UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re GAILON ARTHUR JOY Debtor	Case No: 4:08-CV-40090-FDS
GAILON ARTHUR JOY Plaintiff v. THREE ANGELS BROADCASTING NETWORK, INC., DANNY LEE SHELTON, JOHN P. PUCCI, ESQ., JERRIE M. HAYES, ESQ., GERALD S. DUFFY, ESQ., FIERST, PUCCI & KANE, LLP, and SIEGEL BRILL GRUEPNER DUFFY & FOSTER, P.A. Defendants	

DEFENDANTS' MEMORANDUM OF REASONS SUBMITTED IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. Introduction

Three Angels Broadcasting Network, Inc. ("3ABN"), Danny Lee Shelton ("Shelton"), John P. Pucci ("Pucci"), Jerrie M. Hayes ("Hayes"), Gerald S. Duffy ("Duffy"), Fierst, Pucci & Kane LLP ("Fierst Pucci"), and Siegel Brill Greupner Duffy & Foster, P.A. ("Siegel Brill"), Defendants in the above-captioned adversarial proceeding, have moved, pursuant to Fed. R. Bank. P. 7056 and Fed. R. Civ. P. 56, as well as Local Rules 7.1 and 56.1, for Summary

Judgment as to the entire claim asserted by Debtor, Gailon Arthur Joy ("Joy"), in his Amended Adversarial Complaint.

This Court has already considered the core issues raised by this summary judgment motion when it considered Defendants' motion to dismiss. Although the Court denied that motion under the standards of Fed. R. Civ. P. 12 because Joy had at least pleaded actual injury, the Court invited this summary judgment motion stating that it "share[d] defendants' skepticism concerning whether [Plaintiff's] allegations will be sufficient to establish that Joy suffered an injury in fact", and further noting that "any violation of the automatic stay by the defendants would be, at best, a technical one." (March 10, 2009 Report and Recommendations, pp. 7-8).

Mr. Joy has now undergone an examination under oath pursuant to Bankruptcy Rule 2004, during which he testified to facts showing a total absence of injury in fact arising from the alleged violation. Thus, all Defendants submit this Motion for Summary Judgment.

II. Statement of Legal Elements and Arguments

Federal Rule of Civil Procedure 56 is applicable to this Adversarial Proceeding pursuant to Fed. R. Bankr. P. 7056.

> Under Fed. R. Civ. P. 56, applicable through Fed. R. Bankr. P. 7056, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is only "genuine" if there is sufficient evidence to find in favor of the nonmoving party. The evidence of the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." If after reviewing the evidence, there can be only one reasonable conclusion, summary judgment is appropriate.

Berman v. Kessler (In re Berman), 352 B.R. 533, 542 (Bankr. D. Mass. 2006) (citations omitted).

Joy's Amended Adversarial Complaint alleges that 3ABN and Shelton, along with their attorneys, Duffy, Hayes, and Pucci, and their respective law firms, Siegel Brill and Fierst Pucci, are liable to Joy for damages as a result of alleged automatic stay violations pursuant to 11 U.S.C. §362(k). More specifically, the alleged stay violations[1] are as follows:

1. That Pucci, Duffy, and their clients, 3ABN and Shelton, violated the automatic stay by filing the Motion for Status Conference in the Civil Action on October 24, 2007. See Amended Adversarial Complaint, ¶¶23, 32, 40.
2. That Pucci, Duffy, and their clients, 3ABN and Shelton, violated the automatic stay by participating in the status conference in the Civil Action on November 13, 2007. See Amended Adversarial Complaint, ¶¶23, 35-36, 43-44.
3. That Hayes and her clients, 3ABN and Shelton, violated the automatic stay by sending the November 5, 2007 letter attached as Ex. 4 to the Amended Adversarial Complaint. See Amended Adversarial Complaint, ¶¶22, 48.
4. That Hayes and her clients, 3ABN and Shelton, violated the automatic stay by sending the November 6, 2007 letter attached as Ex. 3 to the Amended Adversarial Complaint. See Amended Adversarial Complaint, ¶¶22, 49.
5. That Hayes and her clients, 3ABN and Shelton, violated the automatic stay by sending the November 9, 2007 letter attached as Ex. 5 to the Amended Adversarial Complaint. See Amended Adversarial Complaint, ¶¶22, 50.

