ⚭2395

City, which held prepetition state-court judgment against Chapter 13 debtor and had garnished three of his bank accounts, did not take any other "act" against debtor in violation of the automatic stay when, upon debtor's bankruptcy filing, it failed to move to quash the writ of garnishment or cause bank to unfreeze the accounts; city, which promptly stayed the parties' pending state-court action and stated multiple times that it did not oppose release of the frozen funds, did not do anything to enhance its position and only sought to maintain the status quo. 11 U.S.C.A. § 362(a)(6).

Appeal from the United States Bankruptcy Court for the District of Arizona, Brenda K. Martin, Bankruptcy Judge, Presiding

Chris D. Barski of Barski Law PLC, Scottsdale, argued for appellant Mark E. Stuart;

Vail C. Cloar of Dickinson Wright PLLC, Phoenix, argued for appellee City of Scottsdale.

Before: FARIS, LAFFERTY, and SPRAKER, Bankruptcy Judges.

OPINION

FARIS, Bankruptcy Judge:

INTRODUCTION

After the City of Scottsdale garnished three of his bank accounts, debtor Mark E. Stuart filed a chapter 13 [1] petition. Mr. Stuart argued that the automatic stay required the City to lift the garnishment immediately. Relying on *City of Chicago v. Fulton*, —— U.S. ——, 141 S. Ct. 585, 208 L.Ed.2d 384 (2021), the bankruptcy court ruled against Mr. Stuart. Mr. Stuart ap-

1. Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

peals, arguing that *Fulton* is inapplicable to this case and that the City engaged in "acts" that violated multiple subsections of § 362(a).

The bankruptcy court correctly held that the City did not violate the automatic stay. We AFFIRM. We publish to explain the effect of *Fulton* on a prepetition bank account garnishment.

FACTS

A. Prepetition events

Mr. Stuart has long pursued the City in various "public interest" cases. He lost one such case (the "State Court Action"), and in 2015 the state court awarded the City a final judgment exceeding $30,000 in sanctions and costs, plus interest (the "State Court Judgment"). The Arizona Court of Appeals affirmed the State Court Judgment.

In April 2019, the City served a writ of garnishment on Bank of America ("BOA"), where Mr. Stuart had three accounts. BOA froze the accounts, which held a total of $8,879.95.

Mr. Stuart sought to quash the writ, arguing that the bank accounts were community property not subject to the City's claims. The state court agreed that the State Court Judgment was unenforceable against any community property. However, it noted that Mr. Stuart had previously obstructed discovery, making it impossible for the City to determine the existence and nature of his property, and allowed the City an opportunity to conduct discovery. Before the City could take any further action, Mr. Stuart filed his bankruptcy petition.

B. Mr. Stuart's bankruptcy case and the City's response

On Saturday, May 4, 2019, Mr. Stuart filed a chapter 13 petition.[2] His attorney contacted BOA by fax dated May 6 (the next business day) and requested that it release the frozen funds. BOA responded the following day that it would retain the funds unless it was directed otherwise by the City or the bankruptcy court.

On May 7, Mr. Stuart's counsel contacted the City and demanded that the City direct BOA to release the frozen funds. The attorney handling the matter was out of town and did not respond immediately. Nevertheless, the City filed a motion to stay litigation in the State Court Action that same day. It requested that "all pending matters in this case, including any scheduled hearings, be stayed pending resolution from [sic] the bankruptcy proceedings." The state court granted the motion.

Also on May 7, Mr. Stuart, proceeding pro se, filed a document informing the state court of the stay and requesting that the state court quash the writ of garnishment.

On May 13, the responsible attorney for the City sent an e-mail to Mr. Stuart's counsel, BOA's counsel, and others. He said that he had been out of the office the previous week and stated that he believed that "the funds being held by the bank pursuant to the garnishment became property of the bankruptcy estate. Accordingly, the City of Scottsdale does not have a current possessory interest in them . . . ." He concluded that "the City will abide whatever disposition of those funds is made in accordance with the Bankruptcy Statutes/Rules."

Counsel for BOA responded that he would direct BOA to release the funds

2. Mr. Stuart apparently faxed a copy of the petition to the City on May 4, a Saturday, but the offices were closed, and the City did not receive it until Monday.

once the City quashed the writ of garnishment. Counsel for the City wrote back that "[t]he City has requested a stay of the proceedings in state court. The City does not oppose release of the funds by the Bank."

The City also filed a response to Mr. Stuart's request to quash the writ. It took the position that the court should "deny Stuart's request as the court has already provided Stuart to [sic] the relief which he is entitled, i.e., a stay of the proceedings. However, the City does not oppose release of the funds by [BOA] and does not object to a court order instructing [BOA] to release the funds." It argued that, under § 362(a), it was not required to dismiss the garnishment proceedings, only to stay them, which the court had already done. Because funds had not left Mr. Stuart's accounts, there was nothing to "return." Nevertheless, it repeated that it "does not object to an order from this Court authorizing [BOA] to release any hold on funds that may have arisen as a result of the garnishment."

On May 14, the state court issued a minute order that: (1) granted Mr. Stuart's request to quash the writ; (2) denied the City's request for a stay, because all matters were previously stayed; and (3) denied Mr. Stuart's request for a return of the funds, because the monies remained in his accounts. BOA unfroze the three bank accounts shortly thereafter.

C. The motions for sanctions for the City's stay violation

Mr. Stuart filed a motion for sanctions ("Stay Violation Motion") against the City [3] based on the alleged violation of the automatic stay.[4] He asserted that there was no dispute that the City knew of the automatic stay yet refused to dismiss the state court garnishment action. He argued that the City had an affirmative duty to remedy the violation by releasing the frozen account funds. He alleged that the garnishment and the stay violation caused him and his wife severe psychological distress, including anxiety, depression, and sleeplessness.

The City objected to the Stay Violation Motion. It argued that it never held the garnished funds and never took any action after the bankruptcy filing, including continuing the garnishment action or exercising control over estate property. It contended that BOA held the funds and that the City had done all that was required of it, i.e., move to stay the State Court Action. It was not required to dismiss any judicial action, only "maintain the status quo ante." It pointed out that Mr. Stuart did not identify any act that violated the automatic stay. The City took the position that it had "nothing to do with" the return of the frozen funds and stated (falsely) that it had "filed a request to quash the writ."

Mr. Stuart filed a reply brief and asserted that sanctions were warranted under § 362(a)(1), (2), (3), and (6).

At the hearing on the Stay Violation Motion, the bankruptcy court recognized that the City immediately sought to stay the State Court Action but nevertheless faulted the City for not seeking to quash the writ of garnishment. The bankruptcy

3. Mr. Stuart also sought sanctions against the City's attorneys. In the remainder of this opinion, the term "City" generally includes its attorneys.

4. The Stay Violation Motion was the third such motion filed by Mr. Stuart against the City. The BAP affirmed the bankruptcy court's denial of his previous motions. *Stuart v. City of Scottsdale (In re Stuart),* BAP No. AZ-19-1332-LBT, 2020 WL 4334120 (9th Cir. BAP July 28, 2020).

court cited an unpublished Ninth Circuit decision, *Best Service Co. v. Bayley (In re Bayley)*, 678 F. App'x 593 (9th Cir. 2017), for the proposition that the City violated the automatic stay "by failing to promptly direct Bank of America to return the funds and/or promptly requesting the writ be quashed . . . ." It said that its decision was a "preliminary ruling" subject to an evidentiary hearing to determine damages.

The court entered a minute order determining that the City violated the automatic stay ("Stay Violation Ruling"). It allowed Mr. Stuart to proceed with an evidentiary hearing for a determination of damages against the City and its attorneys in the State Court Action.[5]

Mr. Stuart filed a motion for sanctions ("Sanctions Motion") under § 362(k) against the City and two of its attorneys. He sought damages for physical and psychological distress for himself and his nondebtor wife, Virginia Stuart, as well as costs associated with the Stay Violation Motion, totaling $20,783. Additionally, he requested $30,000 in punitive damages and attorneys' fees and costs. The City opposed the motion.

D. The City's motion for reconsideration

Prior to the hearing, the City filed a motion for reconsideration ("Reconsideration Motion") of the Stay Violation Ruling under Civil Rule 60(b), made applicable in bankruptcy via Rule 9024. It argued that the U.S. Supreme Court's recent *Fulton* decision "clarified that the mere retention of property post-petition does not comprise a violation of the automatic stay as a matter of law." It contended that *Fulton* dictated that the City needed only to refrain from disturbing the status quo and was not required to release the garnished funds or direct BOA to release the funds.

Mr. Stuart opposed the Reconsideration Motion, arguing that *Fulton*'s narrow holding under § 362(a)(3) was inapplicable to this case because the City denied ever possessing Mr. Stuart's property. Rather, Mr. Stuart focused on the continuation of the writ of garnishment, which he contended was an act to collect and enforce the State Court Judgment under § 362(a)(1), (2), (3), and (6).

The bankruptcy court held a hearing on the Reconsideration Motion. It took the matter under advisement and issued a supplemental minute entry/order granting the Reconsideration Motion. It noted that "the crux of its [Stay Violation Ruling] was that the City of Scottsdale had an affirmative duty to ensure the release of funds frozen by Bank of America based on the City of Scottsdale's pre-petition garnishment action." It clarified that its "focus was on the retention of estate property as being in violation of the stay" and that "the Court ruled that the City of Scottsdale's failure to direct or otherwise secure release of the frozen funds violated the stay under § (a)(3)." It held that, "[u]nder *Fulton* that conclusion is now wrong. . . . [M]ere retention of an estate asset is not an act in violation of § 326(a)(3) [sic] and there is no requirement that an entity take affirmative action 'to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.' " (Quoting *Fulton*, 141 S. Ct. at 591.)

The bankruptcy court then examined subsections (a)(1), (2), (3), and (6) and declined to find any stay violation.

As to subsection (a)(1), the bankruptcy court held that *Eskanos & Adler, P.C. v.*

5. The bankruptcy court held that the City's bankruptcy counsel did not violate the automatic stay and entered a separate order denying the Stay Violation Motion as to them. That order is not part of this appeal.

Leetien, 309 F.3d 1210 (9th Cir. 2002), did not help Mr. Stuart's position because the duty under subsection (a)(1) is to discontinue an action. It noted that the City promptly sought a stay of the State Court Action upon learning of the petition and only opposed the motion to quash the writ, requesting instead that the matter remain stayed. It further rejected his argument that garnishment actions are different from other collection actions.

Regarding subsection (a)(2), the court held that the City's failure to quash the writ was not an act to enforce a judgment. It distinguished *Bayley*, which it earlier relied on, because the City did not direct any third party to retain estate property and did not take any other "act" to compel or enforce the State Court Judgment. It stated that the City "ceased ongoing collection activities."

Regarding subsection (a)(3), the court held that the City did not "obtain possession" of estate property. It stated that Mr. Stuart failed to explain what the City did to "obtain possession" of the frozen funds and that he could have sought turnover of the funds under § 542.

Finally, the court held that subsection (a)(6) was equally inapplicable because the refusal to dismiss a lawsuit was not an "act to collect a claim." The City did not take any action other than to request a stay of the proceedings, and the mere retention of property is not an "act."

The bankruptcy court thus entered an order ("Reconsideration Order") that granted the Reconsideration Motion, vacated its earlier minute order, and denied the Stay Violation Motion.[6]

Mr. Stuart timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court erred by holding that the City did not violate the automatic stay.

STANDARDS OF REVIEW

[1] The City styled its motion as a motion for reconsideration under Rule 9024, and the bankruptcy court applied the incorporated standards of Civil Rule 60(b). But, as the bankruptcy court acknowledged, the Stay Violation Ruling was not a final order because it did not decide the question of damages. Rule 9024 therefore did not apply. The bankruptcy court was free to review and change its own interlocutory order whether or not Rule 9024 permitted it to do so. *See City of L.A., Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001) ("Although [Civil] Rule 60(b) has since changed, the lessons learned from our interpretation of it have not – a district court's authority to rescind an interlocutory order over which it has jurisdiction is an inherent power rooted firmly in the common law and is not abridged by the Federal Rules of Civil Procedure.").

[2, 3] Therefore, we review the Reconsideration Order de novo. *Yellow Express, LLC v. Dingley (In re Dingley)*, 514 B.R. 591, 595 (9th Cir. BAP 2014) ("A bankruptcy court's determination that the automatic stay was violated is a question of law subject to de novo review."), *aff'd on other grounds*, 852 F.3d 1143 (9th Cir. 2017).

6. While the Sanctions Motion was pending, Mr. Stuart filed a motion for leave to amend to add Mrs. Stuart as a party. The court's Reconsideration Order denied that motion. Mr. Stuart does not challenge that part of the order on appeal.

"De novo review requires that we consider a matter anew, as if no decision had been made previously." *Francis v. Wallace (In re Francis)*, 505 B.R. 914, 917 (9th Cir. BAP 2014).

[4–6] We review the court's underlying factual findings for clear error. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003). Factual findings are clearly erroneous if they are illogical, implausible, or without support in the record. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010). If two views of the evidence are possible, the court's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

DISCUSSION

A. The filing of a bankruptcy petition stays certain postpetition actions.

[7] The automatic stay "is designed to effect an immediate freeze of the *status quo* by precluding and nullifying post-petition actions, judicial or nonjudicial, in non-bankruptcy fora against the debtor or affecting the property of the estate." *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 764 F.3d 1168, 1173 (9th Cir. 2014) (quoting *Hillis Motors, Inc. v. Haw. Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993)).

The subsections of § 362(a) describe the actions that are subject to the automatic stay. In this case, Mr. Stuart alleges that the City violated subsections (1), (2), (3), and (6). As is relevant to this case, those sections provide that the filing of a bankruptcy petition creates a stay of:

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

§ 362(a).

[8] Section 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." "A willful violation is satisfied if a party knew of the automatic stay, and its actions in violation of the stay were intentional." *Eskanos & Adler, P.C.*, 309 F.3d at 1215.

B. The bankruptcy court correctly held that, under *Fulton*, the City did not violate § 362(a)(3).

[9] The bankruptcy court held that, under *Fulton*, the City did not violate § 362(a)(3) when it failed to move to quash the writ of garnishment or cause BOA to unfreeze the bank accounts. We discern no error.

Prior to *Fulton*, this circuit interpreted § 362(a)(3) to require the creditor to take affirmative steps to turn over property of the estate, even if it is held by a third party. In an unpublished decision, the Ninth Circuit held:

> Upon the filing of Bayley's bankruptcy petition, Best Service had an affirmative duty to turn over all property to the bankruptcy estate, even if it was in the Sheriff's possession. *See Cal. Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151 (9th Cir. 1996); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989). However, by directing the Sheriff to hold the levied funds, Best Service both "enforce[d]" its pre-petition judgment, *see* 11 U.S.C. § 362(a)(2), and "exercise[d] control over property of the estate," *see id.* § 362(a)(3). Best Service should have "cease[d] its collection procedures and notif[ied] the Sheriff to return [Bayley's] property." *In re Hernandez*, 468 B.R. 396, 405 (Bankr. S.D. Cal. 2012). But because it did not, the district court properly concluded that Best Service was in violation of the automatic stay.

In re Bayley, 678 F. App'x 593. The *Bayley* decision cited *Del Mission*, in which the Ninth Circuit held that "the knowing retention of estate property violates the automatic stay of § 362(a)(3)[,]" 98 F.3d at 1151, and that the state's knowing retention of disputed taxes violated the automatic stay, *id.* at 1152.

In the consolidated cases addressed in *Fulton*, the City of Chicago impounded the debtors' vehicles for nonpayment of fines. The debtors filed chapter 13 petitions and requested that the city return their vehicles, but the city refused. The bankruptcy court held that the city's refusals violated § 362(a)(3) because it had acted to "exercise control over" the debtors' vehicles, and the Court of Appeals for the Seventh Circuit affirmed. 141 S. Ct. at 589.

The Supreme Court began its analysis by looking at the plain language of the statute. It stated:

> The language used in § 362(a)(3) suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms – "stay," "act," and "exercise control" – is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Id. at 590. It then said that the individual words suggested "that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition." *Id.*[7]

The Court pointed to § 542, which concerns turnover of estate property, in support of its decision. It stated that § 542 "would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed." *Id.* at 591. Rather, it clarified that "§ 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee." *Id.*

The Court rejected the notion that § 362(a)(3) contained "an affirmative turnover obligation," instead holding that the reference to exercise of control "simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would

7. The Court acknowledged that an omission can be an "act" in some contexts but maintained that "the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision." 141 S. Ct. at 590.

change the status quo with respect to tangible property without 'obtain[ing]' such property." *Id.* at 592. The Court concluded "that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code." *Id.*[8]

Fulton cited the Ninth Circuit's decision in *Del Mission* as a case on one side of the circuit split that the Court resolved. *Id.* at 590 n.1. Because the Court adopted the view of the courts on the other side of the split, *Fulton* overruled *Del Mission* and other decisions taking the same position, such as *Bayley*.

The bankruptcy court here held that its Stay Violation Ruling was at odds with *Fulton*. It clarified that the Stay Violation Ruling was based on a violation of § 362(a)(3) for the City's failure to affirmatively seek to quash the writ of garnishment and unfreeze the three bank accounts. It had cited *Bayley* in support of its decision, which in turn relied on *Del Mission*. We agree with the bankruptcy court that its initial holding was no longer viable after *Fulton*. Simply stated, the City's inaction did not violate § 362(a)(3).

