Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
December 28, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	Case No.: BK-S-19-17870-MKN
	Chapter 11
JONATHAN R. SORELLE, M.D., PLLC,	
	LEAD CASE
☒ Affects this Debtor.	
	Jointly Administered with:
In re:	Case No.: BK-S-19-17871-MKN
	Chapter 11
The Minimally Invasive Hand Institute, LLC,	
☒ Affects this Debtor.	
	Case No.: BK-S-19-17872-MKN
In re:	Chapter 11
Jonathan R. Sorelle,	Date: December 2, 2020
	Time: 9:30 a.m.
☒ Affects this Debtor.	

INTERIM ORDER ON MOTION TO HOLD CREDITOR, ROBERT HARDING, JR. AND THE LAW FIRMS OF GREENMAN GOLDBERG RABY & MARTINEZ AND ARNTZ ASSOCIATES IN CONTEMPT FOR VIOLATION OF THE AUTOMATIC STAY UNDER §362(A) [sic] AND FOR ACTUAL DAMAGES, ATTORNEYS' FEES AND COSTS, PUNITIVE DAMAGES AND SANCTIONS[1]

[1] In this Order, all references to "PLLC ECF No." are to the numbers assigned to the documents filed in Case No. 19-17870. All references to "Institute ECF No." are to the numbers assigned to the documents filed in Case No. 19-17871. All references to "Sorelle ECF No." are to the numbers assigned to the documents filed in Case No. 19-17872. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references

On December 2, 2020, the court heard the Motion to Hold Creditor, Robert Harding, Jr. and the Law Firms of Greenman Goldberg Raby & Martinez and Arntz Associates in Contempt for Violation of the Automatic Stay Under §362(A) [sic] and for Actual Damages, Attorneys' Fees and Costs, Punitive Damages and Sanctions ("Motion"), brought by Jonathan R. Sorelle, M.D., PLLC ("PLLC"), The Minimally Invasive Hand Institute, LLC ("Institute"), and Jonathan R. Sorelle ("Dr. Sorelle," and together with PLLC and Institute, "Debtors"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On December 12, 2019 ("Petition Date"), Debtors filed three separate voluntary Chapter 11 petitions. (PLLC ECF Nos. 1, 198; Institute ECF Nos. 1, 29; Sorelle ECF No. 1, 32). The voluntary petitions for PLLC and Institute were electronically signed by Dr. Sorelle in his role as manager. On the same date, notices of the bankruptcy filings were entered establishing, *inter alia*, a deadline of April 15, 2020, for creditors to file proofs of claim. (PLLC ECF No. 3; Institute ECF No. 3; Sorelle ECF No. 5). The notice in Dr. Sorelle's case also established a deadline of March 16, 2020, for creditors to file complaints to determine if their claims are nondischargeable under Sections 523(a)(2), (4), or (6).

On December 13, 2019, Debtors filed a motion which, as subsequently amended, requested joint administration of the bankruptcy cases. (PLLC ECF Nos. 9, 37; Institute ECF Nos. 9, 16; Sorelle ECF Nos. 11, 17).

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to "FRE" are to the Federal Rules of Evidence. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure.

[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in Case Nos. 19-17870, 19-17871, and 19-17872. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015), aff'd sub nom. OMS, LLC v. Bank of America, N.A., 2015 WL 1271307 (C.D. Cal. 2015)("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

On December 20, 2019, an order was entered granting joint administration of the three Chapter 11 proceedings. (PLLC ECF No. 84).

On January 27, 2020, Debtors filed their schedules of assets and liabilities ("Schedules") as well as their statements of financial affairs. (PLLC ECF No. 196; Institute ECF No. 27; Sorelle ECF No. 29). On his Schedule "A/B," Sorelle attested that he holds one hundred percent of the interests in PLLC and Institute. On their secured creditor Schedules "D," PLLC and Dr. Sorelle listed Zions Bancorporation, N.A., dba Nevada State Bank ("NSB") as having secured claims in various amounts, secured by various property, and none of the claims were designated as contingent, unliquidated, or disputed.[3]

On February 28, 2020, a motion to appoint a Chapter 11 trustee ("Trustee Motion") was filed by the Office of the United States Trustee ("UST"). (PLLC ECF No. 252). Pursuant to an order shortening time, the Trustee Motion was scheduled to be heard on March 19, 2020, along with the Debtors' motion to approve postpetition financing. (PLLC ECF No. 265).[4]