The purpose of the automatic stay in bankruptcy proceedings is two-fold. "First, the stay protects the estate and gives a trustee the opportunity to marshal and distribute the assets.

[1] Joy's Amended Adversarial Complaint is not particularly clear on this point. In ¶57, Joy states that he "had to endure no less than six intentional stay violations . . .," but in ¶59, he requests punitive damages "in the amount of $35,000, or $5,000 per occurrence of intentional violation of the Automatic Stay," which necessarily suggests he is alleging seven stay violations. However, review of the factual allegations of his Amended Adversarial Complaint reveals only five alleged violations.

Second, it gives the debtor 'breathing room,' stopping all collections, foreclosures, and harassment." In re Rosa, 313 B.R. 1, 6 (Bankr. D. Mass. 2004) (citations omitted). Section 362(k)[2] 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." 11 U.S.C. §362(k)(1). "A debtor is charged with establishing three separate elements before actual damages will be imposed for violation of the automatic stay. First, a violation of the automatic stay must have occurred. Second, the violation must have been committed willfully. Third, the violation must have injured the debtor." In re Rosa, 313 B.R. at 6 (citations omitted).

A. Joy Cannot Establish that Any Violation of the Automatic Stay Occurred.

The undisputed facts demonstrate that neither the Motion for Status Conference in the Civil Action on October 24, 2007, nor the attorneys' participation in the status conference in the Civil Action on November 13, 2007, constitute violations of the automatic stay as a matter of law. Section 362(a)(1) bars "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 ." 11 U.S.C. §362(a)(1). "The statute is clear. The stay applies only to the debtor and not to co-defendants." Christakis v. McMahon (In re Christakis), 291 B.R. 9, 17 (Bankr. D. Mass. 2003). "Notwithstanding the reach of the automatic stay, debtors continue to have a responsibility to serve as witnesses in non-bankruptcy court litigation filed or continuing against

[2] The 2005 Amendments to 11 U.S.C. §362 redesignated former subsection (h) as subsection (k) and inserted a new subsection (h). See Pub. L. 109-8, §305(1)(B)(C). Accordingly, the cases cited in this Memorandum which dealt with alleged or actual stay violations predating the 2005 Amendments refer to the pertinent subsection as being subsection (h).

non-debtor parties unless and until a bankruptcy court says otherwise." Id. at 18. "By the same token, there is no per se violation of the stay in serving notice to the debtor of actions taking place in litigation to which the debtor was formerly an active party." Id.

In this case, Robert Pickle was a co-defendant in the Civil Action at the time of the alleged stay violations. See Defendants' Statement of Material Facts (hereinafter, "Undisputed Facts"), at ¶1. 3ABN, Shelton, and their counsel were lawfully entitled, notwithstanding the automatic stay, to proceed with prosecuting the Civil Action against Pickle, and Joy was required to continue to serve as a witness in the Civil Action. See Christakis, 291 B.R. at 18. See also In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969, 977 (N.D. Ill. 1992) (where the Honorable Judge Easterbrook observed that "at oral argument, counsel for [Debtor-Defendant] conceded that the automatic stay does not affect discovery regarding [other defendants unaffected by bankruptcy], and that [Debtor-Defendant] is obliged to participate to the extent it would be as a non-party. Related litigation goes on without the debtor." (citations omitted)). All of the actions that Joy alleges violated the stay fall within the realm of permissible proceedings in continuing the litigation against Pickle.