The bankruptcy court for the Middle District of Pennsylvania recently reached the same conclusion on similar facts. In *Margavitch v. Southlake Holdings, LLC (In re Margavitch)*, Case No. 5:19-bk-05353-MJC, 2021 WL 4597760 (Bankr. M.D. Pa. Oct. 6, 2021), the creditors served a prepetition writ of execution on the debtor's bank that froze his bank accounts. When the debtor filed a chapter 13 petition, the creditors refused to release the funds or otherwise terminate the attachment lien but took no other action to collect on the debt. The debtor sought sanctions for violation of the automatic stay. *Id.* at *2.

On cross-motions for summary judgment, the bankruptcy court held that *Fulton* dictated that the creditors' inaction did not violate the automatic stay. Considering § 362(a)(3), the court held that:

> Defendants admittedly took no post-petition affirmative action as to the garnished accounts. They maintained the status quo as of the petition date. They were not required to withdraw the attachment because to do so would put them in a more disadvantageous position than they had been as of the petition date and they were entitled to maintain the status quo.

Id. at *6 (citations omitted). The bankruptcy court further considered the other subsections of § 362(a) and concluded that the creditors' inaction did not amount to a stay violation.

[10] *Margavitch* is directly on point and comports with our analysis here. Where a creditor has executed a prepetition writ of garnishment against a debtor's bank account, it is under no affirmative obligation to release the funds and need only maintain the status quo.

[11] Mr. Stuart attempts to distinguish *Fulton* by arguing that it applied only to the exercise of control over estate property,[9] while the stay violation in this case arose from the City's opposition to his efforts to quash the writ of garnishment.

8. The Court explicitly limited its holding to § 362(a)(3), 141 S. Ct. at 592, and Justice Sotomayor stated in her concurrence that the Court did not decide whether the city's actions violated any other subsection of § 362(a), *id.* (Sotomayor, J., concurring).

9. Mr. Stuart argues that *Fulton* cannot apply, because the City never had physical possession of the bank account funds. We reject this argument; nothing in § 362(a)(3) requires actual or physical possession of estate property. *See In re Margavitch*, 2021 WL 4597760, at *6 (rejecting this exact argument).

Mr. Stuart is correct, but only to a point. It is true that *Fulton* considered only the retention of estate property under § 362(a)(3). However, *Fulton* dictates that the City had no affirmative duty to ensure the return of estate property to Mr. Stuart.

C. The bankruptcy court did not err in holding that the City did not otherwise violate the automatic stay.

We agree with the bankruptcy court that the City did not violate any other subsection of § 362(a).

1. The City did not "continue" a proceeding against Mr. Stuart under § 362(a)(1).

[12] Section 362(a)(1) prohibits the "continuation . . . of a judicial, administrative, or other action or proceeding against the debtor . . . ." Mr. Stuart thinks that, in order to avoid the "continuation of" its action against him, the City had to quash the garnishment. We disagree.

In *Eskanos & Adler, P.C.*, the Ninth Circuit held that a creditor must "dismiss or stay" pending collection actions:

> The continuation against judicial actions includes the maintenance of collection actions filed in state court. . . . A party violating the automatic stay, through continuing a collection action in a nonbankruptcy forum, must automatically **dismiss or stay such proceeding** or risk possible sanctions for willful violations pursuant to § 362(h).

309 F.3d at 1214 (emphasis added). The court emphasized that "the automatic stay requires an immediate freeze of the status quo by precluding and nullifying post-petition actions." *Id.*

This leaves the question whether it is sufficient to simply stay a case or whether dismissal is required. In the *Eskanos* case, the creditor filed a new action against the debtor after the petition date. The Ninth Circuit repeatedly referred to it as a "post-petition collection action." *Id.* at 1213. In such a case, the creditor has disturbed the status quo existing at the petition date by filing a new lawsuit. In order to restore the status quo, the creditor must dismiss the postpetition action. But in this case, the action was pending and the garnishment existed when Mr. Stuart filed his petition. Leaving the action and the garnishment in place did not disturb the status quo. *Cf. Perryman v. Dal Poggetto (In re Perryman)*, 631 B.R. 899, 903–04 (9th Cir. BAP 2021) (holding that a postpetition " 'continuance' or status hearing in a stayed nonbankruptcy proceeding" is not a "continuation of a judicial proceeding" under § 362(a)(1) because those "actions did not disturb the status quo"). Therefore, staying the case was sufficient to avoid "continuation" in violation of § 362(a)(1).

The City fulfilled its duty by taking prompt steps to stay the case. Mr. Stuart filed his petition on a Saturday; the City learned of the bankruptcy petition on the following Monday or Tuesday, May 6 or 7; and it filed a motion to stay the State Court Action on Tuesday, May 7.[10]

Mr. Stuart argues that the City "actively objected to the release of funds." This misstates the record. Although the City stated that it opposed quashing the writ of garnishment, it indicated in e-mail correspondence and twice in its response to Mr.

10. Mr. Stuart further argues that the City was "disingenuous" when it filed the motion for stay, because the State Court Action was already stayed by a previous order. To the contrary, the City's actions suggest that it understood its duty to discontinue any prepetition collection action and sought to make clear that it intended to comply with the automatic stay.

Stuart's motion "that it does not oppose release of the funds by [BOA] and does not object to a court order instructing [BOA] to release the funds."

Mr. Stuart argues that a creditor has an affirmative obligation to dismiss an existing writ of garnishment. He primarily relies on *In re Mims*, 209 B.R. 746 (Bankr. M.D. Fla. 1997), where the bankruptcy court held that the creditor had an affirmative duty to release bank accounts frozen pursuant to a prepetition writ of garnishment. The court said that "a garnishment action is unique insofar as it requires affirmative action to comply with the requirements of the automatic stay." *Id.* at 748.

In contrast, the bankruptcy court for the Middle District of Pennsylvania held in *Margavitch* that "§ 362(a)(1) was not violated because Defendants did nothing to further or 'continue' the garnishment process. Nothing has been alleged in the record indicating that the status quo was somehow changed regarding the [bank accounts] after the bankruptcy petition was filed." 2021 WL 4597760, at *8.

[13] Neither party has cited any binding Ninth Circuit authority that dictates whether a creditor has an affirmative duty to dismiss a prepetition writ of garnishment under § 362(a)(1), and we have found none. We think that the decision in *Margavitch* comports more closely than *Mims* with the Ninth Circuit's holding in *Eskanos*, which merely requires a creditor to "dismiss or stay" a judicial proceeding. In this case, the City promptly sought a stay of the State Court Action and took no further steps to advance that case. The failure to affirmatively release the frozen bank account funds, in and of itself, is not a violation of § 362(a)(1). *See id.*[11]

2. The City did not seek to enforce a prepetition judgment against Mr. Stuart under § 362(a)(2).

[14] Mr. Stuart contends that the City violated § 362(a)(2) when it sought to enforce the State Court Judgment by continuing the writ of garnishment. We disagree.

Subsection (a)(2) prohibits "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title[.]" § 362(a)(2).

Mr. Stuart again argues that the City opposed his efforts to quash the writ of garnishment. But as we discussed above, the City took no position on whether the state court should order the release of the account funds. The bankruptcy court was correct that the City did not do anything to enforce the State Court Judgment. *See In re Margavitch*, 2021 WL 4597760, at *8 ("[T]he failure to withdraw a valid prepetition attachment lien cannot be construed as, or equated with, taking an affirmative action to enforce a judgment. The Court concludes that Defendants' passive maintenance of its valid pre-petition attachment lien in no way changed the status quo and therefore, did not constitute a violation of § 362(a)(2).").

Mr. Stuart claims that the City's stated intent clearly indicated that it meant to pursue the State Court Judgment in viola-

11. Many of Mr. Stuart's arguments conflate a judicial proceeding with the retention of estate property. While discussing subsection (a)(1), he cites cases imposing on creditors an obligation to return property under subsection (a)(3). For example, he relies on both *In re Hernandez*, 468 B.R. 396 (Bankr. S.D. Cal.), *aff'd*, 483 B.R. 713 (9th Cir. BAP 2012), and *In re Johnson*, 262 B.R. 831 (Bankr. D. Idaho 2001). However, those cases cited *Del Mission* and other cases relying on § 362(a)(3) regarding the retention of estate property; those cases were effectively overturned by the U.S. Supreme Court's *Fulton* decision.

tion of the automatic stay. The City represented to the state court that it was concerned that, if Mr. Stuart obtained the frozen funds, he could quickly dismiss his bankruptcy case, thus frustrating the purpose of the garnishment. The City's concern with a hypothetical situation is irrelevant; it only reflected the City's desire to maintain the status quo.

Mr. Stuart relies on the Ninth Circuit's unpublished decision in *Bayley*. In that case, the Ninth Circuit upheld the finding of a stay violation under subsection (a)(2), where the creditor "direct[ed] the Sheriff to hold the levied funds . . . ." 678 F. App'x 593. In contrast, in the present case, the City did not direct BOA as to the postpetition disposition of the frozen funds and in fact repeatedly stated that it would not oppose the release of the funds. In other words, unlike in *Bayley*, the City did not take any affirmative action to enforce or further the garnishment.

Similarly, *In re Banks*, 253 B.R. 25 (Bankr. E.D. Mich. 2000), is distinguishable. The creditor obtained relief from the automatic stay but was unaware that the order lifting the stay was itself stayed for ten days pursuant to Rule 4001(a)(3). The creditor obtained and executed on a writ of restitution during the ten-day period and refused to vacate it. In other words, the creditor took action postpetition in violation of the automatic stay (before the bankruptcy court's order lifting the automatic stay went into effect). The bankruptcy court found that the creditor violated § 362(a)(1). *Id.* at 30. In the present case, the City both obtained and executed the writ of garnishment prepetition, which did not violate the automatic stay. It did not take any action postpetition to enforce the writ.

3. The City did not take any act to obtain estate property under § 362(a)(3).

[15] Mr. Stuart further argues that the City's state court filings constituted an act to obtain possession of the garnished funds. He contends that the City had power and authority over the frozen funds, so it had an affirmative obligation to withdraw the writ and make the funds available to Mr. Stuart. We agree with the bankruptcy court that the City took no "act" in violation of the automatic stay.

Section 362(a)(3) prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]"

As the bankruptcy court correctly held, *Fulton* precludes Mr. Stuart's argument that the City took any act to "exercise control over property of the estate." We also agree with the bankruptcy court that the City did not take any "act to obtain possession of property of the estate" when it did not immediately move to quash the writ of garnishment. On the petition date, the City had already obtained the writ of garnishment, and BOA had frozen the three bank accounts. There was no further "act to obtain possession." The City's acts (or omissions) merely preserved the status quo.[12]

12. We emphasize that the City's garnishment did not capture any more funds postpetition. The result would likely be different, as in certain cases cited by Mr. Stuart, *e.g., In re LeGrand,* 612 B.R. 604 (Bankr. E.D. Cal. 2020), if this were a wage garnishment which attached to the debtor's postpetition wages or a bank account garnishment that encompassed postpetition deposits to the account. Here, neither BOA nor the City was actively collecting any debt from Mr. Stuart; staying the State Court Action and maintaining the freeze on the accounts was merely a continuation of the status quo as it existed on the petition date and collected nothing further from Mr. Stuart.

4. The City did not take any other "act" against Mr. Stuart in violation of § 362(a)(6).

[16] Finally, Mr. Stuart argues that the City's refusal to dismiss the writ of garnishment and desire to freeze the bank accounts indefinitely violated subsection (a)(6). For the reasons discussed above, we disagree.

Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]" Mr. Stuart repeats arguments that he raised in connection with the other subsections.

As we explained above, the City did not do anything to enhance its position and only sought to maintain the status quo. *See In re Margavitch*, 2021 WL 4597760, at *7 ("[T]he mere retention of a valid pre-petition state court attachment or lien without more, is not a violation of § 362(a)(4)-(6)."). The City did not take any act to "collect, assess, or recover" a claim against Mr. Stuart, because everything was stayed. Further, it stated multiple times that it did not oppose the release of the frozen funds.

CONCLUSION

Because the City immediately asked the state court to stay the case and did nothing to change the status quo that existed when Mr. Stuart filed his bankruptcy petition, it did not violate the automatic stay. We AFFIRM.

IN RE: FRIENDS OF CITRUS AND the NATURE COAST, INC., Debtor.

Case No. 8:19-bk-07720-MGW

United States Bankruptcy Court, M.D. Florida, Tampa Division.

Signed September 29, 2021

Background: Purchaser of debtor's in-patient hospice facility in Florida, which purchase included a representation and warranty by debtor that facility was in compliance with all relevant state and federal laws and regulations, filed proof of claim for indemnification for the cost of a new generator since the existing generator was not big enough to run the facility's HVAC system if the power went out. Debtor objected to the proof of claim.

Holdings: The Bankruptcy Court, Michael G. Williamson, J., held that neither Florida nor federal law required hospice to have a generator that could run its HVAC system.

Objection sustained.

1. Health ⚿276

In-patient hospice facility was not required by Florida law to have a generator that could run its HVAC system; although Florida law required hospices to have a comprehensive emergency management plan that provides for continuing hospice services in the event of an emergency, Florida's Agency for Healthcare Administration (AHCA) chose not to impose a generator mandate for hospices, and nothing in Florida's building code required a hospice's generator to be sufficient to maintain safe temperatures. Fla. Stat. Ann. § 400.610(1)(b); Fla. Admin. Code Ann. r. 59A-38.018.

634 B.R. 983
United States Bankruptcy Court, S.D. Ohio, Western Division.

IN RE: GYPC, INC., Debtor.
Donald F. Harker, III, Chapter 7 Trustee, Plaintiff,
v.
Eastport Holdings, LLC, Defendant.

Case No. 17-31030
|
Adv. No. 19-3054
|
Signed November 22, 2021

Synopsis

Background: In Chapter 7 case converted from Chapter 11, trustee brought adversary proceeding seeking to enforce automatic stay against parent company that had granted corporate debtor a preferred membership interest (PMI) in parent as part of purchase price when its wholly owned subsidiary purchased substantially all of debtor's assets prepetition, contingent on calculations and adjustments to be made after sale closed, and seeking to obtain declaration that parent's postpetition actions, including sending letter reporting shortfall in contractually required working capital and demanding payment and sending second letter reporting calculations of contractually required adjustments to PMI arising out of prepetition sale of debtor's assets, were in violation of the stay and void, and seeking to recover damages. Parties cross-moved for summary judgment.

Holdings: The Bankruptcy Court, Guy R. Humphrey, J., held that:

[1] corporate entities did not have private right of action for violation of stay, and had to proceed on civil contempt theory;

[2] objective standard applied in civil contempt proceeding when determining whether parent willfully violated automatic stay;

[3] debtor's PMI in parent of purchaser constituted property of the bankruptcy estate, subject to requirements of asset purchase agreement (APA);

[4] letter reporting shortfall in contractually required working capital and demanding payment violated the stay;

[5] doctrine of recoupment did not apply to exempt from stay letter reporting shortfall in contractually required working capital and demanding payment;

[6] letter reporting shortfall in contractually required working capital and demanding payment could not form basis to find parent in contempt; and

[7] patent violated stay by proceeding postpetition in state court action seeking indemnification and damages for debtor's failure to provide required working capital.

Motions granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (36)

[1] **Bankruptcy** Judgment or Order

In order to prevail on summary judgment motion, the movant, if bearing the burden of persuasion at trial, must establish all elements of its claim. Fed. R. Civ. P. 56; Fed. R. Bankr. P. 7056.

[2] **Bankruptcy** Judgment or Order

All inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing motion for summary judgment. Fed. R. Civ. P. 56; Fed. R. Bankr. P. 7056.

[3] **Bankruptcy** Enforcement of Injunction or Stay

"Willful" violation of the automatic stay occurs when the creditor knew of the stay and violated the stay through an intentional act, even if the creditor did not specifically intend to violate the stay. 11 U.S.C.A. § 362(k).

[4] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Contempt

Because corporate entities do not have the benefit of a statutory private right of action for violation of the automatic stay, they must proceed on civil contempt theory pursuant to Bankruptcy Code's provision allowing court to issue "necessary or appropriate" orders to carry out provisions of title 11. 11 U.S.C.A. §§ 105, 362.

[5] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Knowledge, intent, and good faith

Objective standard applied in civil contempt proceeding pursuant to Bankruptcy Code's provision allowing court to issue "necessary or appropriate" orders to carry out provisions of title 11 when determining whether parent company, that had granted corporate debtor a preferred membership interest (PMI) in parent as part of purchase price when its wholly owned subsidiary purchased substantially all of debtor's assets prepetition, willfully violated automatic stay by sending letter postpetition reporting shortfall in contractually required working capital and demanding payment and a second letter reporting calculations of contractually required adjustments to PMI arising out of prepetition sale of debtor's assets. 11 U.S.C.A. §§ 105, 362.

[6] **Bankruptcy** Contempt

Bad faith may be relevant in certain contempt proceedings when party acts in bad faith, but it need not be proven under objective standard court applies to violations of discharge injunction. 11 U.S.C.A. §§ 105, 524.

[7] **Bankruptcy** Automatic Stay

The automatic stay exists to preserve what remains of the debtor's insolvent estate and provide a systematic equitable liquidation procedure for all creditors, thereby preventing a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. 11 U.S.C.A. § 362.