On March 18, 2020, a proof of claim in the non-priority unsecured amount of $15,000,000 was filed by Robert D. Harding, Jr. ("Harding") in the Dr. Sorelle proceeding, based on a claim for medical malpractice under Nevada law. The claim arises from a surgical procedure that was performed by Dr. Sorelle on or about November 12, 2019, i.e., before the Chapter 11 proceedings were commenced. The proof of claim is signed on Harding's behalf by the Kaempfer Crowell law firm and specifies that notices are to be sent on Harding's behalf to the law firm of Greenman Goldberg Raby & Martinez ("GGRM"). On the same date, the Kaempfer Crowell law firm filed a request for special notice of all papers filed in the case. (Sorelle ECF No. 40).[5]

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[3] Because none of NSB's claims were scheduled as contingent, unliquidated, or disputed, NSB was not required to file proofs of claim. See FED.R.BANKR.P. 3003(b)(1).

[4] On March 16, 2020, Administrative Order 2020-04 was entered vacating the March 19, 2020, hearings as a result of the COVID-19 pandemic.

[5] On October 21, 2020, an order was entered granting the Kaempfer Crowell law firm's request to be removed from the email service list. (Sorelle ECF No. 50).

On July 22, 2020, a motion to estimate the Harding claim ("Estimation Motion") was filed and noticed for a hearing to take place on August 26, 2020. (PLLC ECF Nos. 468 and 470).[6] The certificate of service attached to the notice of hearing attests that a copy of the Estimation Motion and the notice of hearing was sent electronically to the Kaempfer Crowell law firm but not to the GGRM firm.

On July 27, 2020, an order was entered to advance the hearing on the Estimation Motion from August 26, 2020, to August 12, 2020. (PLLC ECF No. 485). On the same date, a notice of the advanced hearing was filed (PLLC ECF No. 487), the certificate of service for which specifies that the notice was sent electronically to the Kaempfer Crowell law firm but not to the GGRM firm.

On August 18, 2020, an order was entered granting the Estimation Motion. (PLLC ECF No. 495).

On August 19, 2020, notice of entry of the order granting the Estimation Motion was filed, the certificate of service for which specifies that the notice was sent electronically to the Kaempfer Crowell law firm but not to GGRM. (PLLC ECF No. 496).

On September 28, 2020, Harding commenced a medical malpractice action in the Eighth Judicial District Court, Clark County, Nevada ("State Court"), denominated Case No. A-20-822048-C ("Malpractice Action"). The complaint names all three Debtors as defendants in addition to North Vista Hospital, Inc. The complaint was filed on Harding's behalf by GGRM in association with the law firm of Arntz Associates ("Arntz Firm").[7]

On October 27, 2020, Debtors filed the instant Motion seeking damages under Section 362(k) against Harding, GGRM and the Arntz Firm (collectively "Respondents"), for a willful

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[6] On July 23, 2020, unsecured creditor Schedule "E/F" in the Dr. Sorelle proceeding was amended to include the Harding claim and designated as contingent, unliquidated, and disputed. (Sorelle ECF No. 47). As a result, Harding is scheduled as an unsecured creditor with an address in care of the GGRM law firm.

[7] Apparently, the principal of the Arntz Firm left GGRM to form a separate law practice. That principal worked on the Harding matter before his departure and the firms associated to represent Harding thereafter.

violation of the automatic stay. (PLLC ECF No. 547). The Motion was noticed to be heard on December 2, 2020. (PLLC ECF No. 548).

On November 25, 2020, an order was entered confirming the Debtors' joint Chapter 11 plan of reorganization. (PLLC ECF No. 573).

On November 25, 2020, declarations in support of the Motion were filed by Jonathan R. Sorelle ("Sorelle Declaration") and Samuel Schwartz ("Schwartz Declaration"). (PLLC ECF Nos. 575 and 576).

On November 30, 2020, an opposition to the Motion was filed by the Devine Law Firm, PLLC, on behalf of GGRM and Arntz Firm ("Opposition"). (PLLC ECF No. 578). The Opposition is supported by the declarations of E. Breen Arntz ("Arntz Declaration"), Dillon Coil ("Coil Declaration"), and Taylor Smith ("Smith Declaration").[8] (PLLC ECF Nos. 579, 580, and 581).[9]

On December 1, 2020, Debtors filed a reply ("Reply"). (ECF No. 583).