By the time 3ABN, Shelton, and their counsel filed the October 24, 2007 Motion for Status Conference, they had already stated their understanding, in Hayes' September 13, 2007 letter to Heal, that Joy's bankruptcy filing suspended his involvement in the Civil Action. See Undisputed Facts, ¶13. The October 24, 2007 Motion for Status Conference specifically disclosed to this Court that Joy had filed for Bankruptcy and raised only two issues, which dealt with the continued litigation against Pickle. See Undisputed Facts, ¶14. First, the Motion raised concern about the preservation of electronic evidence given Joy's listing of his computer equipment as a personal asset on his bankruptcy schedules. See id. The information on Joy's

electronic equipment remained relevant and vital to 3ABN and Shelton's claims for trademark infringement and defamation against Pickle, since Pickle and Joy were alleged to have acted in concert in committing their unlawful acts against 3ABN and Shelton. See Undisputed Facts, ¶2. There was nothing improper in 3ABN and Shelton's efforts to preserve that electronic evidence in light of Joy's having listed his personal computer equipment as part of his bankruptcy estate, which created the possibility of that equipment being sold by the Bankruptcy Trustee. Second, the Motion raised the issue of a potential conflict of interest by Heal in representing Pickle in the Civil Action because he was simultaneously representing Joy in his Bankruptcy Case. See Undisputed Facts, ¶14. Certainly, the automatic stay did not preclude 3ABN, Shelton, and their attorneys from challenging Heal's continued representation of Pickle in the Civil Action. Thus, the filing of the Motion for Status Conference by 3ABN, Shelton, Pucci, and Duffy does not constitute a violation of the automatic stay.

Similarly, the participation by Pucci and Duffy on behalf of 3ABN and Shelton in the Status Conference on November 13, 2007 was not violative of the automatic stay. See Undisputed Facts, ¶¶19, 20. The Status Conference dealt in substantial part with the issues relative to the continued prosecution of the Civil Action against Pickle, as set forth in the Motion for Status Conference. See Undisputed Facts, ¶20. Moreover, during the Status Conference, Pucci and Duffy informed the Court that 3ABN and Shelton had that day filed a motion in the Bankruptcy Court seeking relief from the automatic stay for purposes of continuing the Civil Action against Joy. See id. Neither Pucci, Duffy, 3ABN, nor Shelton forced Joy to attend or participate in the status conference.

Joy additionally alleges that three letters from Hayes were sent in violation of the automatic stay. The first letter, dated November 5, 2007, was sent by Hayes to Heal. See

Undisputed Facts, ¶16. Heal was representing Pickle in the Civil Action, not Joy (see Undisputed Facts, ¶4), and there was nothing improper in Hayes serving upon Heal, as counsel for Pickle, this Court's November 2, 2007 Order.

The second two letters, dated November 6 and 9, 2007, respectively, were sent by Hayes to Joy. See Undisputed Facts, ¶17. Both letters addressed the issue of setting up the mirror imaging of Joy's electronic equipment as ordered by this Court on November 2, 2007. See id. Neither of these two letters was violative of the automatic stay. The mirror imaging was ordered not to further the litigation against Joy, but merely to preserve electronic evidence that was equally relevant to the claims against Pickle, claims which 3ABN and Shelton were fully justified in pursuing notwithstanding Joy's bankruptcy filing. The fact that Joy had filed for bankruptcy did not relieve him of the obligation to serve as a witness in the Civil Action against Pickle, and 3ABN and Shelton were fully justified in seeking to preserve any electronic evidence in Joy's possession for that purpose. See Christakis, 291 B.R. at 18 ("notwithstanding the reach of the automatic stay, debtors continue to have a responsibility to serve as witnesses in non-bankruptcy court litigation filed or continuing against non-debtor parties unless and until a bankruptcy court says otherwise.").

Therefore, viewing the evidence in the light most favorable to Joy, the undisputed facts show that Attorney Hayes's letters of November 6 and 9 do not constitute a violation of the automatic stay as a matter of law. This conclusion is buttressed by consideration of the two-fold purpose of the automatic stay. See In re Rosa, 313 B.R. at 6. None of the five acts of which Joy complains had any effect on the bankruptcy estate or the trustee's eventual distribution of the assets in the estate. Even if the mirror imaging had gone forward as ordered by the Court on November 2, 2007, the electronic equipment would have remained fully intact as part of the

estate. Further, none of the five acts interfered with the "breathing room" afforded Joy by his bankruptcy filing. As a matter of fact, and as Joy testified at his deposition, Joy did not consider 3ABN or Shelton creditors, and he had no expectation that the Civil Action would stop as a result of his bankruptcy filing. See Undisputed Facts, ¶35.