[8] **Bankruptcy** Particular Items and Interests

Chapter 7 debtor corporation's preferred membership interest (PMI) in parent company, granted to debtor as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition, constituted property of the bankruptcy estate, subject to requirements of asset purchase agreement (APA). 11 U.S.C.A. § 541.

[9] **Bankruptcy** Interest of debtor in general

Bankruptcy Code provision governing property of the estate wields a broad scope and includes every conceivable interest of the debtor as property of the estate. 11 U.S.C.A. § 541.

[10] **Bankruptcy** Particular Items and Interests

Bankruptcy Code's expansive definition of property of the estate includes membership interests in limited liability companies (LLC). 11 U.S.C.A. § 541.

[11] **Bankruptcy** Title and Rights of Trustee or Debtor in Possession, in General

Breadth of Bankruptcy Code's definition of property of the estate is not without boundaries; trustee's interest in any property is limited to that held by the debtor on the petition date. 11 U.S.C.A. § 541.

[12] **Bankruptcy** Notice to creditors; commencement

Automatic stay maintains the property interests of the debtor as they existed at the commencement of the case. 11 U.S.C.A. §§ 362, 541.

[13] **Bankruptcy** Proceedings, Acts, or Persons Affected

Letter sent by parent company to Chapter 7 debtor corporation that had preferred membership interest (PMI) in parent as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition, reporting shortfall in contractually required working capital and demanding payment, and sent far outside time parameters provided for by asset purchase agreement (APA) and after debtor's bankruptcy was filed, violated the automatic stay. 11 U.S.C.A. § 362.

[14] **Set-off and Counterclaim** Recoupment or reconvention

Set-off and Counterclaim Equitable Set-off

Key difference between “setoff” and “recoupment” is that recoupment arises out of single transaction.

[15] **Set-off and Counterclaim** Recoupment or reconvention

"Recoupment" allows a defendant to reduce the amount of a plaintiff's claim to the extent that the defendant has a valid defense against the plaintiff which arose out of the same transaction as the plaintiff's claim.

[16] **Set-off and Counterclaim** Recoupment or reconvention

Recoupment is equitable in nature and is based on the premise that a defendant should be entitled to show that, because of matters arising out of the transaction sued on, he or she is not liable in full for the plaintiff's claim.

[17] **Bankruptcy** Set-off or recoupment in general

Bankruptcy trustee takes property of estate subject to rights of recoupment.

[18] **Bankruptcy** Set-off or recoupment in general

Although recoupment is typically used defensively after plaintiff or debtor has raised claims against defendant or creditor, creditor may take offensive to adjudicate its recoupment rights; the key is that the action of the creditor must be to reduce or eliminate a debt which the creditor may otherwise owe to the debtor.

[19] **Bankruptcy** Set-off against claim

Recoupment is "defensive" from the perspective that it is sought to reduce the debt which the creditor may otherwise owe to the debtor and is limited to reducing that debt or zeroing out that debt, but not recovering affirmatively against the plaintiff or debtor.

[20] **Bankruptcy** Set-offs and counterclaims; cross claims

To the extent that creditor is merely attempting to exercise a right of recoupment against debtor, stay relief is not required. 11 U.S.C.A. § 362.

[21] **Bankruptcy** Set-offs and counterclaims; cross claims

Doctrine of recoupment did not apply to exempt from the automatic stay a letter sent postpetition by parent company to Chapter 7 debtor corporation that had preferred membership interest (PMI) in parent as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition, which reported shortfall in contractually required working capital and demanded payment; the letter did not seek to reduce or eliminate a debt, rather, it was a simple demand for payment of the working capital shortfall. 11 U.S.C.A. § 362.

[22] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Knowledge, intent, and good faith

Letter sent postpetition and in violation of the automatic stay by parent company to Chapter 7 debtor corporation that had preferred membership interest (PMI) in parent as part of purchase price when parent's wholly owned subsidiary

purchased substantially all of debtor's assets prepetition, which reported shortfall in contractually required working capital and demanded payment, could not form basis to find parent in contempt pursuant to Bankruptcy Code's provision allowing court to issue "necessary or appropriate" orders to carry out provisions of title 11, as there was no evidence that parent was aware of the bankruptcy when the letter was sent. 11 U.S.C.A. §§ 105, 362.

[23] **Bankruptcy** Proceedings, Acts, or Persons Affected

Not all communications from a creditor to a debtor are prohibited by the automatic stay. 11 U.S.C.A. § 362.

[24] **Bankruptcy** Co-debtors and third persons

Automatic stay did not extend to two nondebtor principals of Chapter 7 debtor corporation that was granted a preferred membership interest (PMI) in parent company as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition, in parent's state court action seeking indemnification and damages for debtor's failure to provide required working capital, as debtor was not a party, and neither debtor nor trustee sought to enjoin the state court action in the Bankruptcy Court despite having notice of the state court action. 11 U.S.C.A. §§ 105, 362.

[25] **Bankruptcy** Property and claims subject to stay

Bankruptcy Co-debtors and third persons

Automatic stay only applies to acts against the debtor. 11 U.S.C.A. § 362.

[26] **Bankruptcy** Carrying out provisions of Code

Bankruptcy Injunction or stay of other proceedings

Bankruptcy Co-debtors and third persons

Extending the automatic stay against nondebtors for unusual circumstances requires an injunction under Bankruptcy Code's provision allowing court to issue "necessary or appropriate" orders to carry out provisions of title 11, because it would apply the stay to parties not included by the plain language of Code's provision governing the stay. 11 U.S.C.A. §§ 105, 362.

[27] **Bankruptcy** Co-debtors and third persons

Automatic stay may be implicated in third-party actions under limited circumstances. 11 U.S.C.A. § 362(a)(3).

[28] **Bankruptcy** Co-debtors and third persons

Actions against nondebtors prohibited by automatic stay are not limited to exercising direct control over estate property but acts that have an "adverse impact" on estate property. 11 U.S.C.A. § 362(a)(3).

[29] **Res Judicata** Claim preclusion in general

For claim preclusion to apply under Tennessee law, the suit must be between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit.

[30] **Res Judicata** Collateral estoppel and issue preclusion in general

For issue preclusion to apply under Tennessee law, (1) the precise issue must have been raised and actually litigated in the prior proceedings, (2) the determination of the issue must have been necessary to the outcome of the prior proceedings, (3) the prior proceedings must have resulted in a final judgment on the merits, and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

[31] **Bankruptcy** Co-debtors and third persons

Parent company that had granted Chapter 7 debtor corporation a preferred membership interest (PMI) in parent as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition violated automatic stay by proceeding postpetition in state court action against debtor's two principals, seeking indemnification and damages for debtor's failure to provide required working capital; state court action addressed the ultimate resolution of whether the potentially most significant estate asset, the PMI, was of any value, and parent was aware that to accord full relief in the state court action, debtor might become a necessary party. 11 U.S.C.A. § 362(a)(3).

[32] **Bankruptcy** Co-debtors and third persons

Bankruptcy Contempt

Violation of automatic stay by parent company that had granted Chapter 7 debtor corporation a preferred membership interest (PMI) in parent as part of purchase price when parent's wholly owned subsidiary purchased substantially all of debtor's assets prepetition, by proceeding postpetition in state court action against debtor's two principals seeking indemnification and damages for debtor's failure to provide required working capital, which action addressed the ultimate resolution of whether the potentially most significant estate asset, the PMI, was of any value, was not contemptuous; while liability could ultimately flow to debtor, the pursuit of those contractual rights was not unlawful per se. 11 U.S.C.A. §§ 105, 362(a)(3).

[33] **Bankruptcy** Co-debtors and third persons

Violations of automatic stay based on litigation or other action against non-debtor parties are necessarily fact-specific analyses. 11 U.S.C.A. § 362(a)(3).

[34] **Contempt** Nature and Elements of Contempt

Injunction Specificity, vagueness, overbreadth, and narrowly-tailored relief

Contempt is a severe remedy, and principles of basic fairness require that those enjoined receive explicit notice of what conduct is outlawed.

[35] **Bankruptcy** Validity of acts in violation of injunction or stay

Actions taken in violation of the automatic stay are invalid and voidable, since void actions are incapable of latter cure or validation. 11 U.S.C.A. § 362.

[36] **Contempt** Indemnity to Party Injured

Court does not have the authority to issue punitive damages as a civil contempt remedy.

Attorneys and Law Firms

***987** Nick V. Cavalieri, Bailey Cavalieri, Matthew T. Schaeffer, Columbus, OH, for Defendant.

DECISION (1) GRANTING IN PART AND DENYING IN PART DEFENDANT EASTPORT HOLDINGS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT I; (2) GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I; AND (3) DENYING PLAINTIFF'S MOTION AS TO COUNTS II AND III (DOCS. 40, 48)

Guy R. Humphrey, United States Bankruptcy Judge

I. Introduction

In this dispute, the Chapter 7 Trustee of GYPC, Inc. ("GYPC") seeks to enforce the automatic stay against Eastport Holdings, LLC ("Eastport"), obtain a declaration that its post-petition actions are in violation of the automatic stay and void, and to recover damages. GYPC filed a voluntary petition for relief under Chapter 11 in 2017. In 2019, upon motion of the United States Trustee, this court ordered the case converted to Chapter 7.

Pre-petition, GYPC sold substantially all of its assets to Eastport's wholly owned subsidiary, Mindstream Media, LLC ("Mindstream"). As part of the purchase price, Eastport granted GYPC a preferred membership interest ("PMI") in Eastport, contingent on several calculations and adjustments to be made after the sale closed. After the bankruptcy filing, Eastport sent two letters that contained reports of its calculations and the resulting adjustments to GYPC's membership interest.

The first letter, sent in August 2017, explained that Eastport discovered a significant shortfall in the estimated working capital below the contractually required minimum and demanded immediate payment. GYPC's counsel informed Eastport of the bankruptcy filing in a reply letter in early September. In the second letter, sent in October, Eastport reported that the acquired business had failed to meet the contractual performance targets during the measurement period, leaving GYPC with no remaining membership interest after the adjustments were applied. The Chapter 7 Trustee disputes these adjustments and maintains that GYPC owns the PMI.

In early 2018, Eastport filed a Tennessee state court lawsuit against GYPC's two principals, primarily to seek indemnification and damages for GYPC's failure to provide the required working capital (the "State Court" or "State Court Action"). ***988** After the Trustee filed this adversary proceeding, Eastport asked this Court to abstain from the State Court Action and dismiss this adversary proceeding, suggesting that GYPC could join the State Court Action to resolve its claims against Eastport. Eastport also suggested that the claims in the State Court Action are closely related to those raised in the Trustee's complaint

in this adversary proceeding. This Court denied Eastport's motion because, among other reasons, the claims presented require a determination as to whether the PMI remains property of the bankruptcy estate.

Through this decision, the Court finds that Eastport violated the automatic stay when it sent the August 2017 letter reporting a shortfall in the contractually required working capital and demanding payment but cannot be held liable for damages. The Court further finds that Eastport did not violate the automatic stay when it sent the October 2017 letter reporting its calculations of contractually required adjustments to the PMI arising out of the pre-petition sale of GYPC's assets. Eastport did violate the automatic stay by prosecuting the State Court Action against GYPC's insiders, but cannot be held liable for damages. In addition, the decision explains why the validity of the PMI cannot be determined under the governing sale agreement without resolving certain disputed facts. Finally, the decision explains why the court cannot determine on this summary judgment record that Eastport committed a breach of contract in failing to make certain post-closing payments.

The Trustee's complaint (Doc. 1) has three counts: Count I concerns the stay violation, Count II seeks a determination of the value of the PMI, and Count III asserts a claim for breach of contract. Eastport filed a motion for partial summary judgment as to Count I. The Chapter 7 Trustee, Donald F. Harker, III (the "Trustee") has moved for summary judgment on all three counts in the complaint. For the reasons to be explained, the court grants in part and denies in part Eastport's motion for partial summary judgment, and grants in part and denies in part the Trustee's motion as to Count I, and denies the Trustee's motion for summary judgment as to Counts II and III.

II. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference (Amended General Order 05-02) of the District Court for the Southern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O), and this court has constitutional authority to enter a final judgment.

III. Summary Judgment Standard

[1] **[2]** Federal Rule of Civil Procedure 56(a), made applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure 7056, sets forth the standard to address the parties' filings. It states, in part, that a court must grant summary judgment to the moving party if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In order to prevail, the movant, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). All inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)).

*989 IV. Effect of *Taggart v. Lorenzen* on the Evidentiary Standard for Damages for Automatic Stay Violations Involving Non-Individual Debtors

[3] **[4]** Damages for stay violations in cases involving individuals are determined under 11 U.S.C. § 362(k). See also 11 U.S.C. § 101(41) (defining the term "persons" as including "individuals, partnership, and corporation"). A willful violation of the stay under § 362(k) occurs when the creditor knew of the automatic stay and violated the stay through an intentional act,

even if the creditor did not specifically intend to violate the stay. *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999); *Squire v. Stringer*, 820 F. App'x. 429, 434 (6th Cir. 2020) ("Here, Creditors knew of the § 362 stay and pursued their state court collection action anyway, without prior approval from the bankruptcy court, in willful violation of the stay."). Because corporate entities such as GYPC do not have the benefit of a statutory private right of action for a stay violation, they must proceed under a § 105 civil contempt theory. *Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. Inc. (In re Elder-Beerman Stores Corp.)*, 197 B.R. 629, 632 (Bankr. S.D. Ohio 1996).

Recently, the Supreme Court resolved the standard to be applied in determining whether a creditor may be held in civil contempt for violating a debtor's discharge injunction. *Taggart v. Lorenzen*, —— U.S. ——, 139 S. Ct. 1795, 204 L.Ed.2d 129 (2019). In a unanimous decision, the Court rejected both subjective and strict liability standards and, instead, applied an objective one. *Id.* at 1801-03. It determined that a bankruptcy court may only hold a creditor in civil contempt for violating the discharge injunction if there is no fair ground of doubt as to whether the discharge injunction barred the creditor's conduct. *Id.* at 1799. No fair ground of doubt was defined as "when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." *Id.* at 1801. The standards under §§ 524 and 105(a) of the Bankruptcy Code "bring with them 'old soil' " on how injunctions are enforced. *Id.* This "old soil includes the 'potent weapon of contempt.' " *Id.* (quoting *Longshoremen v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76, 88 S.Ct. 201, 19 L.Ed.2d 236 (1967)).

With *Taggart* having applied the objective standard to contempt proceedings in the context of discharge injunction litigation, the issue arises as to whether that standard applies to the similar stay violation civil contempt proceedings. The Court noted that "[t]his standard reflects that civil contempt is a severe remedy, and that the principles of basic fairness require[e] that those enjoined receive explicit notice of what conduct is outlawed before being held in civil contempt." *Id.* at 1801-02 (cleaned up).

At least in the Sixth Circuit, it is beyond debate that the § 362(k) willful standard for proving a debtor is entitled to damages for a stay violation is easier to prove than the *Taggart* discharge violation standard. Prior to *Taggart*, the courts within the Sixth Circuit (and in many other jurisdictions) applied what *Taggart* described as a standard "akin to strict liability." *Id.* at 1803. Courts sanctioned creditors for violations of the stay if the creditor knew about the stay (i.e. that the debtor filed the bankruptcy), yet intentionally engaged in the conduct that violated the stay, even if the creditor subjectively believed that his conduct would not violate the stay. *Id.* at 1803-04; *Sharon*, 234 B.R. at 687. Courts commonly refer to this principle as a "willful" violation of the stay. See *id.* In a decision shortly before *Taggart* was decided, ***990** the Sixth Circuit at least implicitly approved this standard in a case arising out of this district involving a corporate debtor. *Lowe v. Bowers (In re Nicole Gas Prod.)*, 916 F.3d 566, 578-79 (6th Cir. 2019) ("The Bankruptcy Court below did not simply conclude that the Fulson Parties had fumbled their way into violating the automatic stay – it deemed their actions willful ... [T]the Bankruptcy Court found that Fulson, Sanders, and Lowe were aware of the automatic stay, and had intentionally taken actions that violated it, regardless of their good faith or lack thereof.").

The *Taggart* Court declined to determine whether the language in § 362(k)(1) supports the use of a strict liability willfulness standard in the context of an automatic stay violation. In distinguishing automatic stay violation proceedings from discharge violation proceedings, the Court explained:

> An automatic stay is entered at the outset of a bankruptcy proceeding. The statutory provision that addresses the remedies for violations of automatic stays says that "an individual injured by any willful violation" of an automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11

U. S. C. § 362(k)(1). This language, however, differs from the more general language in section 105(a). The purposes of automatic stays and discharge orders also differ: A stay aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run, whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period. These differences in language and purpose sufficiently undermine Taggart's proposal to warrant its rejection. (We note that the automatic stay provision uses the word "willful," a word the law typically does not associate with strict liability but " 'whose construction is often dependent on the context in which it appears.' " We need not, and do not, decide whether the word "willful" supports a standard akin to strict liability.)

Taggart, at 1803-04 (citations omitted). The court is not faced with an individual debtor and therefore need not comment on continued applicability of the familiar standard under § 362(k). The Supreme Court raised that issue in dicta but did not decide it, and cases such as *Sharon* provide support to apply that standard for such cases. But as a corporate debtor, GYPC cannot use § 362(k), and like a discharge violation action, must pursue a contempt theory. *Nicole Gas Prod.*, 916 F.3d at 578 (stating, in a stay violation case involving a corporate debtor, that "[v]violating the automatic stay constitutes civil contempt."). See also *Forson v. Nationstar Mortgage, LLC*, 549 B.R. 866, 869 n.6 (Bankr. S.D. Ohio 2016) (noting that there is not a private right of action for violations of the discharge injunction, and that § 362(k) applies to individual debtors).