APPLICABLE LEGAL STANDARDS

The automatic stay under Section 362(a) generally arises as soon as a bankruptcy petition is filed.[10] Congress has stated:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992), *quoting* H.R.Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6296-

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[8] Copies of these declarations are also attached as exhibits to the Opposition.

[9] At the hearing on the instant Motion, Debtors objected that the Opposition and accompanying declarations were filed more than ten days late. The objection was overruled.

[10] Notable exceptions exist when an individual debtor has had two or more bankruptcy cases dismissed within the previous year, see 11 U.S.C. § 362(c)(4), and where in rem relief from stay has been ordered in a prior bankruptcy encompassing the same real property. See 11 U.S.C. § 362(d)(4). Neither exception applies in the Debtors' case.

97 (emphasis added). See also 3 COLLIER ON BANKRUPTCY, ¶362.03 (Richard Levin and Henry J. Sommer, eds., 16th ed. 2019) ("The stay provides the debtor with relief from the pressure and harassment of creditors seeking to collect their claims. It protects property that may be necessary for the debtor's fresh start and, in terms of a debtor in a chapter 11, 12 or 13 case, provides breathing space to permit the debtor to focus on rehabilitation or reorganization.").[11]

The automatic stay expressly 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) (emphasis added). Because the stay arises "automatically" upon the filing of a bankruptcy petition, it applies regardless of whether a party has actual knowledge or even notice that the bankruptcy petition was filed. See generally 3 COLLIER ON BANKRUPTCY, supra, ¶362.02.

An express statutory remedy has been created for violations of the automatic stay.[12] Section 362(k) provides that an individual debtor injured by a willful violation of the automatic

[11] The protections of the automatic stay generally do not, however, extend to non-debtor parties or their property, nor does it stay actions against other non-debtor parties liable on the debts of the debtor. See Aerodynamics Incorporated v. Caesars Entertainment Operating Company, 2020 WL 5995488, at *2 (D. Nev. Oct. 9, 2020), citing In re Chugach Forest Prods., Inc., 23 F.3d 241, 246 (9th Cir. 1994).

[12] In Taggart v. Lorenzen (In re Taggart), 139 S.Ct. 1795 (2019), the Supreme Court addressed the standard, under the bankruptcy court's equitable and inherent authority, for the imposition of contempt sanctions for a creditor's violation of the discharge injunction that arises under Section 524(a)(2) after a discharge is entered. Unlike the specific language of Section 362(k), Section 524(a)(2) does not specify a remedy for a violation of the discharge injunction nor does it limit the available sanction to the occurrence of a willful violation. Instead of a willful violation standard, the Court in Taggart articulated a "no fair ground of doubt" or "objectively unreasonable" standard for determining whether a party should be found in civil contempt for violating the discharge injunction. 139 S.Ct. at 1802. See also Taggart v. Lorenzen, 980 F.3d 1340 (9th Cir. 2020) (denying discharge injunction contempt sanctions on remand from Supreme Court). If that standard is applied to the instant Motion, there appears to be no fair ground of doubt that Respondents violated Section 362(a)(1) when they commenced the Malpractice Action after Harding filed his proof of claim in the Chapter 11 case. Accordingly, Respondents would not have an objectively reasonable basis to believe that commencement of the Malpractice Action was lawful.

stay shall recover actual damages, including costs and attorneys' fees, and, may recover, in appropriate circumstances, punitive damages. See 11 U.S.C. §362(k)(1). A violation is willful if a movant shows by a preponderance of the evidence that the responding party knew of the automatic stay, and its actions in violation of the stay were intentional. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002); In re Paxton, 596 B.R. 686, 694 (Bankr. N.D. Cal. 2019), amended in part on reconsideration, 2019 WL 2462797 (Bankr. N.D. Cal. June 12, 2019). It is well established that "knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay." Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 220 (B.A.P. 9th Cir. 2006). Moreover, "no specific intent is necessary, and a creditor's good faith belief that it was not violating the stay is irrelevant to the issue of willfulness." Paxton, 596 B.R. at 694, citing Morris v. Peralta (In re Peralta), 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004).[13] In other words, once a creditor has notice of a bankruptcy, an intention to take the action that violates the automatic stay is all that must be proven under Section 362(k)(1), rather than an intention to violate the automatic stay. Upon a determination that a willful violation has caused injury to an individual, Section 362(k)(1) expressly provides that the individual "shall recover actual damages, including costs and attorney's fees."