Moreover, and as a matter of equity, Joy should be barred from arbitrarily or improperly enforcing the automatic stay where his post-petition conduct indicated that he expected the Civil Action *not* to be subject to the stay. Joy made no effort to inform 3ABN, Shelton, its lawyers, or this Honorable Court of his Bankruptcy Case (see Undisputed Facts ¶¶9, 10, 11), and later testified that had counsel for 3ABN and Shelton *not* learned of his Bankruptcy Case and informed this Honorable Court of it, he would have made no effort to stop the litigation. See Undisputed Facts, ¶35. Instead, Joy continued to participate voluntarily in the Civil Action. Two weeks after he filed his Bankruptcy Case, and utilizing his bankruptcy attorney's ECF account, Joy filed his proposed order regarding the production of electronically stored information, along with an accompanying memorandum of law. See Undisputed Facts, ¶11. Given Joy's continued voluntary participation in the Civil Action as to the discovery of electronic evidence, Joy waived the automatic stay as to that particular issue. See In re Cobb, 88 B.R. 119, 121 (Bankr. W.D. Tex. 1998) (holding that a debtor who appears and defends a suit on any basis other than application of the automatic stay is deemed to have waived the stay as to that particular issue because, "[t]o hold otherwise, would allow a [debtor] to have [a] trump card that he could play if he did not like the outcome of the action, but allowing him [to] take a favorable judgment.").

Rather than coming to this Court with true complaints that the stay was violated, Joy is playing games with 3ABN, Shelton, their lawyers, and this Honorable Court. Joy's examination

testimony shows that he believes that he caught 3ABN, Shelton, and their lawyers in a trap based on his belief that they invoked the automatic stay, not him. See Undisputed Facts, ¶35. See, e.g., Clayton v. King (In re Clayton), 235 B.R. 801, 807 (Bankr. M.D.N.C. 1998) ("The automatic stay was not designed to be used as a kind of spring-loaded gun against creditors who wander into traps baited by the debtor."). He seems to view the actions of the Court similarly, testifying that "[s]omething happened and suddenly the magistrate judge realized that he had a little problem; that there was a bankruptcy hearing and he had to deal with that issue first, so he reversed his order." See Undisputed Facts, ¶36. Joy's testimony demonstrates that his present allegations that the stay was violated were actually motivated by the fact that he was unhappy with the Court's November 2, 2007 Order, and seized on it as an opportunity to seek damages he did not suffer and to which he is not entitled (as will be addressed below). See, e.g., In re Hoskins, 266 B.R. 872, 879 (Bankr. W.D. Missouri 2001) ("It would be manifestly unjust to allow the Hoskins to fully participate in the adversary proceeding, then allow them to pursue their motion asserting a violation of the automatic stay after the Court rendered judgment in favor of [the opposing party]"). Accordingly, viewing the evidence in the light most favorable to Joy, Joy waived his right to claim the stay was violated on the issue of discovery of electronic evidence in the Civil Action.

B. Joy Should be Judicially Estopped from Claiming Any Violation of the Automatic Stay by His Prior Inconsistent Conduct.

The doctrine of judicial estoppel "prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 136 (1st Cir. BAP (Mass.) 2004) (citing InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003)); Pegram v. Herdrich, 530 U.S. 211, 227 n.9 (2000). Judicial estoppel operates to bar a

litigant from "'playing fast and loose with the courts', . . . when 'intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" Aquiar, 311 B.R. at 136 (citations omitted).

Judicial estoppel is to be "directed against those who would attempt to manipulate the court system through the calculated assertion of divergent sworn positions in judicial proceedings," Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1261 (11th Cir. 1988) (quotations omitted), and "is designed to prevent parties from making a mockery of justice by inconsistent pleadings," American Nat'l Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1536 (11th Cir. 1983). The doctrine may apply even if there is no showing of a calculated intent to mislead. See id.

