UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re:	Case No. 99-47379
Shella Read, Debtor, _____/	Chapter 7 Adv. Pro. No. 99-4569
	Hon. Mary Ann Whipple
Shella Read, Plaintiff, v. Greentree Financial Servicing Corp., et al., Defendants, _____/	
Greentree Financial Servicing Corp., et al., Third Party Plaintiffs, v. Al Hinman, Third Party Defendant. _____/	

MEMORANDUM OF DECISION

This adversary proceeding came before the court for trial on Plaintiff's amended complaint [Doc. # 3] alleging a willful violation of the automatic stay under 11 U.S.C. § 362(h) against Defendants, Nicoletti & Associates, P.C. and Paul J. Nicoletti (collectively "the Nicoletti Defendants"),[1] the Nicoletti

[1] Trial was originally commenced in April, 2002, against Greentree Financial Servicing Corp. ("Greentree"), now known as Conseco Finance Servicing Corp., as well as the Nicoletti Defendants. But trial was not completed. Although it was originally scheduled to resume on June 19, 2002, due to a medical condition that arose with respect to one of Plaintiff's lawyers, the trial was rescheduled to resume on February 5, 2003. In the interim, however, Greentree commenced a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Illinois. Thereafter, the scheduled trial date was again vacated as Plaintiff indicated she would seek relief from the automatic stay so as to proceed with trial against Greentree. Stay relief was never obtained and trial was scheduled to recommence on August 30, 2004. But on August 27, 2004, Plaintiff filed an Emergency Motion for Adjournment of the August 30 trial, again due to a medical condition of Plaintiff's counsel. As a result, trial did not recommence until

Defendants' Third-Party Complaint [Doc. # 45] for indemnification and contribution from Third-Party Defendant Al Hindman, and Hindman's counterclaim [Doc. #51] against the Nicoletti Defendants for indemnification.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine whether the automatic stay has been violated are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2); *In re Bunting Bearings*, 302 B.R. 210, 213 (Bankr. N. D. Ohio 2003). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, Plaintiff is entitled to judgment in her favor on the complaint against Defendant Nicoletti & Associates, P.C., Defendant Paul Nicoletti is entitled to judgment in his favor against Plaintiff, Third-Party Defendant Al Hindman is entitled to judgment in his favor on the Nicoletti Defendants' Third-Party Complaint and the Nicoletti Defendants are entitled to judgment in their favor on Al Hindman's counterclaim.

FINDINGS OF FACT

This case involves execution on a state court judgment on June 2, 1999, after Plaintiff Shella Read ("Read") had filed her Chapter 7 bankruptcy petition, in order to recover possession of a manufactured home she owned. Read had purchased the home in 1995. Greentree financed Read's purchase of the manufactured home, which was located at 39003 Wyoming Drive, Romulus, Michigan, in the Rudgate West mobile home park. In 1998, Read defaulted on her obligation to Greentree and Greentree filed a claim and delivery action in state court to obtain possession of the manufactured home. Attorney Paul J. Nicoletti ("Nicoletti") of the Nicoletti & Associates, P.C. law firm ("Nicoletti law firm") represented Greentree.

The state court entered a default Judgment for Possession Only on February 8, 1999, ordering Read to surrender possession of the manufactured home to Greentree. The order provides that "execution may not issue on this judgment if more than 28 days have passed from the date at signing unless there is

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October 25, 2004. However, the parties agreed that the claims against Greentree could not proceed due to Greentree's bankruptcy proceeding. By separate order dated October 28, 2004, Greentree was dismissed as a party in this proceeding.

further notice and hearing." [Pl. Ex. 3]. Thereafter, because execution on the judgment did not occur within 28 days from the date judgment was entered, Greentree filed a Motion for Execution on Judgment. On April 15, 1999, the state court entered an Order for Execution on Judgment, authorizing a sheriff or court officer to seize the home and turn it over to Greentree. [Pl. Ex. 2].

Dana Salansky, a legal assistant employed by the Nicoletti law firm, contacted Al Hindman, a court officer at Michigan's 34th District Court, by telephone to arrange for execution on the judgment. Her call was followed up by a letter to Hindman dated April 27, 1999, instructing him to first serve the judgment on Read to allow her to voluntarily vacate the home. In addition, if it became necessary to move Read from the manufactured home, the letter instructed Hindman to first contact the Nicoletti office in order to coordinate the details of the execution, such as hiring movers and hiring a locksmith. [Pl. Ex. 4]. Execution was not, however, immediately effected and, in the meantime, Read filed a petition for relief under Chapter 7 of the Bankruptcy Code on May 5, 1999.

It is undisputed that the Nicoletti law firm received notice of Read's bankruptcy proceeding no later than May 26, 1999. The law firm's file notes show that an employee in Greentree's South Dakota office notified the law firm on May 26. The court credits the testimony of Dana Salansky that, on that same date, she attempted to contact Hindman by placing a telephone call to the 34th District Court at Hindman's extension and leaving a voice mail message notifying him of the filing of Read's bankruptcy petition and to stop any attempt to execute on the judgment. Receiving no response from Hindman, Salansky called him again on May 27 and June 1, 1999, each time leaving a similar voice mail message. Before learning of Read's bankruptcy filing, Salansky had attempted to contact Hindman on May 13 and 25 in order to inquire as to the status of execution on the judgment, both times leaving a voice mail message and receiving no response. The law firm never received confirmation that any of the voice mail messages left by Salansky had actually been received by Hindman. No other steps were taken to notify Hindman of Read's bankruptcy filing. According to Hindman, he never received the voice mail messages. The court finds Hindman's testimony on this issue credible. He simply had no reason to execute on the judgment after being told to cease all activity dealing with execution. But the court does not credit Hindman's testimony that he was instructed by someone at the Nicoletti law firm during a phone call received by him on June 1, 1999, to proceed with execution and to use his own locksmith in securing the manufactured home. Hindman's memory regarding the timing of phone conversations with Nicoletti's office was not entirely clear. And Salansky testified credibly that Hindman would not have been told to use his own locksmith

since Greentree required that locks be changed by their own locksmith. Salansky's testimony was corroborated by the testimony of Connie Lynn Danner, administrative assistant and collector at Greentree, that Greentree did not allow locks to be changed by someone other than a Greentree employee. With respect to any conversation with Nicoletti himself, Hindman and Nicoletti agree that no communication occurred before Hindman's execution on the judgment on June 2, 1999. While the court finds that the evidence weighs against a finding that Hindman was instructed on June 1 by Nicoletti's office to proceed with the execution, the court nevertheless finds that he had no actual knowledge of Plaintiff's bankruptcy and that he, for whatever reason, had not received the voice mail messages to stop the execution.

Nicoletti testified that, in June 1999, he handled ten to fifteen claim and delivery cases per week, approximately one-half of which were bankruptcy related cases. He further testified that he alone was responsible for the Nicoletti law firm's office procedure for stopping execution of judgment after notice of a debtor's filing of a bankruptcy petition. Although other options were available that would likely have been more effective in notifying Hindman of a debtor's bankruptcy, Nicoletti testified that no procedure other than that employed in this case was necessary. His position is apparently based on his belief that the execution order had expired and would not be acted upon by a court officer. In any event, although the Nicoletti law firm received notice on May 26, 1999, of Read's bankruptcy petition, Nicoletti's testimony, which the court finds credible, indicates that he personally had no knowledge of the filed bankruptcy petition until June 3, 1999, upon being contacted by Read's lawyer the day after execution on the judgment for possession occurred.

There is no dispute that Hindman executed on the judgment on June 2, 1999. He testified that his two sons as well as another 34th District Court officer accompanied him to the mobile home park in order to carry out the execution. They initially gained entry to the home through an unlocked back door and removed items from the home that belonged to Read. Although Read testified that the back door was not used and the home was left locked up, there is no testimony or other evidence indicating that any forced entry of the home occurred. The items removed from the home were placed on the side of the road at the entrance to the mobile home park.

A serious dispute exists regarding what property was actually removed from the home by Hindman and his associates. Hindman testified that, although he did not create a written inventory, the only items removed from the home were a television, bed rail, piece of a table, a bed headboard, a plant, an electric blanket, a plastic bag of stuffed animals and between 5 and 7 cardboard boxes approximately 2 foot x 18

inches x 15 inches in size. Hindman testified that he and Neil Jones ("Jones"), the court officer who assisted him, looked through the boxes in order to ensure that no weapons, ammunition, pornography or drugs were in the boxes that would be put on the side of the road. When questioned regarding many of the items claimed by Plaintiff to be missing from the home, Hindman testified that they were not present in the home at the time of execution. Specifically, he testified that the following items were not in the home on June 2, 1999: VCR, CD player, tables, table lamps, floor lamps, television cart, floor vases, videotapes, 6x9 foot area rug, toy chest, brass fireplace accessories, suitcases, ironing board, laundry baskets, stroller, book case, bike, Sony Playstation, television cable boxes, any clothing, and numerous other smaller items. When shown the list of items Read testified that she left in the home, Hindman testified that none of those items were in the home. But Hindman's broad brush testimony on this point is not entirely believable, as Read's list included a washer and dryer that he separately acknowledged were in the home but not removed by them because they were not aware they were hers. Moreover, Hindman did not personally look in all of the boxes.

Hindman further testified regarding the appearance of the manufactured home at the time of the execution. The boxes and other items were in the living room, with the television near the front door. All other rooms were empty and there were vacuum marks on the carpets. (Jones later testified that the home was clean, which was unusual in his experience for such situations.) Hindman testified that the cupboards and refrigerator were empty. According to Hindman, the removal of belongings from the manufactured home to the road at the entrance of the mobile home park was completed in fifteen minutes at the most using Jones' pick-up truck.

Hindman also testified that he had visited the manufactured home accompanied by Jones before June 2, 1999. At that time, he posted the Order of Judgment for Possession and Order for Execution on Judgment on a large window in the front of the home. He testified that there were no curtains on the windows and the grass was high around the home.

Hindman's testimony was, in most respects, corroborated by the testimony of Jones as well as by Brandon and Bradley Hindman, both of whom also assisted their father in removing items from the manufactured home. There were some differences as to how exactly many boxes were removed. Hindman recalled that there were five to seven, and he previously testified at deposition that there were four to five. Brandon Hindman testified that there were 3 and they were "light." Bradley Hindman testified there were "three boxes" all in one room, and that he could carry a box by himself. Jones recalled that there

were three to four boxes, that they were not huge and that he did not recall the contents of those he looked in beyond there being none of the potentially dangerous items about which they were concerned. In summary, all three of the persons who assisted Hindman with execution on the judgment indicated that Plaintiff's belongings were removed from the manufactured home in no more than ten to twenty minutes, that only some boxes that could be individually carried, a television, a bag of beanie babies/stuffed animals and some miscellaneous items were in the home and that it was otherwise empty. Except as otherwise specified in this opinion, the court generally believes the testimony of these individuals. Despite two of the witnesses being Hindman's sons, with Hindman being a party in interest as a third-party defendant, the court finds that each gave their best independent recollection of what happened on June 2, 1999, at Read's home. The differences in their testimony lent credibility to the testimony offered, with the differences indicative to the court that there was no effort to conform their stories. The differences were not, on the other hand, so dramatic such that the court finds it necessary to discount the collective value of their testimony.