Actual damages recoverable under Section 362(k)(1) encompass compensation for both pecuniary losses, as well as nonpecuniary losses such as pain and suffering, emotional distress, and similar types of general damages. See Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1146-49 (9th Cir. 2004), abrogration on other grounds recognized in Gugliuzza v. FTC (In re Gugliuzza), 852 F.3d 883 (9th Cir. 2017).[14] Any pecuniary losses also may be

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[13] In Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003), the circuit panel stated the following regarding a bankruptcy court's findings that a creditor violated the automatic stay in bad faith: "Nor need we decide whether the bankruptcy court must find bad faith by clear and convincing evidence or under a preponderance of the evidence standard, a question not yet resolved in this circuit." Id. at 1197 n.20. See, e.g., In re Matthews, 2017 WL 2821532, at *3 (Bankr. C.D. Cal. June 29, 2017) (applying a preponderance standard under Section 362(k) and a clear and convincing standard under Section 105(a), for an alleged violation of the discharge order).

[14] Emotional distress damages from an automatic stay violation requires proof by a preponderance of the evidence that the individual (1) suffered significant harm, (2) that the

recovered. See In re Sundquist, 566 B.R. at 587. Attorney's fees recoverable under Section 362(k)(1) encompass the amounts incurred in preventing a continued violation as well as the amounts incurred in seeking sanctions. See America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 765 F.3d 1096 (9th Cir. 2014), aff'd en banc, 803 F.3d 1095 (9th Cir. 2015).

In addition to the express remedy available under Section 362(k), a violation of the automatic stay may be treated as civil contempt that is remedied through a sanctions order entered pursuant to Section 105(a).[15] See Dyer, 322 F.3d at 1190. In Dyer, the circuit panel observed that "[t]he threshold standard for imposing a civil contempt sanction in the context of an automatic stay violation…dovetails with the threshold standard of §362(h)…Under both statutes, the threshold question regarding the propriety of an award turns not on a finding of 'bad faith' or subjective intent, but rather on a finding of 'willfulness,' where willfulness has a particularized meaning in this context: '[W]illful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.'" Id. at 1191, quoting Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th Cir. 1995). Because a civil contempt remedy under Section 105(a) is not limited to injured

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significant harm has been clearly established, and (3) there is a causal connection between the significant harm and the automatic stay violation. See Dawson, 390 F.3d at 1149. Such harm may be clearly established through corroborating medical evidence or testimony from percipient parties who witness the mental anguish of the injured party, or, through proof of circumstances that make it obvious a reasonable person would suffer significant emotional harm. Id. at 1149-50. See, e.g., In re Sundquist, 566 B.R. 563, 608-609 (Bankr. E.D. Cal. 2017)($200,000 and $100,000 damage awards for emotional distress to wife and husband for multiple, egregious actions to foreclose on debtors' family residence during Chapter 13 proceeding); America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 438 B.R. 313, 321 (D. Nev. 2010)(affirming an award of $40,000 damages for emotional distress where a reasonable person would suffer emotional distress if threatened with eviction from a family residence when not in default). The bankruptcy process, however, is inherently stressful for individuals as they attempt to obtain a discharge of personal liability from their pre-bankruptcy debts. See Dawson, 390 F.3d at 1149.

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

individuals like Section 362(k), the remedy is available to non-individuals as well. See Pace, 67 F.3d at 193.