To apply judicial estoppel

> a court must determine that the necessary elements are present. A litigant, as an initial matter, must, in effect, "have made a bargain" with the tribunal of the first proceeding by making certain representations to the tribunal in order to obtain a particular "benefit" from the tribunal. United States v. Levasseur, 846 F.2d 786, 792 (1st Cir.). Additionally, the position taken in the second litigation [or proceeding] must be "inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding," Brewer v. Madigan, 945 F.2d 449, 455 (1st Cir. 1991), regarding a matter "material" to the outcome of the prior proceeding, United States v. Kattar, 840 F.2d 118, 130 n. 7 (1st Cir. 1988).

Aguiar, 311 B.R. at 136-37 (quoting UNUM Corp. v. United States, 886 F.Supp. 150, 157 (D.Me. 1995)).

In the present case, Joy should be estopped from asserting any violations of the automatic stay, because this position is inconsistent with his prior assertions in the Civil Action.

Joy actively litigated and successfully advanced positions in the Civil Action -- post-petition -- that are inconsistent with his subsequent invocation of the stay. On August 27, 2007 -

- almost two weeks post-petition -- Joy e-filed a proposed order (ECF Doc. No. 26) and an accompanying Memorandum of Law (ECF Doc. No. 27) ***in order to comply*** with the Court's August 13, 2007 order requiring these submissions. See Undisputed Facts, ¶11. By this e-filing, Joy represented to the parties and to the Court that he expected a protective order would issue permitting and governing the copying of his computer hard drive despite his bankruptcy. Because Joy was then conducting himself as though the automatic stay did not affect the Civil Action (and in fact, he never notified the Court or the parties of his bankruptcy), the Court accepted Joy's e-filings, considered all parties' advancement of argument, and issued its order on November 2, 2007. See Undisputed Facts, ¶15.

Now, in this Adversary Action, Joy has taken the contrary position that letters sent by counsel requesting Joy's ***compliance with the November 2 Order***, violated the automatic stay. But the real reason Joy claimed the violation was that he found the November 2 Order unfavorable. As recently explained by Justice Alito in Zedner v. U.S., 547 U.S. 489, 504 (2006):

> "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895).

It is inconsistent for Joy to comply with the August 13 order -- post-petition -- by advancing to the Court that a discovery order *should* issue, and then assume the contrary position that counsel's seeking compliance with the order *ultimately* issued -- also post-petition -- constituted a violation of the automatic stay. Joy should therefore be estopped from claiming counsel's letters seeking Joy's compliance violated the stay where Joy implicitly asked this Court to issue a protective order permitting copy of the hard drive.

Especially considering Joy's silence and ongoing litigation activity in the Civil Action post-petition, it was not surprising that Joy later testified that he never conceived that his bankruptcy *would* interrupt his ability to continue litigating the Civil Action, as follows:

> Q: What I want to understand is whether you had an expectation that the District Court litigation would stop as a result of the bankruptcy filing?
>
> A: No. I did not.
>
> Q: You did not have an expectation that the District Court litigation would stop?
>
> A: Why would I? I had produced documentation --
>
> Q: If 3ABN and Danny Shelton had not put on the record that you were in bankruptcy, and they proceeded with the litigation in the normal course, would you have done anything to stop it?
>
> A: Can't imagine. There was --
>
> Q: The question is would you have done anything to stop the litigation?
>
> A: I can't imagine that I would have done anything to stop the litigation at that point . . .

Undisputed Facts ¶35 (Transcript of Examination ("Transcript"), at pp. 161-63).

> Q: Is it your position that the bankruptcy filing did not affect or shouldn't have affected the District Court action?
>
> A: Didn't think about it one way or the other.
>
> Q: Didn't think about it one way or the other?
>
> A: Nope. 3ABN was not on my mind when I filed bankruptcy believe me. It is the last thing on my mind when I filed bankruptcy.