In contrast, according to Read, a detailed four-page list of items she valued at trial at nearly $13,000, excluding items of sentimental value, were missing from her home. Those items included a 32-inch television set valued by Read at $1,100, a ring and pendant necklace valued at $2,200, other jewelry valued at $1,100, 75 movie videotapes at $20 each, food in her refrigerator at $200, end tables, floor lamps, clothing, numerous appliances and miscellaneous tools and household items, as well as many items belonging to her two sons. Although Read testified that she replaced many of the missing items during the latter months of 1999, she kept no receipts and had no recollection of the costs of replacement. Nevertheless, she offered and the court admitted over objection her opinion regarding the value of the missing items. In addition, the list includes a number of items that she testified were priceless and on which she could not put a value, including among other things her mother's 50-year old china set, family photos and photo albums, family records and paperwork, and videotapes of her family. According to Read, the videotapes include footage of her oldest son, who has muscular dystrophy, engaging in activities that he is no longer able to perform due to his medical condition, such as riding a bicycle and playing ball.

While Hindman and Jones looked in all of the boxes that were in the manufactured home on June 2, each looked in separate boxes. Neither Hindman nor Jones individually examined each and every box and neither testified as to what was actually contained in those boxes. Nevertheless, while the court finds some items were obviously left behind by Read to be picked up at a later date, the court does not believe that

Read's entire list of belongings were in the home at the time of execution on the judgment of possession. The court notes that in her bankruptcy schedules, Read values her household goods and furnishings, including audio and video equipment, at only $2,000 and clothing at $300, and specifically indicates that she owns no jewelry, antiques, tapes, or other collectibles. Also, on June 3, 1999, at the § 341 meeting of creditors that took place the day after execution, Read testified that she informed the Trustee that her schedules were incorrect and that she actually owned between $4,000 and $5,000 worth of personal property. But Plaintiff never amended her bankruptcy schedules in writing to include any additional property and the court puts little weight on this testimony. In any event, her "corrected" version of personal property totaling $4,000 to $5,000 is still far less than the nearly $13,000 that she now claims.

In weighing Plaintiff's credibility, the court finds it significant that when Plaintiff arrived at the manufactured home on June 3, 1999, she simply looked in the living room window of the home and concluded that all of her belongings had been taken. She testified that she did not even attempt to open the front or back door to enter into the home in order to determine whether any belongings still remained. For example, although she testified that $200 worth of food in her refrigerator and freezer were missing, she obviously could not determine this by simply looking in the living room window. Likewise, she testified that she had belongings throughout the house, yet she did not attempt to verify whether belongings allegedly located in other rooms were also missing at that time. After concluding that all of her belongings were missing, Plaintiff neither filed a police report nor filed an insurance claim, although she testified that she did have homeowner's insurance at the time.

In finding that Read's testimony about what was removed is not credible, the court has also considered evidence that Read had moved out of the manufactured home before June 2, 1999. On February 27, 1999, Nicoletti sent a letter addressed to Read at the Wyoming Drive address and enclosed the Order of Judgment of Possession. The letter informed Read that Greentree was awarded immediate possession of the manufactured home and that if she did not voluntarily vacate the home, a sheriff or court officer would be directed to remove her and her possessions and deliver possession to Greentree. [Def. Ex. X]. In addition, on March 12, 1999, a Demand for Possession was mailed to Plaintiff at the Wyoming Drive address by the mobile home park for non-payment of rent. [Def. Ex. PP, p. 4]. Shortly thereafter in late March, 1999, and contrary to her deposition testimony that she did not begin looking for an apartment until May, 1999, Read applied for tenancy at Fountain Park Apartments on Strathcona Street in Southgate, Michigan. [Def. Ex. HH].

While it is clear that she eventually moved to the Strathcona apartment, Plaintiff's testimony regarding when she took up occupancy of the apartment is contradictory. She testified that she was living at the manufactured home between May 5, 1999, the date she filed her bankruptcy petition, and June 2, 1999, but that she had obtained an apartment and was preparing to move. Later, when asked if she was still living at the manufactured home on March 29, 1999, Plaintiff responded that she did not recall and that she believed she was at the Strathcona apartment by then. In any event, it is clear that Plaintiff was not at the manufactured home for days at a time, testifying that the last time before June 2 that she had been at the home was some time during May, 1999, and that from time to time she would go to the manufactured home in order to "check on" it. It is also clear that before June 2, 1999, Plaintiff had moved at least some of her belongings to the apartment. She testified that her mattress, a couch and a loveseat, as well as some toiletries, towels and food had been moved.

But in light of Hindman's testimony and the testimony of those who assisted him in the execution regarding the limited amount of property present in the home on June 2, 1999, testimony that the court finds credible, together with evidence that Plaintiff had already obtained an apartment and that she simply returned occasionally to check on the manufactured home, the court finds that it is more likely than not that much more of her property had been moved before June 2. While the court does not credit Hindman's testimony that the property left in the home was simply "debris," it does not believe that Read left $3,300 worth of jewelry behind with her residual belongings in the manufactured home, especially since she listed no jewelry at all in her bankruptcy schedules. Likewise, the court does not believe that she left behind in what was essentially an unoccupied home with an open back door numerous "priceless" items listed by her at trial, such as her mother's china set and her grandmother's depression glass set of dishes. Moreover, no collectibles or antiques were listed on Read's Bankruptcy Schedule B. Finally, the court credits Hindman's testimony regarding the few larger items present at the time of execution that were not in boxes and the fact that no clothing was present at the time of execution.

Also as an element of damages, Read testified that she missed two weeks of work because she was upset after finding that her belongings were gone. At the time, she was earning approximately $20 per hour working at Ford Motor Company. Although she initially testified that she was working 50 hours per week, including overtime hours, on cross examination she admitted that she had only been working a 40-hour work week during that time period. Read also claims damages for time off work in order to be deposed and to attend three days of trial in 2002 and two days of trial in 2004. At the time of her

deposition and trial in 2002, Read earned $24.18 per hour; and at the time of trial in 2004, she earned $25.96 per hour.

Finally, Read seeks costs in the amount of $4,081.28 and attorney fees in the total amount of $88,177.00 as part of her damages. Additional relevant facts are set forth in the sections that follow.

LAW AND ANALYSIS

I. Standing

Defendants argue that Read lacks standing to assert a violation of the automatic stay. They assert that the claim belonged to the Chapter 7 trustee on behalf of the bankruptcy estate instead of to Read.

A party seeking a remedy for violation of the automatic stay must have both constitutional standing and standing under the Bankruptcy Code. *City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82, 85-86 (5th Cir. 1992). Constitutional standing exists if a plaintiff suffers an injury that is fairly traceable to the defendant's allegedly unlawful conduct and can be redressed by the bankruptcy court. *Id.* at 85. Under the Bankruptcy Code, a plaintiff has statutory standing to assert a violation of the automatic stay under § 362(h) if the plaintiff is "an individual injured by any willful violation of a stay. . . ." 11 U.S.C. § 362(h).

Read clearly has standing in this case in that she alleges that Defendants caused her to be dispossessed of all of her personal property that was in her home on the date of execution of the state court judgment. Read has presented three different valuations of her personal property to the court. Under her first valuation, in her bankruptcy petition, all of the property she alleges was taken from the manufactured home was clearly exempted from property of the bankruptcy estate under 11 U.S.C. § 522(d). *See* 11 U.S.C. § 522(b)(1).[2] Under her second valuation, based on Read's oral correction of her schedules at the first meeting of creditors, again all of the property she alleges was taken from the manufactured home was exempt under § 522(d). And even under her third and highest valuation, at trial, it still appears that most if not all of her missing items were likely exempt from the estate under § 522(d). Moreover, ubiquitous items such as family photographs, birth records and medical records are routinely of no value whatsoever to the estate and the Chapter 7 trustee. They are never separately scheduled and itemized

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[2] Although in 1999 when Plaintiff filed her petition, § 522(d)(3) provided an exemption in the aggregate amount of $8,625, Plaintiff claimed only $2,300, the value she placed on those items in her Bankruptcy Schedule B.

by a Chapter 7 consumer bankruptcy debtor, nor would the court, creditors or the Chapter 7 trustee expect them to be. Yet they are all items of personalty for which redress would be available if they were subject to a violation of the automatic stay. *Smith v. Homes Today, Inc. (In re Smith)*, 296 B.R. 46, 52-53 (Bankr. M.D. Ala. 2003)(where creditor disposed of family photographs and home movies , the court noted "[t]hat Smith did not have equity in her mobile home and that her personal property was of only nominal monetary value does not mean that she did not sustain actual monetary damages"). The Chapter 7 trustee was also immediately informed of the potential cause of action at the first meeting of creditors [Record, Doc. # 234, Widenbaum Depo, p.52, Depo. Ex. 8 (pp. 4-6)][3] and did nothing to pursue it on behalf of the estate to the extent that non-exempt property of the estate was allegedly missing. *See* 11 U.S.C. § 541(a)(6) (property of the estate includes proceeds of property of the estate). The alleged damages resulting from the loss of her property are thus personal to Read, are fairly traceable to Defendants' alleged conduct and can be redressed in this proceeding if the requisite elements for recovery are proven.