Civil contempt remedies are limited to coercive or compensatory sanctions, rather than punitive. See Dyer, 322 F.3d at 1193. Civil contempt remedies to enforce the Bankruptcy Code may include an award of compensatory damages to the injured party, both pecuniary and non-pecuniary, as well as an award of the attorney's fees incurred. See, e.g., In re Martinez, 561 B.R. 132 (Bankr. D. Nev. 2016)(damages and attorney's fees awarded for violation of the discharge injunction).[16]

"To find a party in civil contempt, the movant must prove by clear and convincing evidence that the alleged contemnor violated a specific and definite order of the court." Bateman v. GemCap Lending I, LLC (In re Bateman), 2019 WL 3731532, at *6 (B.A.P. 9th Cir. Aug. 7, 2019), citing Dyer, 322 F.3d at 1190-91.[17]

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[16] In Dyer, the Ninth Circuit distinguished between the exercise of a court's civil contempt authority and a court's inherent sanction authority. 322 F.3d at 1196-97. The circuit panel specifically observed: "The inherent sanction authority differs from the civil contempt authority in an additional respect as well. Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct…In this context, 'willful misconduct' carries a different meaning than the meaning employed in the context of determining whether an individual is entitled to damages under §362(h) or a contempt judgment under §105(a) for an automatic stay violation. With regard to the inherent sanction authority, bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness…Although 'specific intent to violate the automatic stay' may not be required in the contempt context,…,such specific intent or other conduct in 'bad faith or conduct tantamount to bad faith,'…, is necessary to impose sanctions under the bankruptcy court's inherent power." Id. at 1196 (emphasis added). Even with the imposition of sanctions under a bankruptcy court's inherent power, however, significant punitive damages may not be awarded. Id. at 1197. "Relatively mild" non-compensatory fines may be permitted. Id. at 1193. Unfortunately, Debtors appear to conflate the exercise of civil contempt authority and the exercise of the court's inherent sanction authority. See Motion at 7:1-17 (referring to "inherent civil contempt authority"). If Debtors are requesting sanctions as an exercise of the court's inherent sanction authority, then specific intent of the responding parties is at issue.

[17] "[C]lear and convincing evidence 'indicat[es] that the thing to be proved is highly probable or reasonably certain. This is a greater burden than a preponderance of the evidence,…but less than evidence beyond a reasonable doubt…'" U.S. v. Jordan, 256 F.3d 922, 930 (9th Cir. 2001), quoting Black's Law Dictionary 577 (7th ed. 1999).

"The bankruptcy court must also find that the contemnor had sufficient notice of the order's terms and the fact that sanctions would follow a failure to comply." Bateman, 2019 WL 3731532, at *6, citing Hansbrough v. Birdsell (In re Hercules Enters., Inc.), 387 F.3d 1024, 1028 (9th Cir. 2004).

"Once a contemnor's noncompliance with a court order is established, the burden shifts, and [the contemnor] must produce sufficient evidence of its inability to comply to raise a question of fact." Bateman, 2019 WL 3731532, at *6, citing Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower), 755 F.3d 1130, 1139 (9th Cir. 2014). "This is because a 'contemnor in violation of a court order may avoid a finding of civil contempt only by showing it took all reasonable steps to comply with the order.'" Bateman, 2019 WL 3731532, at *6, quoting Kelly v. Wengler, 822 F.3d 1085, 1096 (9th Cir. 2016) (emphasis added).

"Whether the contemnor violated a court order is not based on subjective beliefs or intent in complying with the order, 'but [based on] whether in fact [the] conduct complied with the order at issue.'" Bateman, 2019 WL 3731532, at *6, quoting Dyer, 322 F.3d at 1191. "The standard for evaluating civil contempt, thus, is an objective one." Bateman, 2019 WL 3731532, at *6, citing Taggart, 139 S.Ct. at 1804. The Supreme Court has explained "'that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable.'" Freeman v. Nationstar Mortg. LLC (In re Freeman), 608 B.R. 228, 234 (B.A.P. 9th Cir. 2019), quoting Taggart, 139 S.Ct. at 1802. "That said, subjective intent is not always irrelevant: 'Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith.'…On the other hand, a party's good faith, even if it does not prevent a finding of civil contempt, might help determine the appropriate sanction." Freeman, 608 B.R. at 234, quoting Taggart, 139 S.Ct. at 1802.

DISCUSSION

There is no dispute that Harding's medical malpractice claim arose, if at all, in November 2019. Under Section 101(5)(A), Harding has a claim in Dr. Sorelle's bankruptcy proceeding

even though it has been scheduled as contingent, unliquidated and disputed. See note 6, supra.[18]

There is no dispute that Harding had notice and actual knowledge of the Debtors' bankruptcy case: he filed a proof of claim in Dr. Sorelle's case on March 18, 2020, through the Kaempfer Crowell and GGRM law firms.