Undisputed Facts ¶35 (Transcript, p. 125). See also id. (Transcript, pp. 158-59, 178-81).

Finally, on November 13, 2007, Joy knowingly attended the noticed status conference, which Joy now claims violated the stay. See Undisputed Facts, ¶20. The status conference had been noticed by counsel for 3ABN and Shelton on October 24, 2007, to specifically address discovery issues in light of Joy's bankruptcy. See Undisputed Facts, ¶14. Joy provided no prior

objection or notification that he considered the status conference or his attendance to be violative of the stay. See Undisputed Facts, ¶14. Joy should therefore be judicially estopped from claiming a violation occurred by the October 24, 2007 Motion for Status Conference, or the November 13, 2007 status conference itself.

C. Debtor Cannot Carry the Burden of Proving Willfulness.

"A willful violation does not require a specific intent to violate the automatic stay. The standard for a willful violation of the automatic stay under §362(h) is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation." Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999). In this case, there is no dispute that counsel for 3ABN and Shelton eventually learned of the stay. See, e.g., Undisputed Facts, ¶¶12 and 13. But as Judge Easterbrook has stated:

> [t]here is all the difference in the world between a litigant who barges ahead as if the bankruptcy filing never took place and a litigant who conscientiously brings the filing to the attention of the court and asks for interpretation and instruction. [The litigant] honorably took the latter course.

In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. at 972. Counsel for 3ABN and Shelton also took the latter course and brought the bankruptcy to the Court's attention and asked for guidance – and not with respect to continuing litigation against Joy, but for the limited purpose to preserve evidence *in light of* the stay. Defendants' actions were actually intended to *not* violate the stay. Under the undisputed facts, Joy fails to establish willfulness as a matter of law.

D. Even if the Court Finds that Any of the Alleged Actions Constituted Willful Violations of the Automatic Stay, Joy Suffered No Damages.

As the Court noted in its March 10, 2009 Recommendation and Report, the Court then shared Defendants' skepticism that the facts of this case will demonstrate injury-in-fact sufficient to support Plaintiff's claims as a matter of law. The Court further characterized Plaintiff's claims relating to copying of Joy's hard drives as appearing "spurious" and any of the alleged violations of the stay as "at best, a technical one." March 10, 2009 Report and Recommendations, pp. 7-8.

"[T]he automatic stay does 'not shield the debtor from all the vicissitudes, aggravations and anxiety of everyday life.' In addition to the 'willful' violation the debtor must also show injury." In re Sullivan, 357 B.R. 847, 854 (Bankr. D. Colo. 2006) (quoting In re Peterson, 297 B.R. 467, 470 (Bankr. W.D.N.C. 2003)). See also In re Craine, 206 B.R. 594, 597 (Bankr. M.D. Fla. 1997) (citations omitted) ("To recover under 362(h) of the Bankruptcy Code, however, a debtor must show not only the existence of a 'willful violation,' but must also show that he or she was injured by the violation. 'The mandatory tone of section 362(h) does not . . . diminish a debtor's obligation to sufficiently prove his or her actual damages.' . . . This requirement is consistent with the language of Section 362(h) that mandates recovery for an individual 'injured' by a willful violation."); In re Brock Utilities & Grading, Inc., 185 B.R. 719, 721 (Bankr. E.D.N.C. 1995) ("[T]here was no injured party in this case, and only an 'injured' party may recover under §362(h).").

"Where an individual debtor is damaged by a willful violation of the stay, §362(h) provides for a recovery of damages, costs and attorney's fees." In re Heghmann, 316 B.R. 395, 404 (B.A.P. 1st Cir. 2004). "The burden is on the debtor to prove by a preponderance of the evidence that she suffered damages as a result of the stay violation." Id., at 404-05. "For

§362(h) purposes, actual damages should be awarded only if there is concrete evidence supporting the award of a definite amount. Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty. A damages award cannot be based on mere speculation, guess or conjecture." Id. at 405. See also A&J Auto Sales, Inc. v. United States (In re A&J Auto Sales, Inc.), 210 B.R. 667, 671 (Bankr. D.N.H. 1997) ("The Debtor stated in its answers to the IRS's interrogatories that calculating lost revenue and lost sales would be 'purely speculation.'"); In re Alberto, 119 B.R. 985, 995 (Bankr. N.D. Ill. 1990) ("Damages can only be awarded if there is evidence supporting the award of a definite amount, which may not be predicated upon pure speculation.").