Defendants cite *In re Briggs*, 143 B.R. 438 (Bankr. E.D. Mich. 1992), for the proposition that the trustee acquires all rights in estate property and that debtor no longer has rights in such property. In *Briggs*, the court addressed a claimed stay violation by a credit union that froze funds in the debtor's account and refused Debtor's request for payment of the $5.00 in that account. *Id*. at 447. Because the debtor claimed the account as exempt on his bankruptcy schedules and no objections were filed, the court found that the property was no longer estate property and, thus, the debtor had standing to assert a stay violation. *Id.* at 447-48. The reasoning in *Briggs* actually supports this court's determination that Read has standing in this case. As in *Briggs*, Read claimed an exemption under 11 U.S.C. § 522(d)(3) in her household goods and clothing and no objections to her written exemptions were filed. Under *Briggs*, the property was no longer property of the estate after the time to object expired. Thus, Read clearly retained an interest in the property removed from her home. All of the remaining cases cited by Defendants are

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At trial, there was extensive argument over admission of the transcript of the first meeting of creditors as an exhibit when offered by Read. The court sustained the Nicoletti Defendants' objection to admission. But upon subsequent review of the Widenbaum deposition transcript, the court discovered that Read had offered the transcript for admission and counsel for Defendants and for Hindman both stated there was no objection to its admission. The court therefore considers that it is admitted as evidence. Had an objection to its admission been timely made at the deposition, the very purpose of which was to preserve trial testimony, counsel may have proceeded differently with the presentation of testimony and evidence.

distinguishable on their facts and do not provide persuasive authority for Defendants' argument that Read lacks standing in this adversary proceeding. *See In re Lee*, 40 B.R. 123 (Bankr. E.D. Mich. 1984) (stating only that a trustee and not a Chapter 7 debtor is the proper party to prosecute the stay violation where the claimed violation is a setoff stayed under § 362(a)(7) and the setoff has no effect on the debtor); *Spenlinhauer v. O'Donnell*, 261 F.3d 113, 118 (1st Cir. 2001) (trustee alone, as distinguished from the Chapter 7 debtor, possesses standing to appeal from bankruptcy court orders which confirm or reject sales of property of the estate); *In re Acton Foodservices Corp.*, 39 B.R. 70, 72 (Bankr. D. Mass. 1984) (holding that debtor had no standing to assert a fraud claim that accrued after his Chapter 11 petition was filed and before conversion to Chapter 7 and that arose out of his interest in property that had become property of the bankruptcy estate); *In re Doemling*, 116 B.R. 48, 50 (Bankr. W.D. Pa. 1990) (explaining that a property interest acquired postpetition in a Chapter 11 case is property of the estate "only if the property interest is traceable to (or arises out of) some prepetition property interest which already is included in the bankruptcy estate").

II. Willful Violation of the Automatic Stay

A statutory automatic stay arises upon the filing of a bankruptcy petition. 11 U.S.C. § 362(a). To enforce creditor compliance with the automatic stay, the Bankruptcy Code provides that "[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." 11 U.S.C. § 362(h). In order to prevail on a § 362(h) claim, a plaintiff must prove, by a preponderance of the evidence, that the stay imposed under § 362 was violated, that the violation was committed willfully and that plaintiff was injured by the violation. *In re Skeen*, 248 B.R. 312, 316 (Bankr. E.D. Tenn. 2000).

A. Did Defendants Violate the Automatic Stay?

The first element that must be established is that a violation of the stay occurred. Section 362(a) provides that the filing of a voluntary bankruptcy petition operates as a stay, applicable to all entities, of

> (1) the commencement or continuation . . . of a judicial, administrative, or other action 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;
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> (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;
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> (5) any act to create, perfect or enforce against property of the debtor any lien...
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> (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). Unless earlier terminated by the court upon request of a creditor under 11 U.S.C. § 362(d), the stay remains in effect until statutorily terminated under 11 U.S.C. § 362(c). The automatic stay in Read's Chapter 7 case was not terminated prior to June 2, 1999.

Execution on the Judgment of Possession was a continuation of state court proceedings initiated against Read and was an attempt to enforce a prepetition state court judgment as well as to enforce a lien against property of the debtor in violation of § 362(a)(1), (2), (5) and (6). It does not matter that Hindman rather than the Nicolleti Defendants actually performed the execution. As one court explained, "creditors and their counsel are not allowed to sit by and watch the litigation they have commenced proceed by shifting responsibility to local authorities charged with collecting judgments obtained through their efforts." *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D. Ohio 2000). As § 362(a) enjoins a person, including lawyers acting on behalf of creditors, from commencing or continuing a judicial proceeding against the debtor and from enforcing a judgment against the debtor or against property of the debtor and the estate, it also obliges that person to discontinue any such proceedings initiated by the person prepetition. *See Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002); *In re Daniels,* 316 B.R. 342, 350-52 (Bankr. D. Idaho 2004)(court holds that creditor "had an affirmative duty to suspend collection action" and that "Counsel also bears personal responsibility for stay violations under the facts in this case"); *In re Gagliardi*, 290 B.R. 808, 819 (Bankr. D. Colo. 2003); *In re Timbs*, 178 B.R. 989, 996 (Bankr. E.D. Tenn. 1994)(providing string citation of cases involving lawyers who violated the automatic stay when acting for clients) ; *Ledford v. Tiedge (In re Sams)*, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989). The stay was violated when the Nicolleti Defendants failed to stop the execution that they had set in motion for their client and that resulted in Read's property being removed from the manufactured home.

The Nicoletti Defendants rely on *Davis v. Conrad Family Ltd. P'ship (In re Davis)*, 247 B.R. 690 (Bankr. N.D. Ohio), in support of their argument that they did not violate the stay. In *Davis*, the court recognized that creditor inaction can often be as disruptive to the debtor as affirmative collection efforts but "decline[d] to adopt an absolute rule that a creditor has an affirmative duty to prevent a judicial official, acting on their behalf, from executing a writ against the debtor personally." *Id.* at 697. Nevertheless, the court also explained that it would not automatically shield a creditor from liability simply because a judicial

official is the one who executes the judgment on behalf of the creditor. *Id.* at 698. Instead, the court found the better approach is to determine whether the creditor's conduct could be characterized as willful under § 362(h). *Id.* The court in *Davis* refused to impute a bailiff's violation of the automatic stay to the defendant since the defendant did not encourage the bailiff to execute the writ, the state court had been notified of the debtor's bankruptcy petition and had stayed the state action against the debtor, and the bailiff did not execute the writ until more than two weeks after the writ had expired. *Id.* On these facts, the court concluded that the defendant's conduct was not willful. Thus, even under *Davis*, liability may be imposed upon a creditor or its agent where a failure to act constitutes willful conduct under § 362(h) that results in a violation of the automatic stay.

The Nicolleti Defendants also argue that the stay was not violated since Read had, under Michigan law, abandoned her manufactured home and the property in it before execution on the judgment. This argument is without merit. According to Defendants, because Read abandoned the property, she had no legal or equitable interest in the property and, as a result, it ceased to be either her property or estate property. Thus, Defendants argue that the automatic stay was no longer in effect with respect to the manufactured home and, presumably, its contents. Defendants' argument misconstrues the provision of § 362 that the automatic stay terminates with respect to property that is no longer property of the estate. 11 U.S.C. § 362(c). While property is no longer property of the estate after the Chapter 7 trustee abandons the property, a debtor's "abandonment" does not have the same effect. *See* 11 U.S.C. § 554. Furthermore, even if Michigan law applied in this context, property is not abandoned unless there is "an intention to relinquish the . . . property . . . and an external act by which such intention is carried into effect." *Roebuck v. Mecosta County Rd. Comm'n*, 229 N.W. 2d 343, 345-46 (Mich. App. 1975). The evidence does not support a conclusion that Read had abandoned the manufactured home or her personal property within the home. The front door of the home was locked and Read had left belongings packed in boxes in a clean home for removal at a later date. And Hindman testified, for example, that there was still a washer and dryer there, which he did not remove on June 2. Read at least returned periodically to check on the home, including the day after the execution when she discovered property missing. If it had been abandoned she had no reason to do so. The record does not support that Read intended to relinquish the property that was left there.

B. Was the Violation of the Automatic Stay Willful?

Defendants assert that the "willful" element of § 362(h) requires Read to prove that Defendants' conduct was egregious. But the overwhelming weight of authority, which this court finds persuasive, embraces a much broader construction of the term and holds that a willful violation occurs when a party acts deliberately with knowledge of the debtor's bankruptcy petition. *See, e.g., Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999); *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990); *Lansdale Family Rest., Inc. v. Weiss Food Serv. (In re Lansdale Family Rest., Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989); *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989); *Leetien*, 309 F.3d at 1215; *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996); *TransSouth Fin'l Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999); *Davis*, 247 B.R. at 698; *Johnson*, 253 B.R. at 861; *In re Sielaff*, 164 B.R. 560, 568-69 (Bankr. W.D. Mich. 1994); *Gagliardi*, 290 B.R. at 818. *But see Kolberg v. Agricredit Acceptance Corp. (In re Kolberg)*, 199 B.R. 929, 933 (W.D. Mich. 1996) (indicating that "most courts have held that a willful violation requires proof that the creditor demonstrated 'egregious, intentional misconduct'" but citing only cases applying that standard to punitive damages). Willfulness does not require that the creditor intend to violate the automatic stay provision, *Kaneb*, 196 F.3d at 269, rather it requires that the acts which violate the stay be intentional. *Lansdale Family Rest., Inc.*, 977 F.2d at 829; *Skeen*, 248 B.R. at 317. Indeed, "where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate." *Kaneb*, 196 F.3d at 269.

In this case, the Nicolleti law firm received notice of Read's bankruptcy filing one week before execution on the Judgment of Possession occurred. As an experienced and active collection firm, law firm personnel, including Salansky, were well aware of the import of the bankruptcy filing with respect to their ongoing judgment execution activities for Greentree. The only procedure in place at the Nicolleti law firm for stopping execution of judgment after notice of a debtor's bankruptcy petition being filed was to call the court officer with whom arrangements had been made to execute a particular judgment. Nicolleti was responsible for instituting adequate procedures to comply with § 362(a) but testified that no procedure other than calling the court officer was necessary. Although legal assistant Dana Salansky left three voice mail messages for Hindman after learning of Read's bankruptcy, she never received confirmation that any of the messages had been received. There being no further procedure in place, she took no further steps

to notify Hindman of the bankruptcy or to withdraw the Nicolleti law firm's written request that he seize the manufactured home in accordance with the Order for Execution of Judgment. Unlike *Davis* cited by Defendants and discussed above, the Nicolleti law firm had taken an active role in obtaining Hindman to carry out the execution on the judgment, the state court in this case was never notified of Debtor's bankruptcy, and execution was carried out by Hindman before the Order for Execution of Judgment expired.[4] The procedure relied upon by the law firm to halt execution was unreasonable and insufficient in this case in light of the fact that receipt by Hindman of Salansky's messages was never confirmed as well as the fact that Salansky had also left voice mail messages for Hindman during the week before the law firm learned of Read's bankruptcy and Hindman had never responded to those messages.