There is no dispute that on September 28, 2020, Harding commenced the Malpractice Action in State Court through the services of GGRM and the Arntz Firm. There is no apparent dispute the two law firms intentionally filed the malpractice complaint with the authorization of Harding. There is no dispute that Respondents took no steps in the Debtors' bankruptcy proceedings to obtain relief from stay under Section 362(d). As a consequence, there is no dispute that commencement of the Malpractice Action constituted a willful violation of the automatic stay.[19]

There is no dispute that Section 362(k) requires Dr. Sorelle to recover actual damages, including costs and attorneys fees. There is no dispute that entitlement to sanctions under Section 362(k) must be proven by a preponderance of the evidence. There is no dispute that Section 362(k) does not provide a remedy to PLLC and Institute.

There is no dispute that Section 105(a) does permit all three Debtors to recover coercive or compensatory sanctions for civil contempt. There is no dispute that civil contempt sanctions may include compensatory damages as well as an award of attorneys fees. There is no dispute that entitlement to civil contempt sanctions must be proven by clear and convincing evidence.

In this instance, the record establishes that Dr. Sorelle is entitled to recover actual damages under Section 362(k). However, other than a suggestion that the "situation with Mr.

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[18] See 11 U.S.C. 101(5)(A) ("The term "claim" means (A) right to payment, whether or not such right is reduced to judgment, liquidate, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured…").

[19] There also is no dispute that the automatic stay protecting the Debtors does not extend to defendant North Vista Hospital, Inc. See discussion at note 11, supra. There also is no dispute that relevant discovery from the Debtors may be sought in the form of percipient witness testimony or other grounds relevant to pursuit of the Malpractice Action against that non-debtor defendant.

Harding and [GGRM] has caused me distress," see Sorelle Declaration at ¶14, there is no representation that the "situation" entails only the prosecution of the Malpractice Action against Dr. Sorelle rather than a request for information concerning the non-Debtor defendant, i.e., North Vista Hospital.[20] Nor does Dr. Sorelle distinguish between the stress inherent in the bankruptcy process, see In re Dawson, 390 F.3d at 1149, and any additional stress occasioned by the Respondent's violation of the automatic stay. Compare In re Moon, 613 B.R. 317, 355-56 (Bankr. D. Nev. 2020) (individual debtor suffered additional stress from discharge violation, but not from automatic stay violation). Moreover, Dr. Sorelle does not suggest that he or the non-individual Debtors sustained any pecuniary losses caused by the Respondents' actions. While Dr. Sorelle attests that the actions created a "needless distraction from running my medical practice and completing the Debtors' reorganization," see Sorelle Declaration at ¶ 14, he does not identify any economic injuries to himself or any of the Debtors caused by the distraction.

Under Section 362(k), actual damages expressly includes costs and attorneys fees. As previously discussed at 9, supra, costs and attorneys fees also may be recovered as a compensatory sanction for civil contempt under Section 105(a). Debtors' counsel suggests that after the Malpractice Action was commenced, Debtors have incurred legal fees and costs in "an approximate amount of no less than $10,000." Schwartz Declaration at ¶12. At this stage, there is no itemized billing statement submitted by Debtors' counsel, but the submission and review of

[20] There are four exhibits attached to the Motion and an additional four exhibits attached to the Sorelle Declaration. Two more exhibits are attached to the Schwartz Declaration, and two more to the Reply. Exhibits 1, 2, and 3 are copies of communications from Debtors' counsel seeking cessation of any collection activity, and Exhibit 4 is a copy of a proposed order granting the instant Motion. Exhibits 5, 6, 7, and 8 appear to be copies of requests from the Respondents seeking billing information from the Institute, but the purpose of the requests is not specified. Exhibits 9 and 10 are copies of communications between Debtors' and Respondents' counsel after the Motion was filed. Exhibit 11 and 12 are copies of a declaration from Emily Anderson ("Anderson Declaration") that authenticates a copy of an email exchange between counsel. None of the latter four exhibits specify the purpose of the requested billing information. Respondents' counsel, however, attest that medical records in possession of the Institute are necessary to prosecute Harding's claim against defendant North Vista Hospital. See Arntz Declaration at ¶ 18; Coil Declaration at ¶ 17.