1. Joy Failed to Establish *Any* Evidence of Actual Damages

In this case, Joy has alleged that he spent "at least" 10 hours "answering the messages of the Defendants in violation of the Automatic Stay, preparing to meet the orders of the district court during the pendency of the Automatic Stay, and attending the status conference hearing...." See Undisputed Facts, ¶27. Joy admits that he "cannot quantify his lost profits" in connection with the time, but nevertheless goes on to arbitrarily value his time at $25 dollars per hour, for a total damages amount of $250. See id. Joy explains in his Amended Adversarial Complaint that he came up with the $25 figure as a result of having "in the past done paralegal work and been compensated at twenty-five dollars per hour." See id. In his deposition, however, Joy testified that the last time he performed regular work as a paralegal was well over ten years ago. See Undisputed Facts, ¶33. Thus, valuing his time at $25 per hour for purposes of claiming actual damages has no basis whatsoever in fact. Joy's other deposition testimony reveals that, not only did he not miss out on any work as a paralegal, but also, he did not miss out on any other income opportunities in connection with the alleged stay violations in October and November 2007. See

Undisputed Facts, ¶¶32, 34. Thus, viewing the evidence in the light most favorable to Joy, there is insufficient evidence (and, in fact, no evidence) to support the conclusion that Joy is a person "injured" by a willful violation of the automatic stay. Therefore, Joy cannot meet his burden as to the third element necessary to recover damages under 11 U.S.C. §362(k), and Defendants are entitled to summary judgment.

2. Joy is Not Entitled to Attorneys' Fees Under the Law.

"Debtors are indeed under a duty to mitigate their damages resulting from automatic stay violations." In re Rosa, 313 B.R. at 9. "[W]here the only damages to the debtor are the attorneys' fees related to bringing . . . [an adversarial complaint], courts have ruled that such damages are insufficient to satisfy the damages element of 11 U.S.C. §362(h) unless the debtor attempts to resolve the dispute with the . . . [creditor] prior to filing . . . [the adversarial complaint]." Shadduck v. Rodolakis, 221 B.R. 573, 585 (D. Mass. 1998) (citing In re Craine, 206 B.R. at 598). See also McHenry v. Key Bank (In re McHenry), 179 B.R. 165, 168 (9th Cir. B.A.P. 1995) (holding that the Bankruptcy Court was correct in not making any award of damages where the appellants showed no actual damages and the "attorney's fees would not have been incurred but for the bringing of the motion [for sanctions as a result of alleged stay violations]"); In re Brock Utilities & Grading, Inc., 185 B.R. at 720 ("Any costs involved in bringing this motion were unnecessarily incurred and should not be reimbursed by the IRS."); Whitt v. Philadelphia Housing Authority (In re Whitt), 79 B.R. 611, 616 (Bankr. E.D. Pa. 1987) ("Since costs and attorney's fees, by the terms of §362(h), are allowable only to embellish 'actual damages,' these elements of recovery will be denied [where the debtor proved no evidence of any actual damages].").

Joy claims to have incurred attorneys' fees in the amount of $1,593.60. See Undisputed Facts, ¶28. Joy should not be awarded these attorneys' fees, however, because they were completely unnecessary. Joy's accumulating of $1,593.60 in legal fees in connection with filing an adversarial proceeding where he suffered no actual damages is unjustifiable and should not be rewarded. This is particularly true where Joy made no effort to mitigate his damages. Instead, Joy participated voluntarily in the Civil Action after he filed his Bankruptcy Case. See Undisputed Facts, ¶11. It was only after he became unhappy with the Court's orders in the Civil Action that he decided to complain that the stay was allegedly violated. Further, he has perpetuated the problem by continuing to press the case with his Amended Adversarial Complaint, in which he has manufactured a damages amount in an attempt to withstand dismissal for failure to state a claim. Thus, viewing the evidence in the light most favorable to Joy, Joy is not entitled to an award of attorneys' fees pursuant to §362(k), since he cannot prove that he suffered any actual damages.