[5] **[6]** To be sure, Taggart does not discuss non-individual debtor stay violations and acknowledges that different policy imperatives exist in addressing a violation of the automatic stay rather than a discharge violation. *Taggart*, at 1803-04. See also *Windstream Holdings, Inc. v. Charter Comm's (In re Windstream Holdings, Inc.)*, 627 B.R. 32, 40 (Bankr. S.D.N.Y. 2021) ("[I]t should be clear from the nature of [Taggart's] reservation regarding breaches of the automatic stay that applying a standard that is more *lenient* to potential violators of the automatic stay than the objective 'fair ground of ***991** doubt' approach is highly unlikely."). [1] But *Taggart* fundamentally is contrasting § 362(k), a congressionally approved private right of action for individuals, and the separate and more general language under § 105 supporting contempt proceedings. As Congress has chosen to limit any private right of action for stay violations to those against individuals, the court believes it must apply *Taggart* to § 105 contempt actions not covered by § 362(k) (or another private right of action). See e.g. *In re Caldwell*, Case No. 18-32346-jda, 2019 WL 5616908, at *2-3, 2019 Bankr LEXIS 3397 (Bankr. E.D. Mich. Oct. 30, 2019) (applying the settled willful stay violation standard for a § 362(k) action, but the *Taggart* contempt standard for a violation of a turnover order).

1 As explained in *In re Windstream Holdings, Inc.*, applying this more lenient standard to parties violating the stay would be based on specific law in the Second Circuit perhaps suggesting subjective malice or a lack of good faith may be required for a contempt finding for actions in violation of the stay. *Windstream Holdings*, 627 B.R. 32, 41 n.5 (Bankr. S.D.N.Y. 2021) (discussing pre-*Taggart* case law). The issue in this case is essentially the opposite, whether pre-*Taggart* law in the Sixth Circuit that is less favorable to creditors than the *Taggart* standard can still stand under a civil contempt remedy. See *Lowe v. Bowers (In re Nicole Gas Prod.)*, 916 F.3d 566, 578-79 (6th Cir. 2019) (applying the willful stay violation standard in a case involving a corporate debtor). Taggart recognizes that bad faith may be relevant in certain contempt proceedings when a party acts in bad faith, but it need not be proven under the objective standard the Court applies to violations of the discharge injunction. *Taggart v. Lorenzen*, —— U.S. ——, 139 S. Ct. 1795, 1802-04, 204 L.Ed.2d 129 (2019)

Stated differently, corporate debtors cannot pursue stay violations under the willful "akin to strict liability" stay violation standard because it is inconsistent with the conclusion in *Taggart* that damages for contempt under § 105, and the private

right of action supporting damages under § 362(k) have different standards. *Id.* at 1804-05. But compare *In re Spiech Farms, LLC*, 603 B.R. 395, 408 n.22 (Bankr. W.D. Mich. 2019) ("This court does not read *Taggart* to change the Sixth Circuit's standard for determining whether a creditor can be held in contempt for violating the automatic stay.") and *Suh v. Anderson* (*In re Jeong*), BAP No. CC-19-1244-STaF, 2020 WL 1277575, at *4 n.3, 2020 Bankr. LEXIS 714, at *10-11 n. 3 (B.A.P. 9th Cir. Mar. 16, 2020) (applying Taggart's "no fair ground of doubt" standard to a violation of a stay involving a non-individual debtor, and further noting this conclusion was consistent with Ninth Circuit law applying the contempt standard for stay and discharge violations). See also *In re Freeland*, No. 19-32309-pcm7, 2020 WL 4726580, at *2 n.3, 2020 Bankr. LEXIS 2174, at *7 n.3 (Bankr. D. Ore. Aug. 12, 2020) (the court discussed the applicability of *Taggart* but found damages were appropriate under either standard, and also noted *In re Jeong* involved an application of § 362(k)).

For these reasons, the court will apply the *Taggart* standard in determining whether any stay violations committed by Eastport entitle GYPC to damages under a civil contempt theory.

V. Procedural History

GYPC's Chapter 11 case was converted to a Chapter 7 case on August 16, 2019 and the Trustee was appointed. Estate Doc. 219; Docket entry dated August 20, 2019. This adversary proceeding is now being prosecuted by the Trustee.

The Debtor filed the complaint in this adversary proceeding on April 30, 2019. On June 20, 2019 Eastport filed a motion asking the court to abstain from the matter and dismiss the proceeding. Doc. 13. In its ***992** motion, Eastport stated that the contractual rights at issue in this adversary proceeding are identical to those in the State Court Action. Eastport's reply brief states: "The Debtor's principals are already engaged in litigation in Tennessee arising out of the contract and they are alleging that [the] value of the PMI must be determined before determining their liability. Therefore, the Debtor had the perfect opportunity to join that litigation, but it chose not to – even though it agreed in the APA to Tennessee courts as having exclusive jurisdiction. The Trustee is welcome to join the suit in Tennessee." Doc. 23 at 4. This Court denied Eastport's motion on February 19, 2020. Doc. 27. In so doing, this court noted that "[t]he Tennessee Action is a related case in a Tennessee state trial court, with the primary objective being the determination of the parties' rights and obligations under the APA. Those determinations could likely have an effect on the value of the PMI." Doc. 27 at 7. Subsequently, Eastport filed the present motion for partial summary judgment. In response, the Trustee filed a cross-motion for summary judgment.

The Trustee asserts that the letters sent in 2017 violate the automatic stay because: a) Eastport did not obtain relief from the stay to send those letters; b) the PMI is property of the estate; and c) Eastport intended the letters to "extinguish the PMI" and deprive the bankruptcy estate of its value. Doc. 48. The Trustee further contends that the pursuit of the State Court Action is an additional stay violation and was also intended to extinguish the PMI. *Id.* at 16-17. The Trustee asserts that the letters and the State Court Action should be determined void. *Id.* at 20. The Trustee's further position is that since Eastport's actions – the sending of the August and October 2017 letters – are void, Eastport has failed to make timely adjustments to the PMI, rendering the entire value of the PMI "immediately due and payable to [GYPC]." Finally, the Trustee argues that Eastport has failed to pay certain payments due to GYPC under the PMI. *Id.* at 21.

By contrast, Eastport contends that the sending of the letters and the State Court Action did not violate the stay because these actions were taken in execution of the APA's terms. Doc. 40 Alternatively, Eastport states that its actions were permissible exercises of its right of recoupment. *Id.* As to the State Court Action, Eastport alleges that it "is within its rights to pursue the non-Debtor parties to the APA because the automatic stay does not protect them." *Id.* at 4.

VI. Factual Background

This factual background is based upon the Joint Stipulation of Facts (the "Stipulations") (Doc. 64), and the evidentiary materials submitted by the parties in support of their summary judgment motions. The court also takes judicial notice of the docket in this adversary proceeding and the related estate case. Finally, the court reviewed certain documents filed under seal, including the unredacted Asset Purchase and Sale Agreement (the "APA"), the Tennessee State Court Amended Complaint (the "Amended Complaint"), the Tennessee State Court Dismissal Order and letters dated August 3, 2017 (the "August 3, 2017 letter") and October 18, 2017 (the "October 18, 2017 letter") (collectively, "the 2017 letters") sent by Eastport to GYPC, Cummings, and Webb. [2]

[2] Christopher F. Cummings and Eric Webb are the two principals of GYPC.

A. The January 2016 Asset Sale

In January 2016, GYPC sold most of its assets to Mindstream for cash consideration (the "Purchase Price") pursuant to ***993** an Asset Purchase and Sale Agreement (the "APA"). [3] The parties to the APA included GYPC (the "Seller"), [4] Christopher Cummings and Eric Webb (the "Principals"), Mindstream (the "Buyer"), and Eastport (the "Parent"). APA at 1. The parties agreed to treat a portion of the Purchase Price as a preferred capital contribution that would provide GYPC with the PMI in Eastport, with the remainder of the Purchase Price to be paid by wire transfer at the closing. APA ¶¶ 1.5(b)(vi)(B), 1.2, 1.5(b)(vi)(A). They also agreed that the value of the PMI would be subject to express post-closing adjustments to account for the assumptions about future performance and working capital that were used to calculate the Purchase Price. APA ¶¶ 1.3 & 1.5(b)(vi). Specifically, the APA states that the "[p]urchase Price was calculated on the assumptions that (i) the Adjusted EBITDA earned by the Buyer during the Measurement Period will equal or exceed the Target EBITDA and (ii) the Seller would deliver to the Buyer Working Capital ... equal to the Net Working Capital Amount." APA ¶ 1.3.

[3] Unless otherwise provided, any capitalized terms used in this decision shall have the meaning ascribed to them in the APA.

[4] Consistent with the APA, General Yellow Page Consultants, Inc. changed its name to GYPC, Inc. post-sale. APA § 1.5(b)(xiv).

The APA provides a process for determining the adjustments and final value of the PMI, including a mechanism for resolving disagreements as to the calculation of the Adjusted EBITDA. Eastport was required to prepare calculations of both the Working Capital and the adjusted EBITDA. The APA states, "As promptly as practicable following the Closing Date (but in any event within sixty (60) days after such date), [Eastport] shall prepare and deliver to [GYPC] its calculation of the Working Capital delivered as part of the Acquired Assets as of the Closing Date (the "Working Capital Statement"). APA ¶ 1.3(c). The APA also states, "[A]s promptly as practical following the expiration of the Measurement Period [5] (but in any event within ninety (90) days of such date), the Parent shall prepare and deliver to [GYPC] its calculation of the Adjusted EBITDA for such period (the "EBITDA Statement") ...." APA ¶¶ 1.3(a), (d). GYPC was then required to review each received statement within thirty days and, if it had any objections, to notify Eastport in writing. APA ¶¶ 1.3(a), (d). The APA sale closed on January 12, 2016. Stipulations ¶¶ 7, 11.

[5] "Measurement Period" is defined as "the twelve (12) calendar month period commencing on the first day of the first calendar month immediately following the six (6) month anniversary of the Closing Date." APA Article XI Definitions. The Measurement Period expired on July 31, 2017. Stipulations ¶ 16.

B. GYPC's Bankruptcy and Subsequent Communications

On March 30, 2017 GYPC filed a voluntary Chapter 11 bankruptcy petition. The parties dispute when Eastport received notice of GYPC's bankruptcy filing. The parties do agree that GYPC initially did not schedule Eastport and Mindstream and they did not receive formal notice of GYPC's bankruptcy.

On August 3, 2017, approximately four months after the petition date, Eastport sent a letter to GYPC, Cummings, and Webb asserting that its audit established a shortfall in the working capital that GYPC was to provide to Mindstream and demanding immediate payment of the deficient amount. On September 1, 2017 GYPC's bankruptcy counsel sent a letter to Eastport advising of GYPC's bankruptcy filing and the imposition of the automatic stay. Doc. 48 (Ex. A).

***994** On October 18, 2017 Eastport sent another letter to GYPC's bankruptcy counsel, Cummings, and Webb setting forth Eastport's calculation of the adjusted EBITDA for the Measurement Period. The October 18, 2017 letter advised that the Target EBITDA exceeded the Adjusted EBITDA and, as a result, the APA required that the Preferred Capital Contribution and the PMI be reduced in full and deemed to have never been issued to GYPC. GYPC's bankruptcy counsel responded with a November 16, 2017 letter to representatives of Eastport advising them that GYPC viewed the October 18, 2017 letter as a stay violation and asserting that Eastport's "attempt to eliminate, reduce, or setoff GYPC, Inc.'s Preferred Membership Interest" was "void and of no consequence." Doc. 48 (Ex. B).

C. The Tennessee State Court Action

On February 16, 2018 Eastport and Mindstream filed a complaint initiating an action in the Circuit Court of Shelby County, Tennessee, for the Thirtieth Judicial District at Memphis against Cummings and Webb.[6] Stipulations, ¶¶ 27, 29; Ex. 1. GYPC was not a named party.

[6] The APA provides that it shall be governed by the laws of Tennessee and contains a forum selection clause providing for the litigation of disputes under the APA in the courts of Shelby County, Tennessee. APA ¶¶ 12.10, 12.11.

The State Court Action seeks to collect damages and attorney fees from Cummings and Webb on account of cash payments allegedly advanced to and received by GYPC. *Id*. Under the APA, invoices from third party advertising services incurred before the asset sale closing date were "Excluded Liabilities" to be paid or reimbursed by GYPC. *Id.*; APA ¶ 1.1(c). Eastport and Mindstream allege that GYPC or Cummings and Webb received advance cash payments from GYPC customers for third-party advertising services but failed to pay the invoices, leaving Mindstream and Eastport to do so. They allege that GYPC further failed to reimburse Mindstream and Eastport for these costs. *Id*.

The State Court dismissed the complaint on February 21, 2019, with leave to file an amended complaint. Stipulations, ¶ 28, Ex. 2. Eastport and Mindstream filed an amended complaint on March 22, 2019. Stipulations, ¶ 29; Ex. C. The amended compliant includes a count against Webb for violations of fiduciary duty, and against both defendants for unjust enrichment and fraud. Stipulations, Ex. C. Further, Mindstream and Eastport allege in the amended complaint that:

> Plaintiffs have complied with section 6.6(a) of the Agreement. On October 18, 2017, prior to filing the initial Complaint, pursuant to the Agreement, Plaintiffs informed GYPC that due to the fact that the Target EBITDA exceeded the Adjusted EBITDA earned by the Buyer during the Measurement Period, the Preferred Membership Interests were automatically deemed to have never been issued to GYPC .... Therefore, there was no Preferred Membership Interest from which any damages could be offset.

Stipulations, Ex. C. This inclusion appears to be an attempt to address the concerns of the State Court in its decision dismissing the original complaint. Stipulations, Ex. 2. In any event, as a result of this allegation, the Trustee asserts that Eastport is seeking "to exercise control of and make determinations related to property of the estate" and is thereby violating the automatic stay. *Id*.

at ¶ 66. And so, by requesting the State Court to determine that Eastport and Mindstream have complied with the requirements of the APA related to the adjustments to be made to ***995** the Purchase Price and Working Capital Amount, the Trustee asserts that Eastport is attempting to exercise control over the PMI.

VII. Legal Analysis

[7] The automatic stay exists to "preserve what remains of the debtor's insolvent estate and ... provide a systematic equitable liquidation procedure for all creditors ... thereby preventing a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 382-83 (6th Cir. 2001) (cleaned up).

Subject to certain exceptions provided by subsection (b), it stays, among other actions:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [.]

11 U.S.C. § 362(a).

A. The PMI Constitutes Property of the Bankruptcy Estate but Remains Subject to the Requirements of the APA.

[8] [9] [10] [11] The PMI, and all related rights and interests, became property of the estate upon the filing of GYPC's bankruptcy petition. 11 U.S.C. § 541(a)(1). Section 541 wields a broad scope and includes "every conceivable interest of the debtor" as property of the estate. *Church Joint Venture, L.P. v. Blasingame* (*In re Blasingame*), 986 F.3d 633, 638 (6th Cir. 2021) (quoting *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013)). This expansive definition includes membership interests in limited liability companies as estate property. *In re Denman*, 513 B.R. 720, 726 (Bankr. W.D. Tenn. 2014); *Hagemeyer v. Peachy Adventures, LLC* (*In re Neal*), Adv. No. 12-00654, 2013 Bankr. LEXIS 5738, at *10-11, 2013 WL 12108275, at *3 (Bankr. W.D. Tenn. Feb. 4, 2013); *AllCare Med. Servs., LLC v. Buzulencia* (*In re LaGroux*), Adv. No. 17-4045, 2019 Bankr. LEXIS 2585, at *23, 2019 WL 3933797, at *8-9 (Bankr. N.D. Ohio Aug. 19, 2019). Yet this breadth is not without boundaries. It is black letter law that a trustee's interest in any property is limited to that held by the debtor on the petition date. *Lawrence v. Ky. Transp. Cabinet* (*In re Shelbyville Rd. Shoppes, LLC*), 775 F.3d 789, 794 (6th Cir. 2015). Hence, the bankruptcy estate's interest in the PMI is burdened with the same limitations and restrictions under which GYPC held the PMI pre-petition. See *In re Ruetz*, 317 B.R. 549, 553 (Bankr. D. Colo. 2004) ("A bankruptcy trustee takes the rights of a debtor subject to any contingencies that may burden those rights. That only means that a bankruptcy trustee must wait for the unfolding of future events to know what, if anything, those rights are worth."). See also *LaGroux*, 2019 Bankr. LEXIS 2585 at *19, 2019 WL 3933797, at *6 ("The estate cannot possess anything more than the debtor itself did outside bankruptcy.... A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.") (cleaned up).

***996** **[12]** Since the automatic stay maintains the property interests of the debtor under § 541 as they existed at the commencement of the case, the Trustee takes the PMI subject to the contractual adjustments required by the APA. 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983); *Intermet Realty P'Ship v. First Pa. Bank. N.A. (In re Intermet Realty P'ship)*, 26 B.R. 383, 388 (Bankr. E.D. Pa. 1983) (filing of petition for reorganization does not expand rights of a debtor under option agreement that expired post-petition); *In re Clearpoint Bus. Res., Inc.*, 442 B.R. 292, 296 (Bankr. D. Del. 2010) ("A Chapter 11 filing does not expand a debtor's rights.").