itemized billing statements is common in bankruptcy practice.[21] Debtors' submission of itemized billing statements of its counsel is required for attorneys fees and costs to be awarded in this matter.[22]

[21] In these Chapter 11 proceedings, orders previously were entered approving the professional compensation and reimbursement of expenses requested by Debtors' counsel, including approval of hourly billing rates for the attorneys involved in the current Motion. See Order Approving the First Application of Schwartz Law, PLLC for Allowance of Compensation for Services Rendered and Expenses Incurred as Attorneys for the Debtors for the Period March 1, 2020 through August 31, 2020, entered October 22, 2020. (ECF No. 543). Compensation based on hourly billing rates of $810.00 for attorney Schwartz, $595.00 for attorney Agelakopoulos, and $345.00 for attorney Anderson, was approved by that order.

[22] Irrespective of whether itemized statements from Debtors' counsel reflect billings of "no less than $10,000," the court will award only a reasonable amount of any fees requested.

There is no apparent dispute, that as of the hearing on the instant Motion, at least some steps have been taken to dismiss the Malpractice Action.[23] As a consequence, there apparently is no dispute that a continuing violation of the automatic stay may no longer exist.[24]

Section 362(k)(1) expressly provides that an individual injured by a willful violation of the automatic may recover punitive damages "in appropropriate circumstances." As previously discussed, an award of punitive damages for civil contempt or under the court's inherent sanction

[23] At the hearing, counsel for the respondents represented that the Malpractice Action had been dismissed. The representation is inconsistent, however, with a separate representation by GGRM. See Smith Declaration at ¶ 14. In any event, counsel's representation at the hearing is not entirely accurate. The register maintained by the State Court in the Malpractice Action reflects that the Debtors jointly filed a Suggestion of Bankruptcy on October 23, 2020. The register also reflects that a "Notice of Voluntary Dismissal Without Prejudice of Jonathan, M.D." was filed on November 24, 2020. There are no entries reflecting that a voluntary dismissal of the Malpractice Action was filed as to PLLC and the Institute. Having received notice of the Chapter 11 proceedings of all three Debtors, it is not entirely clear why the Respondents chose to dismiss the Malpractice Action only as to Dr. Sorelle. As previously mentioned, an order confirming a joint Chapter 11 plan for all three Debtors was entered on November 25, 2020. The plan confirmation order has not been appealed or stayed. Upon plan confirmation, both of the non-individual Debtors received a discharge of their prepetition debts pursuant to Section 1141(d)(1). As a result of the discharge, the automatic stay arising under Section 362(a)(1) elapsed as to PLLC and the Institute pursuant to Section 362(c)(2)(C). Thus, as of the date of the hearing on the instant Motion, the automatic stay had terminated as a matter of law as to PLLC and the Institute, and the failure of Harding to voluntarily dismiss the Malpractice Action as to those entities was inexcusable but not necessarily prejudicial. A coercive civil contempt sanction therefore may not be necessary. Moreover, because PLLC and the Institute are not individuals, these Debtors would not be entitled to any recovery under Section 362(k)(1). Instead, these Debtors would have to seek civil contempt sanctions under Section 105(a) or under the court's inherent sanction authority.

[24] An annulment of the automatic stay, effective September 28, 2020, has never been sought for cause under Section 362(d)(1). Retroactive relief from stay is not precluded by the Supreme Court's recent decision in Roman Catholic Archdiocese v. Acevedo Feliciano, 140 S.Ct. 696 (2020). See Merriman v. Fattorini (In re Merriman), 616 B.R. 381 (B.A.P. 9th Cir. 2020). Under the current posture of these Chapter 11 proceedings, however, it is unlikely that a request for annulment would ever be granted.

authority is limited to mild, non-compensatory fines.[25] See discussion at note 16, supra.[26] Moreover, an award under the court's inherent sanction authority requires proof of specific intent or bad faith conduct by the party that violated the automatic stay. Id. The testimony contained in the declarations submitted in opposition to the Motion infer that there was no intent to violate the automatic stay nor any bad faith on the part of counsel. See Arntz Declaration at ¶ 33; Coil Declaration at ¶ 29; Smith Declaration at ¶ 14.[27] These representations under penalty of perjury may be material if Debtors are seeking punitive damages under Section 362(k)(1), for civil contempt under Section 105(a), or under the court's inherent sanctions authority. Moreover, the representations also may be material in any event if the Debtors are seeking any sanctions whatsoever under the court's inherent sanction authority. Unfortunately, it is unclear whether