The court finds that the Nicolleti law firm's failure to take effective action to halt the execution constitutes deliberate conduct with knowledge of the filing of a bankruptcy petition. As such, after receiving notice of Debtor's bankruptcy, the court concludes that the Nicolleti law firm engaged in a willful violation of the automatic stay. *See, e.g., Leetien*, 309 F.3d at 1215 (finding a willful violation by creditor's counsel for failing to timely dismiss or stay a state collection proceeding); *Johnson*, 253 B.R. at 861-62 (finding a willful violation when creditor and its counsel failed to take steps to discontinue wage garnishment); *In re Banks*, 253 B.R. 25, 30-31 (Bankr. E.D. Mich. 2000) (finding a willful violation where creditor and its lawyer failed to take necessary steps to have writ of possession vacated); *In re McCall-Pruitt*, 281 B.R. 910, 911 (Bankr. E.D. Mich. 2002)(court concludes that "respondent had a duty to halt *all* collection activities when the debtor filed for bankruptcy protection;" emphasis original).

Defendants try to shift the blame to Read and her counsel for failing to return phone calls placed by Greentree during the weeks or months before Read's bankruptcy petition was filed and for failing to take any affirmative steps themselves to vacate the Order of Execution of Judgment after the bankruptcy petition was filed. But courts overwhelmingly agree that it is the responsibility of the party that set in motion the proceeding to take the steps necessary to restore or maintain the status quo. *See, e.g., Leetien*, 309 F.3d at 1214; *Gagliardi*, 290 B.R. at 819; *Sams*, 106 B.R. at 490; *Timbs*, 178 B.R. at 996; *Banks*, 253 B.R. at 30. Furthermore, the failure of Read and her attorney to return phone calls is irrelevant where, as

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[4] Although the original Order of Judgment for Possession Only, entered February 8, 1999, provided that execution on the judgment may not issue "if more than 28 days have passed from the date at signing unless there is further notice and hearing," [Pl. Ex. 3], after such notice and hearing, on April 15, 1999, the state court entered an Order of Execution on Judgment [Pl. Ex. 2]. That order contained no express limitation on the time of execution and did not otherwise expire until ninety days thereafter. *See* M.C.L. § 600.6002.

here, it is clear that the Nicolleti law firm, in the person of employee Dana Salansky, received actual notice of Read's bankruptcy one week before execution occurred, which was sufficient time to act effectively to assure that the execution not take place. Readily available alternative forms of communication with Hindman such as facsimile, express delivery and personal notification were never attempted. Again, the court emphasizes that voice mail communication with Hindman had already proven ineffective when notice of the Read bankruptcy petition was received by the Nicoletti law firm.

Nevertheless, the court finds that Nicolleti himself did not commit a "willful" violation of the stay since, as the court already found, Nicolleti did not personally receive notice of Read's bankruptcy petition until after execution by Hindman. Although Read does not dispute that Nicolleti had no personal knowledge of Plaintiff's bankruptcy, she argues that he is personally liable for the acts of his professional corporation under M.C.L. § 450.226. That section provides in relevant part: "Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation *to the person for whom such professional services were being rendered*." M.C.L. § 450.226 (emphasis added). But the Nicolleti law firm was rendering professional services for its client, Greentree, and not for Read. Thus, M.C.L. § 450.226 does not apply. The court is aware of no other authority that would allow it to impute the knowledge of the principal (the Nicolleti law firm) to its agent (Nicolleti). *See S.O.G.-San Ore-Gardner v. Missouri Pacific R.R Co.*, 658 F.2d 562, 567 (8th Cir.1981) (stating that "it is well settled that an agent may rely upon the representations of his principal and that the principal's undisclosed knowledge is not imputed to him"); *Siharath v. Citifinancial Servs., Inc. (In re Siharath)*, 285 B.R. 299, 304 (Bankr. D. Minn. 2002) (explaining that the imputed knowledge rule of agency "does not operate in the converse, and the agent cannot be imputed with the information which its principal has failed to give it"). Because Nicolleti did not act deliberately with knowledge of her bankruptcy, Read has failed to satisfy the willfulness standard under § 362(h) with respect to Nicolleti individually.

C. Actual Damages

Having found the Nicolleti law firm's violation of the stay to be willful, § 362(h) mandates the award of actual damages, including costs and attorneys' fees, caused by the violation. *Daniels*, 316 B.R. at 354. Read seeks four categories of actual damages: (1) personal property loss, (2) lost wages, (3) emotional distress, and (4) costs and attorneys' fees.

1. Personal Property Loss

Courts have awarded as part of actual damages under § 362(h) the value of personal property lost or destroyed through willful violations of the automatic stay. *See, e.g., Smith*, 296 B.R. at 52-53; *Fry v. Today's Homes, Inc. (In re Fry)*, 122 B.R. 427, 431 (Bankr. N. D. Okla. 1990); *cf. In re Sumpter*, 171 B.R. 835, 841, 844-45 (Bankr. N.D. Ill. 1994). As in any other case involving damages, a damage award under § 362(h) cannot be based on mere speculation, guess or conjecture. *Archer v. Macomb County Bank*, 853 F.2d 497, 499 (6th Cir. 1988)(citing *John E. Green Plumbing. & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965, 968 (6th Cir. 1984), *cert. denied* 471 U.S. 1102 (1985)). Once a party proves that she has been damaged, the amount of damages must be shown with reasonable certainty, albeit using methodologies that "need not be intellectually sophisticated." *Sumpter*, 171 B.R. at 844.

Read's damages include an amount equal to the value of the items of personal property removed from the manufactured home. The evidence raises two issues as to damages for loss of her personal property. First, what was removed from Read's home and taken out to the road by Hindman and his helpers. Second, what was the value of what was removed.

As to the first issue, the court has already discussed at length its conclusions about what was removed from the home during the execution. For reasons already addressed, the court largely credits the testimony of Hindman, Jones and Hindman's two sons as to what they removed from the home and discounts the credibility of much of Read's testimony as to what she left at the home. The court does not believe that Read was still living at the Wyoming Road address by late May, 1999, when she testified that she was last at the property. This makes it highly unlikely that the scope and amount of the property Read described at trial, including for example virtually all of her personal effects and necessary medical equipment and supplies, was still there on June 2, 1999. Also, there was a court order posted on the home, the grass was overgrown and the lack of activity at the property would be obvious to a casual observer. There is no evidence that forced entry was required to access the interior of the home. This makes it unlikely that Read would leave behind property to be moved later of the significant value she articulated at trial, especially cash, critical medical equipment and supplies, expensive jewelry and priceless family heirlooms. Moreover, Read eventually admitted at trial that she had not been truthful in initially filling out her schedules, which inevitably raises the proverbial question in the fact finder's mind of which version of events can be believed. Lastly, the court was dissatisfied with the seemingly dissembling manner in which

she answered even straightforward questions at trial, such as when and even whether she fell behind on her payments to Greentree, the status of her payment of her lot rent to the mobile home park and her receipt of numerous formal legal notices and documents from Greentree and other creditors.

The court therefore finds that the following property of Read's was removed from the home and discarded on June 2, 1999: a 32 inch TV, a bed headboard and frame; electric blankets, a table, a plant, and 5 to 7 cardboard boxes of property.[5] This is the personal property for which Read is entitled to recover damages.

In testimony admitted over Defendants' objections, Read generally testified as to the value of the property she believed Hindman and his associates had removed from the premises.[6] She appropriately laid a foundation for admission of her lay opinion of value under Rule 701 of the Federal Rules of Evidence. *E.g., South Cent. Livestock Dealers, Inc. v. Security State Bank*, 614 F.2d 1056, 1061 (5th Cir. 1980)("An owner is competent to give his opinion as to value of his property, often by stating the conclusion without stating a reason."). The court will therefore award damages based on Read's testimony of value. As to the T.V., Read testified that it was worth $1,100. Read and Hindman disagreed in their testimony about the size of the T.V. But it was her T.V. and she acquired it, so the court will credit

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Read said there was a shed on the lot, containing property such as a bicycle. Hindman did not recall a shed, but indicated they did not go in and remove anything if there was one. Greentree's interest and the execution order only pertained to the manufactured home itself. Therefore, the court finds that property Read identified as being stored in the shed was not removed by Hindman or at his direction. Also, both Hindman and Read acknowledge the presence of a washer and dryer in the home. Hindman says they left it there, testimony the court credits as generally corroborated by Jones and by Hindman's sons due to the amount of time they spent there and the ease of the job. The record simply does not show what happened when to the washer and dryer or whether Read ever re-entered the manufactured home. The court is therefore not including damages for disappearance of the washer and dryer, as the court cannot find any causal connection in the record to the acts in issue.

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Had Read not been permitted to so testify, one wonders how any debtor would ever prove damages in a case like this, which as the case law shows, are regrettably not unique. After all, Read did not expect the automatic stay to be violated and her property to be unlawfully disposed of. It would be a rare consumer bankruptcy debtor who would have original purchase receipts and documentation and photographs of routine household goods. In the absence of photographs, and with the property in issue having been discarded due to Defendants' omissions, expert valuation testimony was obviously impossible even in the unlikely event a bankruptcy debtor could afford it. [*See* Trial Tr., Read Testimony, April 26, 2002, at p.18, lines 12-17; p.19, lines 5-13]. Congress requires individual consumer bankruptcy debtors to place values on their property in every one of the millions of petitions filed, further demonstrating the competency of such testimony in this context. As the Sixth Circuit noted, quoting a Michigan state court case, "while 'we recognize that 'the law does not require impossibilities' when it comes to proof of damages,...it does require whatever degree of certainty tha(t) the nature of the case admits.'" *Archer*, 853 F.2d at 499 (*quoting Schankin v. Buskirk*, 354 Mich. 490, 497, 93 N.W.2d 293 (1958)).

Read's testimony that it was a Sony with a 32 inch screen. [Trial Tr., Read Testimony, April 26, 2002, p. 44]. As to the table, Read identified one cocktail table with glass valued at $130. [*Id.*, at p.45]. Hindman only indicated there was one table removed, and Read also testified separately to two other tables, but the court infers, since there was only one removed by Hindman, that it was the single cocktail table with glass. Hindman acknowledged that a plant was removed, and Read testified that she had a seven-foot tall ficus plant worth $100. [*Id.*, at p. 47]. Read testified that blankets worth $20 were removed. [*Id*, at p. 49]. And she testified that her headboard and bed were worth $450. [*Id*.]. The total amount of damages that the court will award for these items is $1800.

The court cannot, however, award any damages based on improper disposition of the 5 to 7 boxes. The impediment to doing so is the lack of evidence as to what was in the boxes. Read testified that she had property in boxes, and Hindman and his helpers admittedly removed them from the home. They also testified as to what was *not* in the boxes and the size and general weight of the boxes; no one person involved in the removal looked in all of the boxes. But nobody ever testified as to what was actually in the boxes. And there is otherwise insufficient evidence in the record for the court to make an inference as to what was in the boxes, such as, for example, photos and family records that would have significant value to Read outside of what was scheduled on her Bankruptcy Schedule B. Since the court cannot determine what was in the boxes, any attempt to award damages for improper disposition of their contents would amount to improper speculation.