B. The August 3, 2017 Letter

1. Eastport Violated the stay in Sending the August 3, 2017 Letter

[13] Eastport argues that, in sending the August 3, 2017 letter, it was complying with the terms of the APA in establishing the Working Capital Amount. The APA defined the Net Working Capital Amount, but required the reconciliation following the closing to determine what working capital was provided to Mindstream and Eastport under the APA. Specifically, the APA provided:

> As promptly as practicable following the Closing Date (but in any event within sixty (60) days after such date), [Eastport] shall prepare and deliver to [GYPC] its calculation of the Working Capital delivered as part of the Acquired Assets as of the Closing Date (the "Working Capital Statement"). As promptly as practical following the delivery of each of the foregoing statements [the Working Capital Statement and the EBITDA Statement] (but in each event no later [than] thirty (30) days thereafter), [GYPC] shall review the applicable statements.

APA, ¶ 1.3(a). But the August 3, 2017 letter was not sent until approximately eighteen (18) months after the Closing Date, rather than the sixty (60) days required by the APA, and GYPC's bankruptcy case intervened. Had this letter been sent in the sixty (60) day period called for by the APA, Eastport's argument would be more credible. Having waited eighteen (18) months after the Closing Date and then sending it post-petition, its efforts appear more focused on collecting a debt than concern over contractual compliance.

The August 3, 2017 letter was addressed to "GYPC, INC., ATTN: Eric Webb [and] Chris Cummings' and sent "Via UPS overnight and e-mail" delivery at the address of "222 NE Monroe, 8th Floor, Peoria, IL 61602" and provided, in pertinent part:

> As you are aware, we have found a shortfall in the working capital that was to be delivered on the purchase of Marquette Group. It became clear that there was a series of cutoff issues properly recording the liabilities of the company at the time of closing. Anecdotally you could see the impact as it continued to manifest itself in the delinquent AP. We have subsequently completed our audit which affirmed the belief and quantified the cash required to correct the working capital short fall. I have shared the results of the audit with Eric Webb and Traverse has confirmed the results with Cynthia Keller. It is my understanding that the results have been relayed to Mr. Cummings.
>
> The results of the audit were a total shortfall of $[amount omitted]. The results were primarily due to advance payments and the manner of recognition of deferred revenue. Additionally, there were no matching or corresponding cost of goods sold. As such, the cash at closing ***997** was overstated and left the working capital delivered at closing deficient ....
>
> As time is of the essence, Eastport is willing to accept the net impact of the shortfall which would reduce the payment to [amount omitted]. **The working capital shortfall must be paid to the Company. The payment and closing of the matter needs to be completed by the First of September. Payment will be made directly to Mindstream Media to be credited**

> **to the Marquette financials.** We will have Ms. Keller use those funds to pay off the corresponding AP which is currently causing peril to maintaining those accounts.

August 3, 2017 letter (emphasis added). In addition to being sent significantly outside the time parameters of the APA, the August 3, 2017 letter also included a demand for payment of the alleged deficiency in the Working Capital Amount, which, by itself, violated the stay.

Because the August 3, 2017 letter was sent far outside the time parameters provided for by the APA regarding the working capital reconciliation and after GYPC's bankruptcy was filed and demanded payment of the alleged deficient working capital balance, the court finds that the August 3, 2017 letter violated the automatic stay.

2. The Doctrine Of Recoupment Does Not Apply to the August 3, 2017 Letter

[14] But Eastport also argues that all of its actions are covered by the doctrine of recoupment. As this court has stated:

> **[15]** **[16]** [R]ecoupment addresses "the extinguishment of mutual claims arising from the same transaction." As explained in *Reeves v. Columbia Gas of Ohio (In re Reeves)*, 265 B.R. 766, 770 (Bankr. N.D. Ohio 2001), "recoupment allows a defendant to reduce the amount of a plaintiff's claim to the extent that the defendant has a valid defense against the plaintiff which arose out of the same transaction as the plaintiff's claim." Recoupment is equitable in nature and is based on the premise that "a defendant should be entitled to show that, because of matters arising out of the transaction sued on, he or she is not liable in full for the Plaintiff's claim." *Id.*

Wentz v. Saxon Mortgage (In re Wentz), 393 B.R. 545, 554-55 (Bankr. S.D. Ohio 2008) (citations omitted). The key difference between a setoff and recoupment is that recoupment arises out of a single transaction. *Brunswick Corp. v. Clements*, 424 F.2d 673, 676 (6th Cir. 1970); *PNC Bank v. Gator Piqua Partners, LLLP*, Case No. 3:12-cv-369, 2013 U.S. Dist. LEXIS 109776, at *8, 2013 WL 4008807, at *2 (S.D. Ohio Aug. 5, 2013) ("The common law Doctrine of recoupment ... is used as a defense to a debtor's claim against a creditor .... [T]he Doctrine of recoupment applies only when both parties' claims arise from the same transaction.").

[17] **[18]** **[19]** A bankruptcy trustee takes property of the estate subject to rights of recoupment. *Megafoods Stores v. Flagstaff Realty Assocs. (In re Flagstaff Realty Assocs.)*, 60 F.3d 1031, 1035 (3d Cir. 1995); *Holford v. Powers (In re Holford)*, 896 F.2d 176, 179 (5th Cir. 1990). Further, although recoupment is typically used defensively after a plaintiff or debtor has raised claims against the defendant or a creditor, a creditor may take "the offensive" to adjudicate its recoupment rights. *Flagstaff Realty Assocs.* at 1035,; *Ashland Petroleum Co. v. Appel (In re B & L Oil)*, 782 F.2d 155, 156 (10th Cir. 1986); *In re Public Serv. Co. of N.H.*, 107 B.R. 441, 445-46 (Bankr. D.N.H. 1989) (argument that recoupment can only be used as a defense is "misplaced"). The key is that the action of the creditor must be to reduce ***998** or eliminate a debt which the creditor may otherwise owe to the debtor. Therefore, it is "defensive" from the perspective that it is sought to reduce the debt which the creditor may otherwise owe to the debtor and is limited to reducing that debt or zeroing out that debt, but not recovering affirmatively against the plaintiff or debtor. *See* *Flagstaff Realty Assocs.* at 1035; *Public Serv. Co.* at 445-46.

[20] To the extent that Eastport is merely attempting to exercise a right of recoupment against GYPC arising out of the APA, stay relief is not required. *Reiter v. Cooper,* 507 U.S. 258, 265 n.2, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993); *Holyoke Nursing Home, Inc. v. Health Care Fin. Admin. (In re Holyoke Nursing Home, Inc.)*, 372 F.3d 1, 3 (1st Cir. 2004); *Holford*, at 179. See also *United Structures of America, Inc. ex rel. United Structures of Am., Inc. v. G.R.G. Eng'g.*, 9 F.3d 996, 999 (1st Cir. 1993) (Breyer, J.) ("This explains why recoupment is not expressly regulated by the Bankruptcy Code; some courts even find recoupment unaffected by the automatic stay."); *Gómez-Cruz v. Fernández,* 3:13-cv-01711-JAW, 2018 U.S. Dist. LEXIS

172840 at *15, 2018 WL 4849650, at *5 (D.P.R Oct. 4, 2018) ("It is well-settled that recoupment is outside the scope of the automatic stay in a bankruptcy proceeding pursuant to 11 U.S.C. § 362(a).").

[21] In this instance, the letter does not seek to reduce or eliminate a debt. It is a simple demand for payment of the working capital shortfall. Recoupment, therefore, does not apply to the August 3, 2017 letter.

3. Due to Lack of Notice to Eastport, the August 3, 2017 Letter Cannot Form a Basis to Find GYPC in Contempt.

[22] Given this finding, the court must determine if that stay violation constituted contempt. Contempt is a "severe remedy." *Taggart*, 139 S. Ct. at 1802. In this instance, the parties agree that when the August 3, 2017 letter was sent by Eastport to GYPC, Cummings, and Webb setting forth the alleged working capital deficiency and demanding payment of the deficient amount, Eastport had not been given notice of GYPC's bankruptcy filing by GYPC through its bankruptcy filings. Stipulations ¶ 19. Eastport was not scheduled as a creditor nor listed as a party in interest on GYPC's bankruptcy filings. Nothing in the record shows Eastport learned of the bankruptcy by August 3, 2017. Therefore, without any evidence that Eastport was aware of the bankruptcy when the letter was sent, Eastport cannot be found in contempt and no damages may be awarded as to the August 3, 2017 letter. This result would be the same if the *Sharon* standard applied. 234 B.R. at 687.

C. The October 18, 2017 Letter

1. Eastport Did Not Violate the Stay by Sending the October 18, 2017 Letter.

As described, the "Purchase Price" under the APA was determined on certain assumptions, those being that (i) the Adjusted EBITDA earned by Mindstream during the Measurement Period would equal or exceed the Target EBITDA; and (ii) GYPC would deliver to Mindstream Working Capital equal to the Net Working Capital Amount. APA ¶ 1.3. The APA provided that: "As promptly as practical following the expiration of the Measurement Period (but in any event within ninety (90) days of such date), [Eastport] shall prepare and deliver to [GYPC] its calculation of the Adjusted EBITDA for such period ...." APA ¶ 1.3(a). The parties stipulated that the Measurement Period expired on July 31, 2017. Joint Stipulations, ¶ 16. The ***999** APA further provided a mechanism for resolving disagreements as to the calculation of the Adjusted EBITDA. APA ¶ 1.3(d).

The October 18, 2017 letter was addressed to "General Yellow Pages Consultants, Inc. c/o Law Offices of Ira H. Thomsen, 140 North Main Street, Suite A, Springboro, OH 45066, Telecopy: (937) 748 5003, Attention: Denis E. Blasius" and "Christopher F. Cummings and Eric D. Webb, General Yellow Pages Consultants, Inc., 222 NE Monroe, 8th Floor, Peoria, IL 61602, Telecopy: (309) 677-0407" and provided, in pertinent part:

> RE: EBITDA Statement pursuant to the Asset Purchase and Sale Agreement (the "Agreement"), dated January 12, 2016, by and among (i) General Yellow Pages Consultants, Inc. (currently known as GYPC, Inc., the "Seller"), (ii) Chris Cummings and Eric Webber (the "Principals"), and (iii) Mindstream Media, LLC (the "Buyer"), and Eastport Holdings, LLC (the "Parent")
>
> Gentlemen:
>
> Pursuant to Section 1.3(a) of the Agreement, the Parent hereby delivers the calculation of the Adjusted EBITDA (as defined in the Agreement) in the form of the EBITDA Statement attached hereto. Based on the EBITDA Statement, the Target EBITDA (as defined in the Agreement) of [amount omitted] exceeded the Adjusted EBITDA earned by the Buyer during the Measurement Period (as defined in the Agreement) of [amount omitted]. Pursuant to Section 1.3(b) of the Agreement, as a result of such deficit: [excerpt from Section 1.3(b) of APA omitted]
>
> * * *
>
> According to the Parent's calculations, and the express terms of the Agreement, the Purchase Price must be reduced by ....

> Pursuant to Section 1.3(d) of the Agreement, if [GYPC] wishes to object to the foregoing, then [GYPC] shall ... Failure to make such objection in such format will be deemed to be an approval of the Parent's EBITDA Statement and calculation.
>
> [Eastport] has become aware that the Seller is the subject of a bankruptcy case pending .... Unlike certain other issues that the parties' counsel have discussed previously, this *automatic* re-vesting of the Preferred Membership Interests, by operation of law and contract, is not subject to the automatic stay of 11 U.S.C. § 362.... Furthermore, as a Purchase Price adjustment pursuant to the terms of the Agreement between the parties, any affirmative acts taken by [Eastport] to exercise its contractual right to the reduction of the Preferred Membership Interest are part and parcel of the [Eastport's] right of equitable recoupment regarding the Purchase Price.
>
> Although, pursuant to section 1.3 of the Agreement, [GYPC] is also required to repay promptly any and all Preferred Return paid with respect to the Preferred Capital Contribution, which amount currently equals [amount omitted], the Parent is not making demand for such payment by way of this letter, in light of [GYPC's] bankruptcy case ....
>
> Pursuant to Section 6.1 of the Agreement, the Principals have jointly and severally indemnified the Parent for any breach by [GYPC] of its covenants under the Agreement, including, without limitation, the obligation of [GYPC] to repay promptly any and all Preferred Return paid with respect to the Preferred Capital Contribution. This letter shall also serve to provide notice to the Principals that [GYPC] is in breach of ***1000** its covenants and that [Eastport] intends to exercise all rights and remedies available to it against the Principals under the Agreement.

October 18, 2017 letter. This letter notices GYPC, Cummings, and Webb of Eastport's EBITDA Statement calculations.

The October 18, 2017 letter did not violate the stay as it fits within the contractual framework of the APA. The letter was Eastport's attempt to comply with the terms of the APA concerning the Purchase Price and adjustments to be made. The APA provided for such steps in order to reach a determination as to the Purchase Price. And, unlike the August 3, 2017 letter, the October 18, 2017 letter was sent within the time-frame in the APA. The parties stipulated that the Measurement Period expired on July 31, 2017, with the ninety (90) day period for the EBITDA Statement expiring on or about October 29, 2017.

[23] The APA's terms remained in place after GYPC filed its bankruptcy petition. GYPC (and subsequently the Trustee) took those rights subject to the APA, including the terms requiring the adjustment during the Measurement Period. The bankruptcy did not toll the time-frame Eastport had to provide the EBITDA Statement. *Beverages Int'l, Ltd. v. Schenley Affiliated Brands Corp. (In re Beverages Int'l, Ltd.)*, 61 B.R. 966, 971 (Bankr. D. Mass. 1986); *In re Clearpoint Bus. Res., Inc.*, 442 B.R. at 296; *In re B & K Hydraulic Co.*, 935 F.2d 269. 1991 U.S. App. LEXIS 12127 at *4-5, 1991 WL 93191, at *1-2 (6th Cir. June 4, 1991) (table decision). Nor was the bankruptcy a free ticket to GYPC to avoid the post-closing reconciliation of the Purchase Price pursuant to the terms of the APA. See *Rogan v. Bank One (In re Cook)*, 457 F.3d 561, 566 (6th Cir. 2006) (property interests of the bankruptcy estate cannot be greater than the debtor had pre-petition); *Lawrence v. Ky. Transp. Cabinet (Shelbyville Rd. Shoppes, LLC)*, 775 F.3d 789, 794 (6th Cir. 2015) (finding the debtor's turnover rights fixed as of the date of the bankruptcy filing). If a reconciliation of the EBITDA was required by the APA, then the reconciliation needed to be completed and any actions taken in accomplishing the reconciliation were barred by neither § 362(a) nor § 541. As this court and other courts have recognized, "not all communications from a creditor to a debtor are prohibited by § 362(a)." *In re McCormick*, Nos. 17-8039/8040/18-8015, 2018 Bankr. LEXIS 4041, at *14, 2018 WL 6787558, at *6 (B.A.P. 6th Cir. Dec. 26, 2018) (citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000)); *Cousins v. CitiFinancial Mortgage Co. (In re Cousins)*, 404 B.R. 281, 287 (Bankr. S.D. Ohio 2009) (similar).

Alternatively, Eastport's actions as to the October 17, 2017 letter is classic recoupment because it seeks an offset arising out of mutual debts arising out of the same transaction. However, the Trustee argues that the PMI was an asset and not a debt, and therefore recoupment is inapplicable. The PMI remains an asset of GYPC's bankruptcy estate. But the value of that asset is to

be determined according to the terms of the APA and pursuant to the reconciliation of EBITDA and the Working Capital. Those adjustments to the Working Capital Amount and to the Purchase Price gave rise to potential claims by Eastport against GYPC, Cummings and Webb. See APA ¶¶ 1.2, 1.3, 1.5(b)(vi), 6.1, 6.6, and 10.1. Thus, under ¶ 1.3 of the APA, the Purchase Price was to be adjusted based upon both the Working Capital Statement (See ¶ 1.3(c)) and the EBITDA Statement (See ¶¶ 1.3(a) & (b)). Those adjustments were to be set off against the original Preferred Capital Contribution, ***1001** reducing the original Preferred Capital Contribution and the PMI. The claims of the Trustee relating to the PMI, including the claims relating to the alleged Preferred Return and Priority Payments, and any claim for payment of the asserted value of the PMI all arise out of the APA. In addition, Eastport's claims against GYPC, Cummings, and Webb all arise from the APA. Only after resolution of those claims can the amount of the PMI be determined and, in addition, whether the Trustee is entitled to any Preferred Return payments. As all of those claims arise out of the APA transaction and must be determined in order to arrive at the value of the PMI, recoupment is an appropriate remedy. The PMI's value and the Trustee's entitlement to any benefits arising out of the PMI can only be determined upon reconciliation of Eastport's APA claims against GYPC. That process meets the definition of recoupment, which is not enjoined by the automatic stay. *Reiter*, 507 U.S. at 265 n.2, 113 S.Ct. 1213 (1993).