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[25] Although the circuit panel in Dyer suggested that mild, non-compensatory fines may be permitted under the court's inherent sanctions authority, see note 16, supra, later decisions by the Ninth Circuit raise some doubt. In Lasar v. Ford Motor, 399 F.3d 1101, 1111 (9th Cir. 2005), the circuit suggested that non-compensatory fines are punitive in nature. As a result, criminal procedural protections are required as well as a higher standard of proof. Id. at 1110. Thereafter, the Ninth Circuit issued its unpublished decision in Gibson v. Credit Suisse Group Securities (USA) LLC, 733 Fed.Appx. 342 (9th Cir. 2018) specifically stating, *inter alia*, that "a non-compensatory fine is criminal in nature and when a district court imposes such a fine, the court 'must provide the same due process protections that would be available in a criminal proceeding.'" Id. at 345. The circuit panel then stated as follows: "If any portion of the fines is non-compensatory, then that portion would be criminal in nature and would be subject to the additional due process protection of proof beyond a reasonable doubt. The district court appears to have applied only a 'clear and convincing' standard." Id. at 346 (emphasis added). After the hearing on the instant Motion, the Ninth Circuit issued another unpublished decision that reversed a $6,000 fine entered under the magistrate and district court's inherent powers because the "fines were at least partially non-compensatory." Conant v. Credit Suisse Group Securities (USA) LLC, Case No. 19-35944 (9th Cir. Dec. 23, 2020), Memorandum at 3. The arc of these decisions signal that non-compensatory fines may no longer be permitted in this circuit as a sanction for civil contempt.

[26] As previously discussed at 8, supra, non-individuals that are injured by a violation of the automatic stay can seek sanctions for civil contempt under Section 105(a). In this instance, it appears that the Debtors seek actual damages and attorney's fees solely as to Dr. Sorrelle, and perhaps unspecified sanctions and punitive damages as to the Debtors generally. See Motion at 8:3-14; Reply at 6:17 to 7:3.

[27] The law firms represent that they will change their office procedures to ensure consultation with bankruptcy counsel in the future in the event a party in one of their cases files for bankruptcy relief. See Arntz Declaration at ¶ 34; Coil Declaration at ¶ 30.

the Debtors seek relief under some or all three approaches, and whether they are seeking punitive damages, because they have conflated their request under the court's civil contempt authority with the court's inherent sanction authority. See discussion at note 16, supra.[28]

Under these circumstances, a status conference is required to determine the specific legal basis on which the Debtors seek sanctions as well as the applicable standard of proof. Debtors also must specify whether punitive damages are being sought as well as the amount of attorneys fees and costs being sought through the date of the initial hearing on the instant Motion. The parties will be required to discuss whether discovery will be required in this matter as permitted under FRBP 9014(c).

The date and time of the status conference is set forth below. In the event the parties prudently decide to settle this matter before the scheduled status conference, they may submit an appropriate stipulation for court approval. In the event the parties desire a judicial settlement conference to be conducted, they must contact the courtroom deputy, Cathy Shim, at the earliest opportunity to determine the availability of a settlement judge.

IT IS THEREFORE ORDERED that a telephonic status conference will be held on **January 13, 2021, at 9:30 a.m.,** on the Motion to Hold Creditor, Robert Harding, Jr. and the Law Firms of Greenman Goldberg Raby & Martinez and Arntz Associates in Contempt for Violation of the Automatic Stay Under §362(A) [sic] and for Actual Damages, Attorneys' Fees and Costs, Punitive Damages and Sanctions, Docket No. 547.

IT IS FURTHER ORDERED that the parties shall notify the court **no later than January 11, 2021** of any settlement or requested continuance.

Copies sent via BNC to all parties and via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
JONATHAN R. SORELLE, M.D., PLLC
ATTN: OFFICER OR MANAGING AGENT

[28] Although Harding is legally responsible for the acts of his agents, the law firms apparently have committed to satisfying any sanctions that may be entered in this matter. See Arntz Declaration at ¶ 20; Coil Declaration at ¶ 19.

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