In addition to contesting the bona fides of the specific damages claimed by Read, Defendants assert two arguments contesting any award of damages whatsoever. First, they argue that Plaintiff's claim for damages should be barred because of her failure to file accurate bankruptcy schedules. Defendants rely on *In re Colvin*, 288 B.R. 477 (Bankr. E.D. Mich. 2003), in support of this argument. In *Colvin*, the court sanctioned the debtors' intentional concealment of a $10,000 income tax refund received shortly after filing bankruptcy by denying the debtors' claim of exemption in the refund. *Id.* at 482-83. To the extent that *Colvin* even applies in this adversary proceeding, Defendants have failed to meet their burden of proof. "Mere allegations of bad faith will not suffice; the objecting party must demonstrate the bad faith of the debtor by specific evidence." *Id.* at 481. The evidence is insufficient for the court to conclude that Read intentionally concealed assets. While she provided a lump sum value of only $2,000 for her household goods and furnishings in her bankruptcy schedules, the court finds a value of $1,800 for the property removed from Read's home. There is no evidence before the court as to how Read reached the earlier

$2,000 valuation. At her § 341 meeting of creditors, Read informed the Chapter 7 trustee that the value of her property was higher than indicated in her schedules. Moreover, this is not a case in which Read would have obtained a significant benefit, if any at all, in failing to schedule all of her property given the additional exemptions that would have been available to her under 11 U.S.C. § 522. Thus, Read he would have had little or no incentive to intentionally mislead the court, the trustee, or her creditors in May, 1999, when she first filed her petition.

Defendants also argue that Read is judicially estopped from seeking damages greater than the value she placed on her tangible personal property in her bankruptcy schedules. Although the court ruled at trial that Read is not so estopped, Defendants ask the court to reconsider its ruling in light of the factual development at trial. The facts do not, however, require the court to rule otherwise. As it turns out, the court has awarded less than the scheduled amount of her property. The doctrine of judicial estoppel is utilized "to preserve 'the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.'" *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002) (quoting *Teledyne Indus., Inc. v. NLRB,* 911 F.2d 1214, 1218 (6th Cir.1990)). But the Sixth Circuit has found it "inappropriate in cases of conduct amounting to nothing more than mistake or inadvertence." *Id.* The party asserting the doctrine has the burden of proving its applicability. *See id.*

In *Browning*, the plaintiff failed to disclose claims against a law firm even though plaintiff was aware of the factual basis for its claims. The court considered the fact that plaintiff would receive no "windfall" from the failure to disclose since under its plan of reorganization any recovery would go to its creditors. Since there was no evidence that the plaintiff had a motive for concealment, the court concluded that its failure to disclose was inadvertent and judicial estoppel did not apply. *Id.*; *see also McClain v. Coverdell & Co.*, 272 F. Supp. 2d 631 (E.D. Mich. 2003) (finding judicial estoppel did not apply since debtor received no windfall from failing to disclose funds in checking account that she would have been able to keep as exempt property if she had disclosed the account).

In this case, the additional exemptions that would have been available to Read had she placed a higher value on her property lead the court to conclude that, as in *Browning* and *McClain*, Plaintiff lacked a motive to conceal assets when she initially filed her petition. The facts otherwise presented at trial, as already discussed, do not support a finding of intentional concealment at that time. Thus, the court concludes, again, that judicial estoppel does not apply.

2. Lost Wages

Read is entitled to actual damages that include lost wages for work missed due to attendance at trial and at her deposition, all of which was a direct result of the stay violation. *See Daniels*, 316 B.R. at 354-55; *In re See*, 301 B.R. 549, 553 (Bankr. N.D. Iowa 2003); *In re Flack*, 239 B.R. 155, 164 (Bankr. S.D. Ohio 1999); *In re Markey*, 144 B.R. 738, 746 (Bankr. W.D. Mich. 1992). Read's lost wages due to attendance at her deposition and three days of trial in 2002 equal $773.76 ($24.18 x 8 hours x 4), and lost wages due to attendance at two days of trial in 2004 equal $415.36 ($25.96 x 8 hours x 2), for a total of $1,189.12.

Read also seeks damages for lost wages for two weeks of work missed because, according to Read, she was upset immediately after the stay violation occurred. Read's claim of damages for emotional distress is discussed below.

3. Emotional Distress

Plaintiff seeks an award of $40,000, including the wages lost immediately after the stay violation, as a result of emotional distress caused by the violation. The national case law conflicts on whether emotional distress damages are recoverable under § 362(h). *Compare Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 879-80 (7th Cir. 2001)(emotional distress damages not allowed under § 362(h)) *with Dawson v. Wash. Mut. Bank (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004)(emotional distress damages allowed under § 362(h)). There is no binding Sixth Circuit precedent on this point. But the court need not decide that question here, because even if such damages are recoverable, Read has not sustained her burden of proving entitlement to damages for emotional distress in this case.

Those courts that allow recovery of damages for emotional distress as actual damages under § 362(h) still make it clear that not every willful violation of the stay merits an award of such damages. *See, e.g., Dawson*, 390 F.3d at 1149; *Kaneb*, 196 F.3d at 269; *In re Perviz*, 302 B.R. 357, 371 (Bankr. N.D. Ohio 2003); *Johnson*, 253 B.R. at 862; *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995); *Briggs*, 143 B.R. at 463. The Ninth Circuit held that a plaintiff must "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay..." *Dawson*, 390 F.3d at 1149. Medical evidence is not necessary to prove damages for emotional distress. *Kaneb*, 196 F.3d at 269-70; *Perviz*, 302 B.R. at 371; *Flynn*, 185 B.R. at 93. And as explained by the Ninth Circuit, emotional distress damages may be established in several different ways, including corroborating medical evidence, non-expert testimony by others, such as family members, friends or coworkers, regarding manifestations of

mental anguish or, in some cases, by the facts of the case where it is obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at 1149-50. In any case, something more than a plaintiff's own vague and conclusory testimony is necessary to sustain the burden of proving such damages. *Briggs*, 143 B.R. at 463.

In this case, the only evidence of emotional distress is Read's conclusory testimony that she was "upset" and did not go to work for two weeks. This, without some corroborating evidence, is insufficient to support an award of emotional distress damages under the standard of proof set forth in *Dawson*. *See Skeen*, 248 B.R. at 318-19 (finding emotional distress damages not compensable where plaintiff offered neither evidence that she sought medical relief nor evidence that the anxiety caused by the stay violation rendered her incapable of going about her daily routine). The facts of the case are not such that it is obvious to the court that a reasonable person would suffer substantial emotional harm requiring two weeks off of work. *See Daniels*, 316 B.R. at 355 (in case involving outstanding arrest warrant and two days missed work, "no competent evidence was offered to prove Debtor's health suffered significantly as a result"). This is particularly so given the court's findings as to what was removed from the home by Hindman and his assistants.[7] As such, the court will not award damages for emotional distress, including without limitation the wages claimed for two weeks off of work.

4. Attorneys' Fees and Costs

When the court finds a willful violation of the automatic stay, as in this case, § 362(h) mandates an award of costs and attorneys' fees as an element of damages. 11 U.S.C. § 362(h). Read seeks attorneys' fees in the total amount of $88,177, consisting of $66,977 charged by attorney Widenbaum and $21,200 charged by co-counsel Lyzohub.[8] The burden of proving entitlement to the requested fees and

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Loss of family photographs and videos and irreplaceable property of that nature would more obviously result in serious, compensable emotional distress. But, as explained above, Read has not proven that Hindman removed such items from the home. The court cannot presume that they were in the boxes.

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The court has excluded from Widenbaum's total fees and costs any amounts charged as interest on unpaid balances as reflected in her fees statements. The case law dealing with interest on attorney fees awarded under 11 U.S.C. § 330 generally indicates that interest does not begin to run until the court awards the fees and they become an administrative expense, at which time § 726(a)(5) specifically authorizes payment of interest on such administrative expenses. *See In re Caribou P'ship III*, 152 B.R. 733, 741 (Bankr. N.D. Ind. 1993) and cases cited therein. While this reasoning is not necessarily applicable to fees awarded under § 362(h), the court nevertheless finds an award of interest inappropriate in this case. The long delay in bringing this case to a conclusion was in large part the fault of Plaintiff and her counsel. The case was stayed in order to allow Read to seek relief from the automatic stay in the United States Bankruptcy Court for the Northern District of Illinois after Defendant Greentree filed a Chapter 11 petition so as to

costs is on Read. *In re Price*, 143 B.R. 190, 192 (Bankr. N.D. Ill. 1992). In curious contrast to numerous other federal fee-shifting statutes that depart from the American Rule and allow prevailing plaintiffs to recover attorneys' fees from their opponent, *see, e.g.*, 42 U.S.C. § 1988, the word "reasonable" does not appear in § 362(h) as a standard by which to measure an award of attorneys' fees and costs. The substantial body of federal case law involving attorneys' fee awards and litigation is derived from interpreting statutes, like 42 U.S.C. § 1988, that include the word "reasonable" as an express statutory standard for making fee awards. Moreover, the structure of § 362(h) is unusual in that it includes costs and attorneys' fees as a specific element of actual damages and not as an element of costs. *See Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002). One might therefore argue that, because of these differences, the body of case law applying the long established lodestar method of determining fee reasonableness does not apply to § 362(h). The conclusion to such an argument might further be that the court should not consider reasonableness, but must instead award the attorneys' fees incurred as a proximate result of the stay violation, whether the court thinks they are reasonable or not.

But courts making fee awards under § 362(h) nevertheless uniformly apply a reasonableness standard, without explaining the statutory basis for applying such a limitation. *See, e.g., Eskanos & Adler, P.C.*, 283 B.R. at 11("Section 362(h) provides little guidance regarding the applicable standards for awarding actual damages. Nonetheless, most courts apply a reasonableness analysis.");*see generally* Eric C. Surrette, Annotation, *Remedies and Damages for Violations of the Automatic Stay Provisions of the Bankruptcy Code (11 U.S.C.A. 362(h)), By Parties Other Than the Federal Government*, 153

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proceed against all defendants together in this court. But Read never sought such relief. This case was also stayed two additional times as a result of the medical condition of Read's counsel. While the medical issues were real impediments to conclusion of trial, there is no reason that the Nicoletti law firm should bear the financial consequences of those issues. In addition, although the interest charged by Widenbaum is on the full amount of her fees and costs, as explained in this order, only a fraction of that total amount is awarded as damages in this case. Moreover, Read has offered no evidence of an appropriate interest rate that she believes should be charged and no interest rate is provided in Widenbaum's written fee agreement.