2. The Trustee's Alternative Arguments are Unconvincing.

The Trustee argues that Eastport was not entitled to follow the procedures provided by the APA for reconciling the working capital and the EBITDA because such procedures would have required GYPC "to participate in and complete a very detailed and complex procedure during the pendency of its bankruptcy case, requiring timely and extensive review by accounting professionals, the result of which could have resulted in a significant reduction in the value of its assets, all without notice to, or oversight of, any kind by the Bankruptcy Court." Doc. 60 at 4. The Trustee explains that Eastport's ability to provide adjustments to the Purchase Price was a "contingent right," as opposed to an "absolute right" because the parties were "contractually bound to follow specific procedures outlined in the [APA] in order for any adjustment to occur." *Id*. Because of this asserted complexity, the Trustee argues that relief from the stay was required. However, the Trustee cites no legal authority for this proposition and the court is not aware of any. There is no "complexity" exception to the premise that the automatic stay does not stay performance of contractual terms. [7]

[7] Further, the Trustee's assertion that he could not follow the contractual process because it would require "timely and extensive review by accounting professionals" is without merit. Doc. 60 at 4. Trustees frequently employ accounting and other professionals to engage in such tasks. In fact, GYPC employed both Clifton Larson Allen LLP and Brady Ware & Schoenfeld as accountants. Estate Docs. 72, 135. The Trustee later employed Trustee Resource Group as an accountant. Estate Doc. 255. The court has approved multiple applications for compensation of these accountants. Estate Doc. 456. In addition, GYPC hired Valuation Research Corporation early in this case "to appraise the value of Debtor's Preferred Membership Interest in Eastport Holdings, LLC." Estate Doc. 119 at 1. See also Estate Doc. 126 (order approving retention). However, the court is not aware if that professional ever rendered an opinion on the value of the PMI.

3. Eastport Violated the Stay When It Pursued the Tennessee State Court Action Against Cummings and Webb.

The Trustee argues that Eastport violated the stay when it filed and prosecuted the State Court Action against Cummings and Webb as principals of GYPC and as parties to the APA even though it did not name GYPC as a party. The automatic stay covers nearly every type of action taken against the debtor, the debtor's property, or the estate property but generally provides no protection to third parties, such as the debtor's affiliates, officers, and ***1002** shareholders. [8] *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993) (citing 2 *Collier on Bankruptcy*, ¶ 362.04 (15th ed. 1993)). Despite this, courts have identified some circumstances in which the stay prohibits actions taken against non-debtor third parties.

[8] Chapter 13 provides a co-debtor stay, 11 U.S.C. § 1301, but there is no comparable provision for Chapter 11 and Chapter 7 cases.

a. Inapplicability of § 362(a)(1) to the State Court Action

Courts have extended the § 362(a)(1) stay to non-debtors in cases involving "unusual circumstances." The Sixth Circuit Court of Appeals has identified three categories of such circumstances – "when the non-debtor defendant is entitled to absolute indemnity by the debtor, when the stay would contribute to the debtor's reorganization, or when there is such identity between the debtor and the [non-debtor] that a judgment against the [non-debtor] defendant will in effect be a judgment or finding against the debtor." *Plastech Holding Corp. v. WM GreenTech Auto. Corp.*, Case No. 17-2122, 2018 U.S. App. LEXIS 16915, at *1-2 (6th Cir. June 21, 2018) (cleaned up) (summarizing Sixth Circuit's jurisprudence and collecting cases). See *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 314-15 (6th Cir. 2000) (finding extending the stay to nondebtor co-defendants based on a contractual relationship was not justified); *Patton*, 8 F.3d at 349 (similar); *Amer. Imaging Svcs. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.2d 855, 861 (6th Cir. 1992) (quoting *A.H. Robins, Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (similar)).

[24] **[25]** **[26]** Section 362(a)(1) only applies to acts "against the debtor." In the Sixth Circuit, extending the stay for "unusual circumstances" requires an injunction under 11 U.S.C. § 105 because it would apply the stay to parties not included by the plain language of § 362(a)(1). The Trustee has not sought any such extraordinary relief with this court despite having notice of the State Court Action.[9] *Patton*, 8 F.3d at 349 (Stay against nondebtors requires the bankruptcy court "to extend the automatic stay under its equity jurisdiction pursuant to 11 U.S.C. § 105", and further noting that "the [Debtors] have not brought forth any evidence of unusual circumstances which would justify extending the automatic stay to their protection."); *Parry*, 236 F.3d at 314 (citing *Patton* and stating ***1003** debtor failed to prove "unusual circumstances" to extend the stay to nondebtors); *In re Johnson*, 548 B.R. 770, 788 (Bankr. S.D. Ohio 2016) ("In *Patton*, the Sixth Circuit made it clear that the unusual circumstances test does not mean the stay applies automatically by its terms to actions against nondebtors."). Therefore, the court finds that Eastport has not violated § 362(a)(1) by prosecuting the State Court Action against Webb and Cummings because GYPC is not a party, and neither GYPC nor the Trustee sought to enjoin the State Court Action in this court.

9 Although the Trustee does not argue about the applicability of each subsection of § 362(a) in his summary judgment filings, the court, for the sake of completeness, will briefly comment on 11 U.S.C. § 362(a)(6). Section 362(a)(6) applies to "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of this case under this title[.]" In the context of formal litigation, § 362(a)(6), like § 362(a)(1) cannot be extended to an action taken against a non-debtor. To do so would avoid the consequences of Sixth Circuit precedent under § 362(a)(1) that places the burden on the debtor or trustee to seek an injunction under § 105 to protect non-debtors from being sued, and would create uncertainty about whether litigation filed against a non-debtor could violate § 362(a)(6). See *In re Norman*, Case No. 19-61286, 2020 WL 820315, at *2 (Bankr. N.D. Ohio Feb. 18, 2020) ("For the stay to exist beyond [the] debtor, Sixth Circuit case law suggests that a bankruptcy court must affirmatively act to issue an injunction."). The case law under § 362(a)(6) typically addresses acts of collection against a debtor or persons associated with the debtor that are not based upon a formal court proceeding. See generally *In re Harchar*, 694 F.3d 639, 648 (6th Cir. 2011) (quoting *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000)) ("A course of conduct violates § 362(a)(6) if it (1) could reasonably be expected to have a significant impact on the debtor's

determination of whether to repay, and (2) is contrary to what a reasonable person would consider to be fair under the circumstances.").

b. Eastport Violated § 362(a)(3).

[27] **[28]** The remaining question is whether the State Court Action violated § 362(a)(3). Section 362(a)(3) protects the debtor from "any act to obtain possession of property of the estate or of property from the estate or *to exercise control over property of the estate*." See *City of Chicago, Illinois v. Fulton*, —— U.S. ——, 141 S. Ct. 585, 589, 208 L.Ed.2d 384 (2021) (quoting 11 U.S.C. § 362(a)(3); emphasis added in decision). The automatic stay may be implicated in third-party actions under limited circumstances. The Sixth Circuit has interpreted § 362(a)(3) to automatically stay actions against non-debtors when the creditor seeks to obtain possession of or exercise control over the debtor's property through the action. *Amedisys, Inc. v. Nat'l Century Fin. Enters. (In re Nat'l Century Fin. Enters.)*, 423 F.3d 567, 575-76, 578 (6th Cir. 2005) (stating that § 362(a)(3) bars actions against non-debtors when the action would inevitably have an adverse impact upon the bankruptcy estate property). Actions prohibited under § 362(a)(3) are not limited to exercising direct control over estate property but acts that have an "adverse impact" on estate property. *Amedisys*, 423 F.3d at 578 (cited in *In re Johnson*, 548 B.R. at 790); *Acands, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (Alito, J.) (third-party lawsuit that would affect the debtor's rights under an insurance contract is stayed); *48th St. Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987) (action to terminate lease of prime tenant that would have terminated the debtor's sublease is not permitted under § 362(a)(3)); *In re Elrod*, 523 B.R. 790, 803 (Bankr. W.D. Tenn. 2015) ("[T]he statute's terms 'obtain possession' and 'exercise control' indicate that a wide spectrum of acts is stayed.").

The Sixth Circuit interpreted § 362(a)(3) to determine the effect of the stay on third-party litigation in the National Century Financial Enterprises ("NCFE") decision, a case from this district that concerned a dispute over control of accounts receivable. Applying § 362(a)(3), the court determined that the creditor impermissibly attempted to exercise control over the debtor's accounts receivable when it filed an action against a third-party bank that held the accounts. The court explained that, although the debtor, NCFE, was not a named party in the state court litigation, the creditor's litigation sought to recover disputed accounts receivable of the debtor held by a third party, and therefore was attempting to control estate property. *Nat'l Century Fin. Enters.*, 423 F.3d at 575-76 (citations omitted).

[29] **[30]** Just as in NCFE, GYPC was not named in the State Court Action and would not be subject to preclusion under Tennessee law. In order for claim preclusion to apply, the suit must be "between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit." *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995) (quoting ***1004** *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989)). For issue preclusion to apply, "(1) the precise issue must have been raised and actually litigated in the prior proceedings; (2) the determination of the issue must have been necessary to the outcome of the prior proceedings; (3) the prior proceedings must have *resulted in a final judgment on the merits;* and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Georgia-Pacific Consumer Products LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098 (6th Cir. 2012) (quoting *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589–90 (6th Cir. 2009)). See also *MarketGraphics Rsch. Group v. Berge (In re Berge)*, 953 F.3d 907, 917 (6th Cir. 2000) ("Whether we apply federal or Tennessee issue-preclusion law is thus of little practical concern in this case; the tests are nearly the same"). Without the Trustee as a party to the State Court Action, any determination made by the State Court with respect to the PMI would not have been

binding on the bankruptcy estate.[10] See e.g. *Funk-Vaughn v. Rutherford Cty. Tenn.*, No.: 3:18-cv-01311, 2019 WL 4727642, at *2, 2019 U.S. Dist. LEXIS 167032, at *6 (M.D. Tenn. Sept. 27, 2019) ("All requirements of claim preclusion are satisfied here, including the requirements that the current defendants are 'privies' of the defendant in Plaintiff's prior lawsuit and that the theories of recovery Plaintiff asserts now could have been presented in her prior lawsuit.").

10 Perhaps pre-petition, as the only shareholders and officers of GYPC, Cummings and Webb were in privity with GYPC. But post-petition, the legal interests between GYPC, and Cummings and Webb diverged so as to preclude any privity. See *Smith v. Lerner, Sampson & Rothfuss, L.P.A.*, 658 F. App'x 268, 276 (6th Cir. 2016) (citation omitted) ("A party is in 'privity' with another if it succeeds to an estate or an interest formerly held by the other, or where a party is so identified in interest with another that the party represents the same legal right."); *Mitchell v. Chapman*, 343 F.3d 811, 823 (6th Cir. 2003) ("In the context of claim preclusion, privity ... means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented." The decision elaborated that a party appearing in one capacity is not bound by a judgment when that party is sued in another action in a different capacity.) (cleaned up). See also *Stooksbury v. Ross*, No.: 3:09-CV-498, 2013 U.S. Dist. LEXIS 130248, at *26-27, 2013 WL 5133226, at *8-9 (E.D. Tenn. Sept. 12, 2013) (Determination by court did not bar a receiver because the receiver was not a party to that prior litigation.). With the filing of the bankruptcy, GYPC and later the Trustee were not identified in interest with Cummings and Webb such that claim or issue preclusion would be applicable. *See* *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 705 (6th Cir. 1999) (noting that a bankruptcy trustee is "not simply the successor-in-interest to the Debtor" and, thus, the trustee was not barred from seeking an adjudication of entitlement to lottery winnings which were previously allocated in a state court divorce proceeding to which the debtor was a party).

[31] However, the cases which apply § 362(a)(3) to third-party actions, such as the State Court Action, instruct that the mere potential for the application of non-party preclusion is sufficient to violate § 362(a)(3) if the non-party preclusion could impact property of the estate. *In re Jefferson Cty., Ala.*, 491 B.R. 277, 294-95 (Bankr. N.D. Ala. 2013) (finding that § 362(a)(3) applied to preclude litigation in a state court when, due to collateral estoppel or when the debtor's legal position could be impacted by testimony, the debtor would be forced to monitor and potentially participate in that litigation); *Johnson*, 548 B.R. at 797 (finding "the threat of issue of issue preclusion is not nonexistent."). *Klarchek Family Trust v. Costello (In re Klarchek)*, 508 B.R. 386, 397 (Bankr. N.D. Ill. 2014) (applying § 362(a)(3) to bar litigation in which the debtor was not a ***1005** party, but nevertheless could have had preclusive effects over estate property). Eastport has recognized the impact which the State Court Action could have on the PMI and the Trustee's interests: "[T]he Debtor had the perfect opportunity to join that litigation [State Court Action], but it chose not to—even though it agreed in the APA to Tennessee courts having exclusive jurisdiction. The Trustee is welcome to join the suit in Tennessee." Doc. 26 at 4. It is significant that the State Court Action was filed post-petition after notice of the bankruptcy because Eastport filed it with knowledge of its potential impact on GYPC's interests, and the need for GYPC to monitor and potentially participate in that litigation. Those facts evince a violation of § 362(a)(3).

Further, and more to the point, the State Court Action addresses the ultimate resolution of whether the potentially most significant estate asset, the PMI, is of any value. At first blush, the complaint does not appear to address estate property issues, as it seeks, under theories of breach of contract, unjust enrichment, and fraud to recover certain advance payments that were due to Eastport under the APA from Cummings and Webb. But the complaint and the amended complaint required the state court to potentially decide four separate issues that could adversely affect property of the GYPC estate: 1) whether GYPC is in breach of the APA; 2) whether GYPC is liable for damages, and in what amount; (3) whether the EBITDA calculations are correct in setting the preferred contribution at zero, thus eliminating the PMI, and (4) whether Webb and Cummings must pay damages, which in turn may result in Webb and Cummings having a claim against GYPC for contribution, as they are jointly and severally liable under the APA.

The structure of the APA makes this clear. Before pursuing damages, Eastport must offset such damages against GYPC's PMI interest. APA ¶ 6.6(a). Therefore, the value of the PMI, and any post-closing adjustments be calculated. Additionally, APA ¶ 6.1 makes GYPC, and Cummings and Webb "jointly and severally" liable under indemnification provisions, which include "Excluded Liabilities." It therefore appears possible that Cummings and Webb, if liable, could have a contribution claim back against the GYPC estate. Cases do not limit § 362(a)(3) violations "to acts for which the violator would be liable under applicable non-bankruptcy law and instead apply the stay by its plain terms to conduct that simply interferes with the debtor's contract rights." *Windstream Holdings*, 627 B.R. at 43. See *In re Johnson*, 548 B.R. at 791 (prosecution of an arbitration and state court proceeding against nondebtor codefendants affected the debtor's rights in his employment contract, and the debtor's rights in that contract constituted property of the estate). See also *In re Cincom iOutsource, Inc.*, 398 B.R. 223, 229 (Bankr. S.D. Ohio 2008) (litigation involving third parties would not impair the rights of the trustee, and the stay should not be used shield solvent nondebtor co-defendant). The complaint and amended complaint interfere with GYPC's contractual rights, particularly paragraph 26 of the amended complaint requesting the court to find the PMI to not have been issued. Amended Complaint at 6, ¶ 26.

As noted, Eastport had reason to know these issues that affected GYPC bankruptcy estate could not be separated from the State Court Action. Upon the initial complaint being dismissed without prejudice, the state court decision made plain what the legal impediment was with Eastport's allegations. Eastport was not entitled to any funds on these advance payments unless and until it could be determined ***1006** whether such advance payments were offset against GYPC's interest in the PMI, if any. If GYPC's interest in the PMI has no value at all, this condition would not be a stumbling block to the success of the State Court Action. Nevertheless, Eastport, knowing that GYPC would need to intervene in the litigation to defend its interests, alleged that the PMI was "automatically deemed never to have been issued to GYPC" because certain EBIDTA adjustments during the Measurement Period showed that PMI had no value, and indeed, at least as Eastport alleged, was contractually deemed not to exist. *Id*. This allegation is incorporated into each count of the amended complaint. *Id.* at 5, 7-9, ¶¶ 19, 31, 36, 43. Unlike the October 17, 2017 letter, Eastport is not complying with the contractual terms of the APA, or using recoupment based upon a debt owed to Eastport by GYPC, but instead is seeking a determination that the PMI lacks any value as a condition precedent to success in the State Court Action. Eastport could have filed a relief from stay motion to determine whether its actions were appropriate prior to the State Court Action. Instead, after the amended complaint was filed and the GYPC bankruptcy case was ongoing, it requested this court to abstain to allow the State Court action to resolve these estate property questions. And as noted, the abstention motion discusses that GYPC would appear to be a necessary party to any such determination, and the pursuit of it could lead to inconsistent findings between this court and the State Court Action. Doc. 13 at 6, 7. But Eastport never raised these issues before the State Court Action commenced, or even before filing the amended complaint.