3. Joy is Not Entitled to Punitive Damages

Nor is Joy entitled to the $35,000 in punitive damages he seeks, or to any punitive damages award whatsoever. "Pursuant to §362(h), individuals injured by willful violations of the automatic stay are entitled to recover punitive damages in 'appropriate circumstances.'" In re Heghmann, 316 B.R. at 405 (quoting 11 U.S.C. §362(h)). "The Bankruptcy Code does not attempt to delineate further what this means, leaving it to the sound discretion of the bankruptcy court. However, punitive damages usually require more than mere willful violations of the automatic stay. Relevant factors are: (1) the nature of the creditor's conduct; (2) the creditor's ability to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor." Id. (citations omitted). "[C]ourts often limit the imposition of punitive damages to cases where

there is 'egregious, intentional misconduct.'" Id. (citations omitted). See also Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 590 (B.A.P. 9th Cir. 1995) ("Punitive damages will be awarded only if a defendant's conduct was malicious, wanton or oppressive."). Further, "'no punitive damages should be awarded in the absence of actual damages.'" See, e.g., In re Kinsey, 349 B.R. 48, 53 n.5 (Bankr. D. Idaho 2006) (quoting McHenry, 179 B.R. at 168).

As discussed, in this case, Joy has suffered no actual damages and, therefore, he is not entitled to an award of punitive damages. "The automatic stay afforded by section 362 is intended to be a shield protecting debtors and their estates, and should not be used as a sword for their enrichment." See McHenry, 179 B.R. at 169. Here, Joy is clearly trying to unjustifiably enrich himself to the tune of $35,000.

Moreover, even if the Court finds that any of the five alleged acts was actually in violation of the stay, they cannot be considered particularly egregious. The Defendants in this case were motivated by a desire to preserve evidence, nothing more. In the process of addressing this concern, they advised this Court at every turn of the existence of the Bankruptcy Case. See Undisputed Facts, ¶¶14, 20. And they did so within the context of Joy continuing to voluntarily participate in the Civil Action as to the discovery of electronic evidence. See Undisputed Facts, ¶11.

Additionally, 3ABN and Shelton filed their Motion for Relief from Stay in a timely fashion and sought expedited determination thereof. See Undisputed Facts, ¶18. When 3ABN, Shelton, and their attorneys learned that Joy was claiming their actions were in violation of the stay, they immediately informed this Court and asked that this Court address the stay issue rather than proceed with the mirror imaging as ordered on November 2. See Undisputed Facts, ¶22. See, e.g., In re Nelson, 335 B.R. 740, 752 (D. Kan. 2004) ("It is well-established that a party who

violates the automatic stay has an affirmative duty to remedy the violation and return the debtor to the status quo."). While 3ABN, Shelton, and their attorneys disagreed (and continue to disagree) with Joy that the stay was in any way violated, nevertheless, in an abundance of caution, they specifically approached this Court to immediately stop the pending activity in the Civil Action until some sort of determination could be made as to the stay. Given the nature of the alleged stay violations and the motivation behind them, combined with Joy's voluntary actions in the Civil Action, one simply cannot conclude that this case is one which can support an award of punitive damages.

III. Conclusion

For the reasons set forth herein, and based on the material facts of record as to which there is no genuine issue to be tried (viewed in the light most favorable to Joy) as set forth in the Defendants' Statement of Material Facts, Defendants seek Summary Judgment as to the entirety of Joy's claim for relief in his Amended Adversarial Complaint.

Respectfully Submitted,

Dated: May 15, 2009

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system, along with any affidavits and/or attachments filed herewith, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: May 15, 2009 /s/ M. Gregory Simpson