A.L.R. Fed. 463 at § 6[a] and [n] (2005). And many courts have found the standards for compensating professionals in bankruptcy set forth in 11 U.S.C. § 330 to provide helpful guidelines. *See Eskanos & Adler, P.C.*, 283 B.R. at 11; *Smith*, 296 B.R. at 62-63; *Siharath*, 285 B.R. at 306; *Price*, 143 B.R. at 192. That section provides for "reasonable compensation for actual, necessary services. . . ." 11 U.S.C. § 330(a)(1)(A).

Notwithstanding the absence of the word "reasonable" in § 362(h), this court will also apply a reasonableness standard in determining the award of attorneys' fees to Read under § 362(h). The legal basis for doing so is provided by 11 U.S.C. § 329. Section 329 of the Bankruptcy Code is called "Debtor's transactions with attorneys," and provides as follows:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such compensation exceeds the *reasonable value* of any such services the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to–
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> (1) the estate, if the property transferred–
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> (A) would have been property of the estate; or
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> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12 or 13 of this title; or
>
> (2) the entity that made such payment.

(Emphasis added). In this court's view, § 329(b) imposes an overall reasonableness standard on any transaction that a debtor has with an attorney. The court is authorized and indeed directed to independently assess the reasonableness of attorney compensation "in a case under this title, or in connection with such a case." Under such broad language, this adversary proceeding is at least one "in connection" with a case under Title 11, with Read pursuing a cause of action expressly created by a section of Title 11. *Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714, 718-19 (6th Cir. 2001). Moreover, by its reference in § 329(b)(2) to repayment of excessive fees to "the entity that made such payment," Congress recognized that an entity other than the debtor may be paying the debtor's attorney's compensation, as would be the situation where fees are awarded under § 362(h). For these reasons, the court finds that the

standard of reasonableness in § 329 governs attorneys' fees awarded to a debtor under § 362(h).[9]

To determine the reasonableness of attorneys' fees, this court will also apply the "lodestar" method of fee calculation endorsed by the Supreme Court and the Sixth Circuit under numerous other federal fee shifting statutes. *See Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983) and employing the lodestar method in determining an award of attorney fees in a civil rights case); *but see United HealthCare Corp. v. American Trade Ins., Co.*, 88 F.3d 563, 575-76, n.10 (8th Cir. 1996)(court notes that there is some disagreement among the courts regarding the extent to which the *Hensley* factors should apply in cases involving mandatory, rather than permissive, fee shifting statutes). This involves a two-step analysis. First, "the court multiplies a reasonable hourly rate by the proven number of hours reasonably expended on the case by counsel" to arrive at the lodestar figure. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). Second, "[o]nce the lodestar figure is established, the trial court is permitted to consider other factors, and to adjust the award upward or downward to achieve a reasonable result." *Id.* at 792 (citing *Hensley*, 461 U.S. at 434).

The "other factors" generally considered in adjusting the lodestar to determine a reasonable fee are derived from *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974); *see Hensley*, 461 U.S. at 430 n.3; *Geier*, 372 F.3d at 792. These factors are: "(1) the time and labor required by a given case; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and

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In making this conclusion of law, the court is mindful of recent Supreme Court case law interpreting § 330 of the Bankruptcy Code, which also governs attorneys' fees. In *Lamie v. United States Trustee*, 540 U.S. 526 (2004), the Supreme Court reiterated that bankruptcy courts must apply the plain meaning of the terms of the statute and explicitly cautioned against adding words to the statute that are not there. Deleted, apparently inadvertently in a 1994 amendment, the Court refused in *Lamie* to read the words "debtor's attorney" back into 11 U.S.C. § 330(a)(1). Noting that the petitioner's argument "would have us read an absent word into the statute," the Court stated that "[o]ur unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Id.* at 538 (*quoting United States v. Locke*, 471 U.S. 84, 95 (1985)). These standards of statutory interpretation, as expressly applied to interpretation of the Bankruptcy Code, are overcome as to § 362(h) and the absence of the word "reasonable" by the presence of § 329 in the Bankruptcy Code. This court would also be extremely surprised if the Supreme Court and the Sixth Circuit were to adopt any standard for awarding attorneys fees as damages under § 362(h) that sanctioned "unreasonable" attorneys' fees, although that result might also very well be construed as simply one of the "harsh outcomes" of applying the plain meaning of Congress' chosen words, which do not include the word "reasonable" in the text of § 362(h).

ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Johnson*, 488 F.2d at 717-19. Although "'many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate to arrive at the lodestar figure'" in the first step of the analysis, some of these factors may still serve as a basis for an upward or downward adjustment of the lodestar figure in the second step of the analysis. *Geier*, 372 F.3d at 793-94.

The court finds that Widenbaum's billing rate of $195 per hour and Lyzohub's billing rate of $200 per hour reflect counsel's skill and experience and are within the range of prevailing community rates during the extended time period involved in this case.[10] Thus, the court finds the proposed billing rates reasonable.

Meaningful determination of the reasonableness of the hours expended in this litigation is frustrated by lack of detail in the fee statements submitted by counsel. "[I]nadequate documentation 'makes it impossible for the court to verify the reasonableness of the billings, either as to the necessity of the particular service or the amount of time expended on a given task.'" *In re Pierce*, 190 F.3d 586, 593-94 (D.C. Cir. 1999) (quoting *In re Sealed Case*, 890 F.2d 451, 455 (D.C. Cir. 1989)(*per curiam*)); *see* L.B.R. 2016-1 (E.D.M.). The following discussion explains the court's conclusion that the requested hours must be reduced due to lack of sufficiently detailed documentation.

First, the court notes that all of the time entries contained in Lyzohub's fee statement are charged in one-quarter hour increments. *See* United States Trustee's Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330, ¶ (b)(4)(v), *reprinted in* 28 C.F.R. Part 58, Appendix ("UST Guidelines"). As stated by one court, an attorney's practice of billing in quarter hour increments "inherently inflates and distorts the time actually expended, and hence is unacceptable." *Price*, 143 B.R. at 194; *see also In re Corporacion de Servicios Medico-Hospitalarios de Fajardo, Inc.*, 155 B.R. 1, 2 (Bankr. D.P.R.1993) (stating that "minimum charges of .10-hour increments more fairly reflect actual time involved, than do quarter hour segments"); *In re Jefsaba, Inc.*, 172 B.R. 786, 801 (Bankr. E.D. Pa. 1994). Because counsel is only entitled to compensation for time actually expended, the court will reduce Lyzohub's fees by 10 percent, or $2,120, to account for the likely overcharge resulting from his billing method.

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Defendants' expert witness on attorney fees testified that he is an attorney in the relevant community. Although he testified that the range of billing rates in the Eastern District of Michigan, Southern Division, was $145 - $200 during 1999 through 2004, he also testified that he bills at a rate of $275 per hour in bankruptcy cases.

Next, it appears from Widenbaum's testimony and her fee statements that the time entries on her fee statements reflect work performed by persons other than herself. She testified that her secretary and paralegal keep track of their time and bill at $75 per hour. The time entries contained in her fee statements contain 8.05 hours specifically designated as time her paralegal worked on the case. Yet the fee statements simply total all of of the hours expended in the case without designating persons that should not be compensated at Widenbaum's $195 per hour rate. The court will, therefore, reduce the requested fees by $966, which represents the difference between counsel's hourly rate of $195 and her paralegal's hourly rate of $75.

Widenbaum's fee agreement and time entries reflecting her court appearances indicate that she bills a minimum of three hours for court appearances and hearings, regardless of the actual time expended. As indicated above, such billing practices tend to inflate the actual time involved. Widenbaum billed the three hour minimum on the following dates for appearance at three pretrial conferences and one hearing on a motion to dismiss: November 2, 2000; December 7, 2000; February 8, 2002; and March 14, 2002.[11] To account for the likely overcharge due to this billing practice, the court will reduce counsel's fees by four hours or $780.

Counsel's time entries also indicate travel time to court on nine separate occasions with respect to Widenbaum and six occasions with respect to Lyzohub. The entries do not specify the actual time spent traveling but bills this time at counsel's regular hourly rates of $195 and $200, respectively. Nevertheless, Widenbaum has indicated her travel time totals 1.5 hours per appearance. [*See* Pl. Ex. 21C, Deposition Ex. 6] and the court estimates the same travel time per appearance for Lyzohub given the location of his office. As such, the fee statements include approximately $2,632 for 13.5 hours of travel by Widenbaum and $1,800 for 9 hours of travel by Lyzohub. While the approach taken by courts regarding compensation for travel time varies greatly, *see In re Landing*, 122 B.R. 701, 703 (Bankr. N.D. Ohio 1990), the court finds billing for travel time at counsel's full hourly rate is unreasonable absent a showing that counsel performed some legal services during that time. *See Hayes & Son Body Shop, Inc. v. Childress (In re Hayes & Son Body Shop, Inc.)*, 958 F.2d 371 (Table), 1992 WL 56754 (6th Cir. March 23, 1992) (citing *In re S.T.N. Enters.*, 70 B.R. 823, 837 (Bankr. D. Vt. 1987) and stating that "local travel time is

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Widenbaum also billed the minimum three hours for her attendance at mediation in Federal Court on November 6, 2002. But she testified that she actually spent at least that amount of time in mediation on that date.

an overhead expense built into a lawyer's hourly rate, except for situations in which the lawyer actually performs legal services during the travel time, or in which the travel time exceeds one hour, in which case billing at one half the attorney's hourly rate is permissible"); *see also Gagliardi*, 290 B.R. at 820. The court will, therefore, reduce the requested fees for travel by one-half or by a total of $2,216.

Next, the court has reviewed time entries representing numerous hours in the fee statements that simply indicate that a telephone conference took place with a specified person or correspondence was prepared or reviewed without supplying any information identifying the nature or purpose of the call or correspondence. A mere notation of a telephone call or a letter prepared or reviewed, without identifying the nature or purpose of the call or correspondence, does not permit the court to determine whether the services were reasonable and necessary. *See, e.g., In re Copeland*, 154 B.R. 693, 701 (Bankr. W.D. Mich. 1993) (requiring that the nature and purpose of the activity must be noted in order to be compensable); *In re Wiedau's, Inc.*, 78 B.R. 904, 908 (Bankr. S.D. Ill. 1987); *Price*, 143 B.R. at 195. In order to address these deficiencies, the court will reduce the requested fees for 37 hours or $7,215, representing all entries that provide virtually no explanation of the purpose of the call or correspondence and that are not lumped into an entry with other tasks.