Eastport's expressed motivation, prior to the conversion of this case to Chapter 7, was its concerns that Cummings and Webb were acting in their own interests, rather than that of GYPC. Estate Doc. 13 at 1, 3-4. But Eastport could have attempted to resolve these issues by seeking relief from stay, filing its own motion to convert this case to Chapter 7, or seeking the appointment of a Chapter 11 trustee. *Johnson*, 548 B.R. at 799 (quoting *In re Durango Ga. Paper Co.*, 297 B.R. 316, 321 (Bankr. S.D. Ga. 2003)) ("when asked whether an act contemplated by a creditor might violate the automatic stay, are likely to advise their clients—out of an abundance of caution—that it is safer to ask permission than forgiveness."). Eastport was aware that to accord full relief in the State Court Action, GYPC might become a necessary party. By taking this action, it interfered with GYPC's contractual rights under the APA and particularly the determination of the issue pertaining to the PMI and therefore violated § 362(a)(3).

c. Eastport's Actions in the State Court Action Are Not Contemptuous Under the *Taggart* Standard of No Fair Ground for Doubt

[32] **[33]** Violations of § 362(a)(3) based on litigation or other action against non-debtor parties are necessarily fact-specific analyses. Had Eastport filed an action to directly obtain possession or control over the PMI, prosecute a cause of action belonging to the Trustee or sought to interfere with GYPC's contractual rights unlawfully, this case would more fairly be on four squares with *National Century*, *Johnson* and other § 362(a)(3) cases that the court independently reviewed. Instead, as explained, Eastport's actions sought, under contractual and tort theories, damages against insiders of GYPC, and conditions precedent for those determinations would require an adjustment and ultimate valuation of the PMI, and potentially could lead to liability for GYPC under a contribution theory. Although this court denied Eastport's motion for abstention, other precedent in this complicated area of bankruptcy ***1007** law present more transparent violations of the stay in attempting to directly control or affect estate property. For example, In *National Century*, the creditor attempted to directly control accounts receivable belonging to the debtor. In *Johnson*, the creditor took deliberate actions in an arbitration and state court proceeding to determine the debtor-player's contract was subject to the creditor's perfected security interest, and the court found that such actions could have directly impacted the plan of reorganization. 548 B.R. at 791. Other cases the court considered represent direct violations of contracts or clear interference with contractual rights. See e.g. *In re Extraction Oil & Gas Co.*, Case No. 20-11548, 2020 WL 7074142 (Bankr. D. De. Dec. 3, 2020) (litigation interfered with debtor's business relationships with third parties) *48th St. Street Steakhouse*, 835 F.2d 427 at 431 (action directly affecting debtor's rights as a sub-lessor). In this case, the effect on the PMI is based on findings that the state court would be required to make, but the causes of action themselves are based on potential liabilities of Cummings and Webb. And while liability could ultimately flow to GYPC, unlike other § 362(a)(3) cases the court reviewed, the pursuit of those contractual rights was not unlawful per se. See e.g., *Windstream Holdings*, 627 B.R. at 44 (defendants had a "literally false and intentionally misleading advertising campaign" that violated federal and state statutes).

[34] This court was concerned at the time the abstention motion was adjudicated that a significant estate asset would be addressed and GYPC would ultimately become a necessary party to the State Court Action. This court maintains exclusive jurisdiction over all estate property. 28 U.S.C § 1334(e). Nevertheless, the Supreme Court has emphasized that contempt is a "severe remedy" and that "principles of 'basic fairness requir[e] that those enjoined receive explicit notice' of 'what conduct is outlawed.' " *Taggart*, 139 S. Ct. at 1802 (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661, (1974)). Had the trustee sought a § 105 injunction to raise the § 362(a)(1) stay violation issue, the court likely would have addressed all of the § 362(a) issues at an earlier date. As it is, because the fact pattern and legal issues in this case are sua generis and less clear than available precedent and persuasive authority, the court finds it fits within the framework of the "no fair ground of doubt" analysis of *Taggart*. See *Orlandi v. Leavitt Family Ltd. P'ship (In re Orlandi)*, 612 B.R. 372, 382-83 (B.A.P. 6th Cir. 2020) (action against pre-petition guaranty post-discharge not contemptuous due to a case law split about whether it is a contingent claim without a post-petition right to payment); *In re Distefano*, 611 B.R. 100, 105-06 (Bankr. W.D. Mich. 2019) ("fair ground of doubt" existed whether deficiency notice sent by a secured creditor was in contempt of the debtor's Chapter 7 discharge). Eastport's action was ill-advised, but Eastport had an objectively reasonable basis to believe the State Court Action was not enjoined under § 362(a)(3) of the automatic stay. In other words, the court finds "a fair ground of doubt' as to whether § 362(a)(3) barred the State Court Action.

Nevertheless, the court remains troubled that Eastport chose this "file first" course of action (particularly as to the amended complaint), knowing that full and fair relief likely would require GYPC's participation in the State Court Action as a real party in interest. Creditors need to be mindful that actions involving third parties can affect debtor's rights as to estate property in a variety of ways, that § 362(a)(3) has a broad reach, and the well-traveled and surest path is to resolve these issues up front by seeking relief from the stay in ***1008** the bankruptcy court. *Windstream*, 627 B.R. at 44.

D. Legal Consequences of and Remedies Available for a Stay Violation

Because the Court finds that Eastport violated the stay by sending the August 3, 2017 Letter and pursuing the State Court Action, the Court turns to the applicable remedies. The Trustee seeks a determination that Eastport's actions in violation of the stay are invalid and void and attorney fees and punitive damages for Eastport's "willful" violation of the stay.

1. The Demand in the August 3, 2017 Letter and the State Court Action Are Invalid and Void.

[35] Eastport sent the August 3, 2017 Letter and pursued the State Court Action in violation of the stay. The Sixth Circuit has clearly stated that actions taken in violation of the automatic stay are "invalid and voidable, since void actions are incapable of latter cure or validation." *Easley v. Pettibone Mich. Corp.* 990 F.2d 905, 910 (6th Cir. 1993) (discussing the legal effect of a stay violation). Thus, because Eastport violated the stay, its actions in violation of the stay are invalid and void. [11]

11 Actions in violation of the stay are invalid and void except in "limited equitable circumstances" such as when the stay is annulled under § 362(d). *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). Those circumstances do not apply here.

2. Monetary Damages

[36] The Trustee is not entitled to monetary damages under Count I because, as explained, there is no basis to find Eastport in contempt as to its stay violations concerning the August 3, 2017 letter. As also explained, the State Court Action is not contemptuous because it is covered by the objective "no fair ground for doubt" standard under *Taggart* and therefore no damages are appropriate. [12]

12 In addition, this court could not award punitive damages as a remedy for civil contempt because this adversary proceeding does not involve a private right of action available to individuals under § 362(k) and although the court's civil contempt power includes the authority to compensate a party for damages, and the authority to issue a sanction to coerce compliance with the court's order, the court does not have the authority to issue punitive damages as a civil contempt remedy. See *Dean v. Lane (In re Lane)*, No. 20-5359, 2020 U.S. App. LEXIS 40147 at *5, 2020 WL 9257958, at *2 (6th Cir. Dec. 22, 2020) (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)) ("Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge."). See also *In re John Richards Homes Building Co.*, 552 F. App'x 401, 416 (6th Cir. 2013) (in an appeal involving an involuntary bankruptcy petition and a putative debtor seeking damages under §§ 303(i) and 105 of the Bankruptcy Code, finding bankruptcy courts lack both the statutory or inherent authority to impose "serious noncompensatory punitive damages.").

E. The Trustee's Motion for Summary Judgment Is Granted as to Count I With Respect to Determining that the August 3, 2017 Letter and the State Court Action are Void as a Violation of the Stay, and Otherwise Denied.

The Trustee has sought summary judgment on all three counts of his complaint. Count I seeks a determination that the 2017 letters and the State Court Action all violated the automatic stay and are void. Further, it requests a finding that the October 18, 2017 letter and the State Court Action were willful stay violations, entitling the Trustee to attorney fees and punitive damages. For the reasons discussed, the court only grants the Trustee's motion as to Count I in that the court finds that the August 3, 2017 letter and the ***1009** State Court Action violated the stay and are void. All other relief sought through Count I is denied.

Count II seeks a determination of the value of the PMI. The Trustee's argument for seeking summary judgment as to Count II is that the APA provided an original value of the PMI, subject to certain adjustments. The Trustee argues that Eastport's ability to be granted such adjustments to the Purchase Price and PMI were contingent upon Eastport providing proper and timely reconciliations of the working capital and the EBITDA pursuant to the contractual terms of the APA. The Trustee argues that Eastport no longer has the ability to provide those reconciliations because: a) Eastport's attempts to provide those reconciliations through the 2017 letters were improper and are void in violation of the stay, and the time for Eastport's ability to provide those reconciliations under the APA has expired. While the court finds that Eastport's attempt to provide the working capital adjustment through the August 3, 2017 letter is void as a violation of the stay, the record is insufficient to determine whether (or to what degree) the contractual rights of the parties were affected by August 3, 2017 letter. Further, the court finds that the October 18, 2017 letter did not violate the stay. Accordingly, the court cannot determine as a matter of law that Eastport's reconciliation of the EBITDA, Purchase Price, and PMI through the October 18, 2017 letter is void. For all these reasons, the court denies the Trustee's motion as to Count II.

Count III seeks a determination that Eastport breached the APA and Eastport's Operating Agreement because Eastport has failed to pay GYPC the Priority Payments which the Trustee asserts are due to the estate under the APA and Eastport's Operating Agreement. The Trustee's motion as to Count III is premised upon the argument that because the 2017 letters are void, the Trustee is entitled to the full amount of the Preferred Capital Contribution and PMI and all payments which GYPC would be due to it under the APA and Operating Agreement as a Preferred Member. For the same reasons stated as to Count II, further adjudication as to Count III is required so as to determine whether any adjustments of the EBITDA, Purchase Price, and PMI under the APA are appropriate and, if so, what those adjustments should be and the impact those adjustments would have on any payments which the GYPC estate would be due under the APA and Eastport's Operating Agreement. For these reasons, the Trustee's motion for summary judgment is denied as to Count III.

The court is not opining on whether Eastport's calculations regarding the working capital amount, the EBITDA, or the PMI are correct or proper; whether either Eastport's, GYPC's, or the Trustee's actions concerning the calculations under the APA were timely (except as discussed as to the 2017 letters); or any other issues which may affect the ultimate determination of the value of those items. Those issues remain for resolution through adjudication of Counts II and III of the complaint.

VIII. Conclusion

For the reasons explained, Defendant Eastport Holdings, LLC's Motion for Partial Summary Judgment (Doc. 40) as to Count I of the Complaint is granted in part and denied in part. Plaintiff Trustee's Motion for Summary Judgment (Doc. 48) is granted in part and denied in part as to Count I and denied as to Counts II and III. The court is contemporaneously entering an order consistent with this decision.

IT IS SO ORDERED.

All Citations

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though it has exempted many other drugs from such a requirement given the health risks of COVID–19. There simply is no reasoned decision here to which this Court can defer. Cf. *Democratic National Committee* v. *Wisconsin State Legislature*, 592 U.S. ——, ——, 141 S.Ct. 28, 43, 208 L.Ed.2d 247 (2020) (Kagan, J., dissenting in denial of application to vacate stay) (deference not due where the government "has not for a moment considered whether recent COVID conditions demand changes").

* * *

This country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks. See Greenhouse & Siegel, Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice, 125 Yale L. J. 1428, 1430 (2016). Like many of those laws, maintaining the FDA's in-person requirements for mifepristone during the pandemic not only treats abortion exceptionally, it imposes an unnecessary, irrational, and unjustifiable undue burden on women seeking to exercise their right to choose. One can only hope that the Government will reconsider and exhibit greater care and empathy for women seeking some measure of control over their health and reproductive lives in these unsettling times. See *Gonzales*, 550 U.S. at 172, 127 S.Ct. 1610 (Ginsburg, J., dissenting) ("[Women's] ability to realize their full potential ... is intimately connected to their ability to control their reproductive lives" (internal quotation marks omitted)). For now, I respectfully dissent.

CITY OF CHICAGO, ILLINOIS,
Petitioner

v.

Robbin L. FULTON, et al.
No. 19-357

Supreme Court of the United States.

Argued October 13, 2020

Decided January 14, 2021

Background: Bankruptcy court issued rule to show cause why city should not be sanctioned for refusing to release Chapter 13 debtor's vehicle, which had been impounded because of unpaid parking tickets. The United States Bankruptcy Court for the Northern District of Illinois, Jacqueline P. Cox, J., 584 B.R. 252, entered judgment in favor of debtor, and city appealed. In separate Chapter 13 case, debtor moved to enforce automatic stay by requiring city to release vehicle, and the United States Bankruptcy Court for the Northern District of Illinois, Deborah Lee Thorne, J., 588 B.R. 811, granted motion. City appealed. In yet another case, debtor again filed motion to enforce stay against city, which motion was granted by the United States Bankruptcy Court for the Northern District of Illinois, Carol A. Doyle, J., 590 B.R. 467, and city appealed. Finally, like relief was granted by the United States Bankruptcy Court for the Northern District of Illinois, Jack B. Schmetterer, J., 2018 WL 2570109, and city appealed. Consolidating cases for purposes of appeal, the Court of Appeals for the Seventh Circuit, Flaum, Circuit Judge, 926 F.3d 916, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Alito, held that an entity's mere retention of estate property after the filing of a bankruptcy petition does not constitute an act to exercise control over property of the estate in violation of the Bankruptcy Code's automatic stay, abrogating *In re*

Weber, 719 F.3d 72, *In re Del Mission Ltd.*, 98 F.3d 1147, and *In re Knaus*, 889 F.2d 773.

Vacated and remanded.

Justice Barrett took no part in the consideration or decision of the case.

Justice Sotomayor filed a concurring opinion.

1. Bankruptcy ⚿2394.1

When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. 11 U.S.C.A. § 362(a).

2. Bankruptcy ⚿2492

Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences, including the creation of "an estate." 11 U.S.C.A. § 541.

3. Bankruptcy ⚿2531

Section of the Bankruptcy Code governing property of the estate is intended to include in the estate any property made available to the estate by other provisions of the Code. 11 U.S.C.A. § 541.

4. Bankruptcy ⚿3063.1

Turnover section of the Bankruptcy Code provides, with just a few exceptions, that an entity other than a custodian in possession of property of the bankruptcy estate shall deliver to the trustee, and account for, that property. 11 U.S.C.A. § 542.

5. Bankruptcy ⚿2394.1

One automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition operates as a stay, applicable to all entities, of efforts to collect from the debtor outside of the bankruptcy forum. 11 U.S.C.A. § 362(a).

6. Bankruptcy ⚿2391

Bankruptcy Code's automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. 11 U.S.C.A. § 362(a).

7. Bankruptcy ⚿2467, 2468

Under the Bankruptcy Code, an individual injured by any willful violation of the automatic stay shall recover actual damages, and may recover punitive damages. 11 U.S.C.A. §§ 362(a), 362(k)(1).

8. Bankruptcy ⚿2394.1

Entity's mere retention of estate property after the filing of a bankruptcy petition does not constitute an act to exercise control over property of the estate in violation of the Bankruptcy Code's automatic stay; rather, that subsection of the Code prohibits affirmative acts that would disturb the status quo of estate property as of the time the bankruptcy petition was filed; abrogating *In re Weber*, 719 F.3d 72, *In re Del Mission Ltd.*, 98 F.3d 1147, and *In re Knaus*, 889 F.2d 773. 11 U.S.C.A. § 362(a)(3).

9. Action ⚿68

A "stay" is an order that suspends judicial alteration of the status quo.

See publication Words and Phrases for other judicial constructions and definitions.

10. Bankruptcy ⚿2394.1

In context of the stay provision of the Bankruptcy Code prohibiting any act to exercise control over property of the estate, the term "act" refers to something done or performed, or a deed. 11 U.S.C.A. § 362(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

11. Bankruptcy ⚿2394.1

In context of the stay provision of the Bankruptcy Code prohibiting any act to exercise control over property of the estate, to "exercise" means to bring into play or to make effective in action, and to exercise something like control is to put in practice or carry out in action. 11 U.S.C.A. § 362(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

12. Statutes ⚿1132

In interpreting a statute, omissions may qualify as "acts" in certain contexts.

See publication Words and Phrases for other judicial constructions and definitions.

13. Statutes ⚿1132

In interpreting a statute, in certain contexts the term "control" may mean to have power over.

See publication Words and Phrases for other judicial constructions and definitions.

14. Bankruptcy ⚿3063.1

Exceptions to the Bankruptcy Code's turnover provision shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy petition, and (2) good-faith transfers to satisfy certain life insurance obligations. 11 U.S.C.A. §§ 542, 542(c), (d).

15. Statutes ⚿1156

Canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.

16. Bankruptcy ⚿2394.1

Stay provision of the Bankruptcy Code prohibiting any act to exercise control over property of the estate prohibits collection efforts outside the bankruptcy proceeding that would change the status quo. 11 U.S.C.A. § 362(a)(3).

17. Bankruptcy ⚿3063.1

Bankruptcy Code's turnover provision works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee. 11 U.S.C.A. § 542(a).

18. Bankruptcy ⚿3063.1

Bankruptcy Code's turnover provision does not mandate turnover of property that is of inconsequential value or benefit to the estate. 11 U.S.C.A. § 542(a).

Syllabus *

The filing of a petition under the Bankruptcy Code automatically "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). Section 541 is intended to include within the estate any property made available by other provisions of the Bankruptcy Code. Section 542 is one such provision, as it provides that an entity in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property. The filing of a petition also automatically "operates as a stay, applicable to all entities," of efforts to collect prepetition debts outside the bankruptcy forum, § 362(a), including "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," § 362(a)(3). Here, each respondent filed a

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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

Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed. Respondents' alternative reading would create at least two serious problems. First, reading § 362(a)(3) to cover mere retention of property would render § 542's central command—that an entity in possession of certain estate property "shall deliver to the trustee . . . such property"—largely superfluous, even though § 542 appears to be the provision governing the turnover of estate property. Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command. Under respondents' reading, an entity would be required to turn over property under § 362(a)(3) even if that property were exempt from turnover under § 542. The history of the Bankruptcy Code confirms the better reading. The Code originally included both § 362(a)(3) and § 542(a), but the former provision lacked the phrase "or to exercise control over property of the estate." When that phrase was later added by amendment, Congress made no mention of transforming § 362(a)(3) into an affirmative turnover obligation. It is unlikely that Congress would have made such an important change simply by adding the phrase "exercise control," rather than by adding a cross-reference to § 542(a) or some other indication that it was so transforming § 362(a)(3). Pp. 590 – 592.