Both Widenbaum's and Lyzohub's fees statements include time entries for the preparation and/or review of reports filed regarding the status of proceedings by Read against Defendant Greentree to obtain relief from the automatic stay. As explained earlier in this opinion, after trial had commenced but before it was completed, Greentree filed a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Illinois. A further trial date was vacated at that time because Read indicated she would seek relief from the automatic stay so that she could proceed with trial against Greentree. Read was directed to file reports with the court regarding the stay proceedings. But Read never sought relief from stay and trial eventually recommenced with Greentree being dismissed as a party. Read's failure to seek relief as she had indicated she would resulted in an unnecessary delay in this proceeding. She is not entitled to recover attorney fees incurred for status reports during the time period of this delay. The court will therefore disallow $419 billed by Widenbaum and $220 billed by Lyzohub for the preparation or review of these status reports.

The court also disallows $1,228 billed by Widenbaum for preparation and attendance at her own trial deposition offered as evidence of the reasonableness of her fees. Widenbaum's role was as witness only; Lyzohub conducted her direct examination and has billed for his time doing so. Under these

circumstances, Widenbaum is not entitled to recover fees for legal services in connection with her own deposition.

The fee reductions discussed above total $15,164 leaving a balance of $73,013. Nevertheless, the court's determination of a lodestar amount requires an additional reduction. While the court has already addressed a number of deficiencies in the fee statements at issue that it could quantify with some degree of specificity, the court's additional reduction results from its consideration of numerous additional deficiencies that are difficult to quantify but that the court finds impact the reasonableness of the fee request. *Hensley*, 461 U.S. at 433 ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly.").

For instance, the fee statements are replete with entries that lump numerous tasks into a single entry.[12] In order to determine whether a reasonable amount of time was spent performing a task, each task should be listed separately with a separate time entry. *See, e.g., In re New Boston Coke Corp.*, 299 B.R. 432, 446-47 (Bankr. E.D. Mich. 2003); UST Guidelines, ¶ (b)(4)(v). Counsel's extensive failure to do so severely impacts this court's ability to determine the reasonableness of the hours expended. In addition, within the "lumped" entries, there are numerous entries that fail to provide sufficient detail to determine whether the service performed was necessary to this litigation and reasonable.

A further deficiency that the court is unable to otherwise quantify is Widenbaum's failure to identify persons other than herself that performed services. Although a reduction has already been made for a portion of the 8.05 hours of paralegal time specified in the fee statements, Widenbaum also testified that her secretary's time is billed at $75 per hour. She testified that when her secretary takes a message, the message memo is put in the client's file and Widenbaum later pulls the file and writes on the memo the time spent on the call. [Record, Doc. # 234, Widenbaum Depo., p. 75]. While the court finds it more likely than not that many of the entries indicating that telephone calls were made or received were handled by the secretary, none of those entries so indicate. Widenbaum's fee statements also indicate that she utilized a

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An example of Widenbaum's "lumping" of tasks into a single entry is as follows:

3/11/02 Telephone conference with Attorney Berke advising him that we need to know no later than March 12, 2002 which days Nicoletti is available for deposition and further the status of mediation and/or arbitration; Receipt and review of Memorandum of Decision and Order Denying Defendant's Motion for summary Judgment and for Sanctions; Telephone conference with Attorney Berke; Telephone conference with Attorney McSorley; Research regarding amendment of Schedules; Initial Disclosures; etc.; Telephone conference with Attorney Berke 2.50 [hrs.]

"research attorney."[13] However, none of the entries billing for research time specify that it was done by someone other than Widenbaum. The court also considers the numerous entries that include time spent copying and sending facsimile transmissions. Attorneys are not generally compensated at their hourly rate for clerical work as such work is considered part of the attorney's overhead. *In re Newman*, 270 B.R. 845, 849 (Bankr. S.D. Ohio 2001); *In re Bass*, 227 B.R. 103, 107 (Bankr. E.D. Mich. 1998).

Other issues considered by the court as impacting the reasonableness of the hours sought include the fact that Read requests fees for two attorneys billing time in this case. The fact that there were a total of three attorneys representing the Defendants and third-party Defendant Hindman is offered as justification for the need for two attorneys to represent Read. This, without more, is insufficient to support a finding that obtaining co-counsel in this case was reasonable. The factual and legal issues in this case are not complex and, contrary to Read's argument at trial, there were not an extensive number of exhibits that would require the assistance of co-counsel. If Widenbaum was not up to an aggressive defense from the standpoint of skills, then her hourly rate is excessive. While the court recognizes that Widenbaum's medical issues eventually required co-counsel's involvement to participate in and conclude the trial for her, under § 362(h) a plaintiff is entitled only to damages reasonably incurred as a proximate result of the violation of the stay. *See United States v. Fingers (In re Fingers)*, 170 B.R. 419, 433 (S.D. Cal.1994); *Sucre v. MIC Leasing Corp. (In re Sucre)*, 226 B.R. 340, 350 (Bankr. S.D.N.Y. 1998) (holding that to render creditor liable for actual damages pursuant to § 362(h), debtor must prove that creditor's conduct proximately caused the damages claimed and that those damages were a reasonably foreseeable result of creditor's actions); *Orient River Invest., Inc. v. Equibank (In re Orient River Invest., Inc.)*, 105 B.R. 790, 796 (Bankr. E.D. Pa.1989) (same). This is particularly so given the inclusion of attorneys' fees in § 362(h) as a specific item of damages, and not just as an element of costs as in other federal fee shifting statutes. To the extent that additional fees were incurred as a direct result of Widenbaum's medical issues, Plaintiff has not demonstrated proximate causation. Moreover, a review of Lyzohub's fee statement reveals duplicative efforts that are not otherwise explained.[14]

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An April 5, 2002, entry states, "Multiple telephone conferences with research attorney regarding issue of governmental immunity." [Pl. Ex. 21C, Depo. Ex. 4].

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For example, on April 17, 2002, both Lyzohub and Widenbaum billed for attendance at a telephone conference and on April 18, 2002, both billed for attendance at a conference with opposing counsel. No explanation for the attendance of both attorneys is offered.

In light of the foregoing, the court finds that Plaintiff has failed to sustain her burden of proof regarding the total amount of attorneys' fees requested. The court finds a 50 percent reduction of the $73,013 fee balance computed above appropriate to address the unquantifiable deficiencies and other issues discussed, resulting in a balance of $36,506 as the lodestar amount.

In making the determination that $36,506 represents a reasonable number of hours at reasonable hourly rates, the court has considered and rejected as unpersuasive the testimony of Defendants' expert, Stuart Gold. He opined that Read should have filed a motion to show cause why Defendants should not be held in contempt rather than an adversary proceeding under § 362(h). Moreover, Gold asserted that Read's claims could have been resolved by expending only 20 to 30 hours of lawyer times if she had filed a motion.

As to the choice of an adversary proceeding over a motion for contempt, the court notes that there is no specific procedural method for litigating § 362(h) claims set forth in either the statute or in the Bankruptcy Rules. The "custom" in this district is apparently to proceed via a motion to show cause why an order should not issue holding the alleged offending party in contempt of court. The court assumes this custom harkens back to an earlier time, preceding the enactment of § 362(h) by Congress in 1984, Pub. L. No. 98-353 § 304. *See Spookyworld, Inc. v. Town of Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1, 8 (1st Cir. 2003). Before that time, there was no express Bankruptcy Code remedy for violation of the automatic stay. *See Fry*, 122 B.R. at 430. Accordingly, bankruptcy courts treated the automatic stay as a court-ordered injunction, the violation of which was punishable by contempt, and proceeded in that manner under the authority of 11 U.S.C. § 105. *Id.; Crysen/Montenay Energy Co.*, 902 F.2d at 1104. After § 362(h) was added to the Bankruptcy Code, there was a clear statutory remedy, for individuals if not for entities. *See Spookyworld*, 346 F.3d at 8; *In re Xavier's of Beville*, 172 B.R. 667, 671 (Bankr. M.D. Fla. 1994). The case law shows that many individual debtors now bring § 362(h) claims by adversary proceeding. *See, e.g., Smith*, 296 B.R. at 50. Yet many individual debtors also still bring claims seeking damages under § 362(h) by motion to show cause as in a contempt proceeding. *See, e.g., Timbs*, 178 B.R. at 992-95.

In this court's view, the preferred, if not exclusive procedure for individual debtors to address violations of the automatic stay under § 362(h) is to assert the cause of action by adversary proceeding,

as Read has pursued.[15] *Cf. Fortune & Faal v. Zumbrun (In re Zumbrun)*, 88 Bankr. 250, 252 (B.A.P. 9th Cir. 1988)(adversary proceeding not required to pursue § 362(h) claim); *In re Dunning*, 269 B.R. 357, 367-68 (Bankr. N.D. Ohio 2001)(adversary proceeding not required to pursue § 362(h) claim where debtor did not seek money damages but compliance with the Bankruptcy Code). Bankruptcy Rule 7001(1) provides that "a proceeding to recover money or property" is an adversary proceeding, which must be commenced by complaint, Fed. R. Bankr. P. 7003. Read clearly seeks money damages from Defendants. A claim under § 362(h) differs from a contempt proceeding; in contrast to the mandatory damages specified in § 362(h), "whether damages are awarded for contempt is within the discretion of the court," *Xavier's of Beville*, 172 B.R. at 671. The nature of the relief specified by the statute as including compensatory and punitive damages is the sort of claim that will best be articulated by complaint and not just by motion. As in this case, there are often multiple parties and cross or third party claims that don't cleanly lend themselves to motion practice and for which one would expect process in the form of a summons to be issued to bring defending parties before the court to answer to any claim. Nicoletti and the Nicoletti law firm were not creditors of Read. The issuance of a summons to bring Nicoletti and the Nicoletti law firm before the court was unquestionably appropriate, and one might argue, necessary. *But see Timbs*, 178 B.R. at 994. That Read proceeded under Bankruptcy Rule 7001 and not under Bankruptcy Rule 9014 does not provide a basis for declining to award attorneys' fees under § 362(h).

Even if a contempt proceeding was the correct procedural method for raising this dispute, the court remains wholly unpersuaded by Attorney Gold' s testimony that the case could have been handled with a total of 20-30 hours of attorney time. Rule 9020 of the Bankruptcy Rules provides that "Rule 9014 [Contested Matters] governs a motion for an order of contempt...." In turn, Rule 9014(c) incorporates into procedure on contested matters most of the Part VII Rules governing adversary proceedings, including all of the discovery rules and the rules governing dispositive motions. *See Zumbrun*, 88 Bankr. at 252. And Rule 9014(d) provides that the testimony of witnesses shall be taken in the same manner as in an adversary proceeding. Thus, the same legal activities that Read's lawyers necessarily pursued on her behalf in the context of this adversary proceeding would likely have been pursued in a motion proceeding.