926 F.3d 916, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which all other Members joined, except BARRETT, J., who took no part in the consideration or decision of the case. SOTOMAYOR, J., filed a concurring opinion.

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

Mark A. Flessner, Benna Ruth Solomon, Myriam Zreczny Kasper, Ellen W. McLaughlin, City of Chicago, Office of Corporation Counsel, Chicago, IL, Craig Goldblatt, Danielle Spinelli, Joel Millar, Isley Gostin, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, Allyson M. Pierce, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, for Petitioner.

Catherine Steege, Adam T. Swingle, Jenner & Block LLP, Chicago, IL, Eugene R. Wedoff, Counsel of Record, Carl Wedoff, Jenner & Block LLP, New York, NY, John P. Wonais, Michael A. Miller, The Semrad Law Firm LLC, Chicago, IL, for Respondents.

For U.S. Supreme Court briefs, see:

2020 WL 583728 (Pet.Brief)

2020 WL 1478598 (Resp.Brief)

2020 WL 1875614 (Reply.Brief)

Justice ALITO delivered the opinion of the Court.

[1] When a debtor files a petition for bankruptcy, the Bankruptcy Code protects the debtor's interests by imposing an automatic stay on efforts to collect prepetition debts outside the bankruptcy forum. *Ritzen Group, Inc.* v. *Jackson Masonry, LLC*, 589 U.S. ——, ———–———, 140 S.Ct. 582, 588–589, 205 L.Ed.2d 419 (2020). Those prohibited efforts include "any act . . . to exercise control over property" of the bankruptcy estate. 11 U.S.C. § 362(a)(3). The question in this case is whether an entity violates that prohibition by retaining possession of a debtor's property after a bankruptcy petition is filed. We hold that mere retention of property does not violate § 362(a)(3).

I

[2–4] Under the Bankruptcy Code, the filing of a bankruptcy petition has certain immediate consequences. For one thing, a petition "creates an estate" that, with some exceptions, comprises "all legal or equitable interests of the debtor in property as of the commencement of the case." § 541(a)(1). Section 541 "is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code." *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 205, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). One such provision, § 542, is important for present purposes. Titled "Turnover of property to the estate," § 542 provides, with just a few exceptions, that an entity (other than a custodian) in possession of property of the bankruptcy estate "shall deliver to the trustee, and account for" that property.

[5–7] A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition "operates as a stay, applicable to all entities," of efforts to collect from the debtor outside of the bankruptcy forum. § 362(a). The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others. Under the Code, an individual injured by any willful violation of the stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." § 362(k)(1).

Among the many collection efforts prohibited by the stay is "any act to obtain possession of property of the estate or of property from the estate or *to exercise control over property of the estate*." § 362(a)(3) (emphasis added). The prohibition against exercising control over estate property is the subject of the present dispute.

In the case before us, the city of Chicago (City) impounded each respondent's vehicle for failure to pay fines for motor vehicle infractions. Each respondent filed a Chapter 13 bankruptcy petition and requested that the City return his or her vehicle. The City refused, and in each case a bankruptcy court held that the City's refusal violated the automatic stay. The Court of Appeals affirmed all of the judgments in a consolidated opinion. *In re Fulton*, 926 F.3d 916 (CA7 2019). The court concluded that "by retaining possession of the debtors' vehicles after they declared bankruptcy," the City had acted "to exercise control over" respondents' property in violation of § 362(a)(3). *Id.*, at 924–925. We granted certiorari to resolve a split in the Courts of Appeals over whether an entity that retains possession of the property of a

bankruptcy estate violates § 362(a)(3).[1] 589 U.S. ——, 140 S.Ct. 680, 205 L.Ed.2d 449 (2019). We now vacate the judgment below.

II

[8] The language used in § 362(a)(3) suggests that merely retaining possession of estate property does not violate the automatic stay. Under that provision, the filing of a bankruptcy petition operates as a "stay" of "any act" to "exercise control" over the property of the estate. Taken together, the most natural reading of these terms—"stay," "act," and "exercise control"—is that § 362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

[9–11] Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder*, 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed . . . ; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International Dictionary, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition.

[12, 13] We do not maintain that these terms definitively rule out the alternative interpretation adopted by the court below and advocated by respondents. As respondents point out, omissions can qualify as "acts" in certain contexts, and the term "'control'" can mean "'to have power over.'" *Thompson* v. *General Motors Acceptance Corp.*, 566 F.3d 699, 702 (CA7 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)). But saying that a person engages in an "act" to "exercise" his or her power over a thing communicates more than merely "having" that power. Thus the language of § 362(a)(3) implies that something more than merely retaining power is required to violate the disputed provision.

Any ambiguity in the text of § 362(a)(3) is resolved decidedly in the City's favor by the existence of a separate provision, § 542, that expressly governs the turnover of estate property. Section 542(a), with two exceptions, provides as follows:

> "[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

[14] The exceptions to § 542(a) shield (1) transfers of estate property made from one entity to another in good faith without notice or knowledge of the bankruptcy pe-

1. Compare *In re Fulton*, 926 F.3d 916, 924 (CA7 2019), *In re Weber*, 719 F.3d 72, 81 (CA2 2013), *In re Del Mission Ltd.*, 98 F.3d 1147, 1151–1152 (CA9 1996), and *In re Knaus*, 889 F.2d 773, 774–775 (CA8 1989), with *In re Denby-Peterson*, 941 F.3d 115, 132 (CA3 2019), and *In re Cowen*, 849 F.3d 943, 950 (CA10 2017).

tition and (2) good-faith transfers to satisfy certain life insurance obligations. See §§ 542(c), (d). Reading § 362(a)(3) to cover mere retention of property, as respondents advocate, would create at least two serious problems.

[15] First, it would render the central command of § 542 largely superfluous. "The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Yates* v. *United States*, 574 U.S. 528, 543, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015) (plurality opinion; internal quotation marks and brackets omitted). Reading "any act . . . to exercise control" in § 362(a)(3) to include merely retaining possession of a debtor's property would make that section a blanket turnover provision. But as noted, § 542 expressly governs "[t]urnover of property to the estate," and subsection (a) describes the broad range of property that an entity "shall deliver to the trustee." That mandate would be surplusage if § 362(a)(3) already required an entity affirmatively to relinquish control of the debtor's property at the moment a bankruptcy petition is filed.

[16, 17] Respondents and their *amici* contend that § 542(a) would still perform some work by specifying the party to whom the property in question must be turned over and by requiring that an entity "account for . . . the value of " the debtor's property if the property is damaged or lost. But that is a small amount of work for a large amount of text in a section that appears to be the Code provision that is designed to govern the turnover of estate property. Under this alternative interpretation, § 362(a)(3), not § 542, would be the chief provision governing turnover—even though § 362(a)(3) says nothing expressly on that question. And § 542 would be reduced to a footnote—even though it appears on its face to be the governing provision. The better account of the two provisions is that § 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee.

[18] Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command, and § 542(a) by its terms does not mandate turnover of property that is "of inconsequential value or benefit to the estate." Under respondents' reading, in cases where those exceptions to turnover under § 542 would apply, § 362(a)(3) would command turnover all the same. But it would be "an odd construction" of § 362(a)(3) to require a creditor to do immediately what § 542 specifically excuses. *Citizens Bank of Md.* v. *Strumpf*, 516 U.S. 16, 20, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995). Respondents would have us resolve the conflicting commands by engrafting § 542's exceptions onto § 362(a)(3), but there is no textual basis for doing so.

The history of the Bankruptcy Code confirms what its text and structure convey. Both § 362(a)(3) and § 542(a) were included in the original Bankruptcy Code in 1978. See Bankruptcy Reform Act of 1978, 92 Stat. 2570, 2595. At the time, § 362(a)(3) applied the stay only to "any act to obtain possession of property of the estate or of property from the estate." *Id.*, at 2570. The phrase "or to exercise control over property of the estate" was not added until 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, 98 Stat. 371.

Respondents do not seriously dispute that § 362(a)(3) imposed no turnover obligation prior to the 1984 amendment. But

transforming the stay in § 362 into an affirmative turnover obligation would have constituted an important change. And it would have been odd for Congress to accomplish that change by simply adding the phrase "exercise control," a phrase that does not naturally comprehend the mere retention of property and that does not admit of the exceptions set out in § 542. Had Congress wanted to make § 362(a)(3) an enforcement arm of sorts for § 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a crossreference or provide any other indication that it was transforming § 362(a)(3). The better account of the statutory history is that the 1984 amendment, by adding the phrase regarding the exercise of control, simply extended the stay to acts that would change the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without "obtain[ing]" such property.

* * *

Though the parties debate the issue at some length, we need not decide how the turnover obligation in § 542 operates. Nor do we settle the meaning of other subsections of § 362(a).[2] We hold only that mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BARRETT took no part in the consideration or decision of this case.

2. In respondent Shannon's case, the Bankruptcy Court determined that by retaining Shannon's vehicle and demanding payment, the City also had violated §§ 362(a)(4) and (a)(6). Shannon presented those theories to the Court of Appeals, but the court did not reach them. 926 F.3d at 926, n. 1. Neither do we.

Justice SOTOMAYOR, concurring.

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay" of "any act . . . to exercise control over property of the [bankruptcy] estate." 11 U.S.C. § 362(a)(3). I join the Court's opinion because I agree that, as used in § 362(a)(3), the phrase "exercise control over" does not cover a creditor's passive retention of property lawfully seized prebankruptcy. Hence, when a creditor has taken possession of a debtor's property, § 362(a)(3) does not require the creditor to return the property upon the filing of a bankruptcy petition.

I write separately to emphasize that the Court has not decided whether and when § 362(a)'s other provisions may require a creditor to return a debtor's property. Those provisions stay, among other things, "any act to create, perfect, or enforce any lien against property of the estate" and "any act to collect, assess, or recover a claim against [a] debtor" that arose prior to bankruptcy proceedings. §§ 362(a)(4), (6); see, *e.g.*, *In re Kuehn*, 563 F.3d 289, 294 (CA7 2009) (holding that a university's refusal to provide a transcript to a student-debtor "was an act to collect a debt" that violated the automatic stay). Nor has the Court addressed how bankruptcy courts should go about enforcing creditors' separate obligation to "deliver" estate property to the trustee or debtor under § 542(a). The City's conduct may very well violate one or both of these other provisions. The Court does not decide one way or the other.

Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly

comports with its spirit. "The principal purpose of the Bankruptcy Code is to grant a '"fresh start"'" to debtors. *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). When a debtor files for Chapter 13 bankruptcy, as respondents did here, "the debtor retains possession of his property" and works toward completing a court-approved repayment plan. 549 U.S. at 367, 127 S.Ct. 1105. For a Chapter 13 bankruptcy to succeed, therefore, the debtor must continue earning an income so he can pay his creditors. Indeed, Chapter 13 bankruptcy is available only to "individual[s] with regular income." 11 U.S.C. § 109(e).

For many, having a car is essential to maintaining employment. Take, for example, respondent George Peake. Before the City seized his car, Peake relied on his 200,000-mile 2007 Lincoln MKZ to travel 45 miles each day from his home on the South Side of Chicago to his job in Joliet, Illinois. In June 2018, when the City impounded Peake's car for unpaid parking and red-light tickets, the vehicle was worth just around $4,300 (and was already serving as collateral for a roughly $7,300 debt). Without his car, Peake had to pay for rides to Joliet. He filed for bankruptcy, hoping to recover his vehicle and repay his $5,393.27 debt to the City through a Chapter 13 plan. The City, however, refused to return the car until either Peake paid $1,250 upfront or after the court confirmed Peake's bankruptcy plan. As a result, Peake's car remained in the City's possession for months. By denying Peake access to the vehicle he needed to commute to work, the City jeopardized Peake's ability to make payments to *all* his creditors, the City included. Surely, Peake's vehicle would have been more valuable in the hands of its owner than parked in the City's impound lot.[1]

Peake's situation is far too common.[2] Drivers in low-income communities across the country face similar vicious cycles: A driver is assessed a fine she cannot immediately pay; the balance balloons as late fees accrue; the local government seizes the driver's vehicle, adding impounding and storage fees to the growing debt; and the driver, now without reliable transportation to and from work, finds it all but impossible to repay her debt and recover her vehicle. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 11–16, 31–32. Such drivers may turn to Chapter 13 bankruptcy for a "fresh start." *Marrama*, 549 U.S. at 367, 127 S.Ct. 1105 (internal quotation marks omitted).[3] But without their vehicles, many debtors quickly find themselves unable to make their Chapter 13 payments. The cycle thus continues, disproportionately burdening com-

1. Even though § 362(a)(3) does not require turnover, whether and when the City may sell impounded cars is an entirely different matter. See, *e.g.*, *In re Cowen*, 849 F.3d 943, 950 (CA10 2017) ("It's not hard to come up with examples of . . . 'acts' that 'exercise control' over, but do not 'obtain possession of,' the estate's property, e.g., a creditor in possession who improperly sells property belonging to the estate").

2. See, *e.g.*, Ramos, Chicago Seized and Sold Nearly 50,000 Cars Over Tickets Since 2011, Sticking Owners With Debt, WBEZ News (Jan. 7, 2019) (online source archived at www.supremecourt.gov).

3. The 10-year period from 2007 to 2017, for instance, saw a tenfold increase in the number of Chicagoans filing Chapter 13 bankruptcies that involved debt to the City. See Sanchez & Kambhampati, Driven Into Debt: How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy, ProPublica Illinois (Feb. 27, 2018) (online source archived at www.supremecourt.gov).

munities of color, see Brief for American Civil Liberties Union et al. as *Amici Curiae* 17, and interfering not only with debtors' ability to earn an income and pay their creditors but also with their access to childcare, groceries, medical appointments, and other necessities.

Although the Court today holds that § 362(a)(3) does not require creditors to turn over impounded vehicles, bankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under § 542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U.S.C. § 542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, § 363(e); for example, the debtor may need to demonstrate that her car is sufficiently insured. In this way, § 542(a) maximizes value for all parties involved in a bankruptcy: The debtor is able to use her asset, which makes it easier to earn an income; the debtor's unsecured creditors, in turn, receive timely payments from the debtor; and the debtor's secured creditor, for its part, receives "adequate protection [to] replace the protection afforded by possession." *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 207, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). Secured creditors cannot opt out of this arrangement. As even the City acknowledges, § 542(a) "impose[s] a duty of turnover that is mandatory when the statute's conditions . . . are met." Brief for Petitioner 37.

The trouble with § 542(a), however, is that turnover proceedings can be quite slow. The Federal Rules of Bankruptcy Procedure treat most "proceeding[s] to recover . . . property" as "adversary proceedings." Rule 7001(1). Such actions are, in simplified terms, "essentially full civil lawsuits carried out under the umbrella of [a] bankruptcy case." *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 505, 135 S.Ct. 1686, 191 L.Ed.2d 621 (2015). Because adversary proceedings require more process, they take more time. Of the turnover proceedings filed after July 2019 and concluding before June 2020, the average case was pending for over 100 days. See Administrative Office of the United States Courts, Time Intervals in Months From Filing to Closing of Adversary Proceedings Filed Under 11 U.S.C. § 542 for the 12-Month Period Ending June 30, 2020, Washington, DC: Sept. 25, 2020.

One hundred days is a long time to wait for a creditor to return your car, especially when you need that car to get to work so you can earn an income and make your bankruptcy-plan payments. To address this problem, some courts have adopted strategies to hurry things along. At least one bankruptcy court has held that § 542(a)'s turnover obligation is automatic even absent a court order. See *In re Larimer*, 27 B.R. 514, 516 (Bankr. D Idaho 1983). Other courts apparently will permit debtors to seek turnover by simple motion, in lieu of filing a full adversary proceeding, at least where the creditor has received adequate notice. See Tr. of Oral Arg. 81 (counsel for the City stating that "[i]n most bankruptcy courts, if a creditor responds to a motion [for turnover] by" arguing that the debtor should have instituted an adversary proceeding, the bankruptcy judge will ask whether the creditor received "actual notice"); Brief for United States as *Amicus Curiae* 32 (reporting that "some courts have granted [turnover] orders based solely on a motion"); but see, *e.g.*, *In re Denby-Peterson*, 941 F.3d 115, 128–131 (CA3 2019) (holding that debtors must seek turnover through adversary proceedings). Similarly, even when a turnover request does take the form of an

adversary proceeding, bankruptcy courts may find it prudent to expedite proceedings or order preliminary relief requiring temporary turnover. See, *e.g., In re Reid*, 423 B.R. 726, 727–728 (Bkrtcy. Ct. ED Pa. 2010); see generally 10 Collier on Bankruptcy ¶ 7065.02 (16th ed. 2019).

Ultimately, however, any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges. It is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned. Congress, too, could offer a statutory fix, either by ensuring that expedited review is available for § 542(a) proceedings seeking turnover of a vehicle or by enacting entirely new statutory mechanisms that require creditors to return cars to debtors in a timely manner.

Nothing in today's opinion forecloses these alternative solutions. With that understanding, I concur.