To the extent that the hours pursued in the adversary proceeding are reasonable, they would have

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As at least five circuits hold that entities may not assert claims under § 362(h), *e.g.*, *Spookyworld*, 346 F.3d at 8, the show cause procedure for contempt under § 105 retains vitality.

been equally reasonable in the context of a show cause proceeding. Defendants aggressively defended against Read's claim; Read's lawyers necessarily had to respond to those defense efforts to achieve any recovery at all for their client. *See Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711, 730 (1987)(nature and quality of the opposition is reflected in the lodestar element of time); *City of Riverside v. Rivera*, 477 U.S. 561, 580 n.11 (1986)(plurality opinion)(same). No defense efforts have been identified that would have been foregone if this were a "motion proceeding" instead of an "adversary proceeding." If anything, the potential that a lawyer or a law firm might be held in contempt of court would only heighten the litigation stakes from a defense perspective. Most significantly, no specific services or hours of service provided by Read's lawyers have been identified as having been unnecessary or unreasonable in the context of a motion to show cause. The standard by which this court is guided "is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 889 F.2d 1169, 1177 (6th Cir. 1990). Having determined the lodestar amount at $36,506, the court must undertake the second step of the inquiry and decide whether any adjustment of the lodestar amount is appropriate. The most important factor bearing on adjustment and not already built into the lodestar calculation is the "results obtained." In *Hensley*, the Supreme Court identified two situations where the results obtained may affect the fee award; only the second of these situations is relevant to this case. As the Supreme Court explained, "[i]f, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley*, 461 U.S. at 436. In such situations, it is within the trial court's equitable discretion either to "attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37. The measure of success is the result of the lawsuit in terms of relief; there should not be a downward adjustment simply because not every argument prevailed and not every motion was won. *Id.* Thus, the significance of the $2,989.12 in damages awarded to Read for personal property loss and lost wages must be considered in light of the lodestar fee amount of $36,506. *See Hensley*, 461 U.S. at 435.

The damages ultimately proven related only to Read's property loss and lost wages. From the beginning, Read sought the substantial bulk of her damages of more than $40,000 through emotional distress and punitive damages, and not based on her property loss. As has already been explained as to claimed damages for emotional distress, Read's proof is insufficient to sustain any award, let alone the

substantial one she seeks. Likewise, as explained below, Read has not established the egregious circumstances required for an award of punitive damages as to the Nicoletti law firm. And she has been wholly unsuccessful as to Nicoletti, individually, and Greentree, albeit the latter failure was ultimately unrelated to the merits.[16] For these reasons, the court finds that Read has achieved only limited success in her lawsuit such that a downward adjustment in the lodestar amount is appropriate to reflect that she failed to recover most of the damages she sought.

The nature of Read's claim and of the shortcoming in the results obtained do not permit the court to identify specific hours of service that must be reduced to account for her limited success at trial. Therefore the court will reduce the lodestar amount by a percentage, as permitted by *Hensley*. In the court's equitable judgment, for the reasons explained below, the appropriate percentage reduction for Read's limited success is 35% of the lodestar amount of $36,506, or a reduction of an additional $12,777.

In the court's view, the award of punitive damages against the Nicoletti law firm turned on whether the court believed Hindman's testimony that he was directed by somebody at the Nicoletti law firm to proceed with the execution even *after* the law firm was aware of Read's bankruptcy filing. That would have been egregious conduct of the type, as explained further below, that justifies punitive damages. The court did not find that Hindman was so directed. That determination was ultimately a disputed factual issue reasonably left by the parties to the trier of fact to decide, not a failure of proof otherwise within Read's control. *See Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 437-38 (6th Cir. 1999)(closeness of case on merits tends to justify services, not to be a basis to reduce a fee award). Nevertheless, the fact that she did not ultimately prevail on that claim must also be recognized in evaluating the overall results at trial, and for which some reduction in the lodestar is appropriate. This is because the statutory availability of and Read's claim for punitive damages almost certainly heightened the defense effort, which in turn directly affected the lodestar figure. The court will thus apply a 10% reduction to the lodestar amount, or $3,651, to account for the lack of a punitive damages award. *Cf. Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291, 299 (6th Cir. 1989)(35% reduction in fees for limited success affirmed where plaintiff was unsuccessful on punitive damages claim); *Spanish Action Committee v. Chicago*, 811 F.2d 1129, 1135 (7th Cir. 1987)(plaintiff's failure to recover punitive damages was an "important factor" in trial court's 80%

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Prevailing against Nicoletti and Greentree would not have changed Read's proven compensatory damages, but would have presented alternative avenues for recovery of punitive damages, with each Defendant's role and conduct in the events in issue different and required to be separately evaluated.

reduction in requested fees).

The court believes a more significant percentage reduction is appropriate for the lack of success in proving emotional distress damages. Although an unclear legal entitlement, the request for emotional distress damages was the most substantial aspect of Read's prayer for compensatory damages. The proof to substantiate such damages at trial was always directly within her control: proving that items of personal significance were lost and convincing testimony as to the impact of the property loss on Read's well-being. In the court's view, medical testimony was not necessary to prevail on this claim. Rather, more detailed testimony from Read, herself, beyond just that she was upset, was required. Testimony from family, friends and co-workers as to how she reacted to the events of June, 1999, would have provided an evidentiary basis for awarding such damages. The hours of service rendered as reflected in the lodestar amount do not account for this failure of proof, because the court cannot identify any service hours separately attributable to this element of damages. Therefore, a further reduction in the lodestar amount is necessary to account for Read's lack of success in this regard. Because this was proof within Read's control, and because of the relatively greater amount originally sought for emotional distress damages than for property loss, the court finds that a more significant percentage reduction of 25% of the lodestar amount, or $9,126, is necessary.

The court has explained why Read is not entitled to as much as she has requested for attorneys' fees, and recognizes that she and her lawyers will probably disagree that the fees awarded by the court are reasonable. Notwithstanding the substantial reductions made by the court, the court recognizes that the Nicoletti law firm will be equally vehement in asserting that the fees awarded are unreasonable. Defendants argued vigorously in motion practice that this was essentially a $4,000 case based on principles of estoppel. Although the court disagreed with their legal argument on that point, in the end their valuation of the case has turned out to be substantially correct on the proof at trial. As they could therefore be expected to assert, Read is thus recovering attorneys' fees that are almost 8 times the damages awarded to her. The court thus believes it is necessary to explain why a greater reduction for her limited success is not required.

The court notes that most of the hours expended by Read's counsel arose directly from responding to an aggressive defense. This was extremely contentious litigation. Defendants initially diverted this case into binding arbitration, resulting at one point in dismissal of the adversary proceeding, an effort that Widenbaum successfully unwound. There were extensive discovery disputes, written

discovery requests and unaccountably lengthy depositions taken of Read and Widenbaum given the simplicity of the facts and events at issue. Defendants filed many motions, including potentially dispositive motions under Rules 12(b)(6) and 56, as well as motions in limine, that Read had to defend against and prevail upon to vindicate her rights under the automatic stay and achieve any recovery whatsoever. Many questions and virtually all of the evidence at trial were disputed. And unfortunately, bad blood among counsel drips from the record. Defendants were entitled to so defend Read's lawsuit, including asserting third party claims. But having strategically chosen to mount such a vigorous defense in the face of a fee shifting statute, Defendants also obviously incurred the risk of the costs of that strategic decision in the form of bearing the price of reasonable and necessary responsive efforts by Read's counsel to achieve any recovery at all. *Lipsett v. Blanco*, 975 F.2d 934, 941 (1st Cir. 1992)(While "Stalingrad defense" may "be viewed as effective trench warfare, it must be pointed out that such tactics have a significant downside. The defendants suffer the adverse effects of that downside here."). It thus seems incongruous to assert that this was always a $4,000 case and that the fees awarded to Read should therefore be much less than $23,729, when it was *never* defended as a $4,000 case. *See Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298 (1st Cir. 2001)("After setting militant tone and forcing plaintiffs to respond in kind [to defense characterized as battling from rock to rock and tree to tree and having ferocity], it seems disingenuous... to castigate the plaintiffs for putting too many troops in the field."); *Robinson v. City of Edmond*, 160 F.3d 1275, 1284 (10th Cir. 1998)(because "tenacious" defense expended large amount of attorney time resisting case, number of hours claimed by plaintiff appeared to be more reasonable than trial court concluded). Here, "the effort expended by the defendants suggests at least that they viewed the case as sufficiently complex and serious to warrant the expenditure of large amounts of attorney time...." *Id.*

The actual damages experienced by Read as a result of willful violation of the automatic stay were also typical and foreseeable: loss of property and loss of wages. While she certainly sought more money and Defendants argued for none, neither the nature nor the amount of the damages she is recovering are unusual. As the Sixth Circuit noted in reversing a 50% reduction in fees for lack of success at trial, "[t]he law does not require plaintiffs to recover 100% of what they sue for in order to be considered successful at trial. Otherwise, virtually no plaintiff would ever recover reasonable attorneys' fees." *Hamlin*, 165 F.3d at 438. Indeed it would be the unusual Chapter 7 debtor that would have substantial property worth very much. Review of similar cases shows that actual damages awarded for loss of property and lost wages are generally in the low four figures. *See, e.g.*, *Daniels*, 316 B.R. at 357 (compensatory damages of $135 for

lost wages and fees of $2,850); *In re Andrus*, 2004 WL 2216493, 2004 Bankr. LEXIS 1548 (Bankr. D. Idaho Sept. 23, 2004)(actual damages of $830.50, fees and costs of $6,590.40 and punitive damages of $10,000); *Smith*, 296 B.R. at 56 (loss of property taken from mobile home of $1,400); *Fry*, 122 B.R. at 431-33 (property loss damages of $8,665); *Diviney v. Nationsbank, N.A. (In re Diviney)*, 225 B.R. 762, 768-69 (B.A.P. 10th Cir. 1998)(actual damages of $2,850). The court therefore cannot find that the damages awarded are only nominal or the victory only technical such that no or a very low fee award is appropriate. *Cf. Farrar v. Hobby*, 506 U.S. 103, 114-15 (1992).

The automatic stay and the breathing room it provides from creditor collection activities also play a vital and fundamental role in bankruptcy. *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 503 (1986). It protects debtors, other creditors and estates alike. *Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Prods., Inc.)*, 23 F.3d 241, 243(9th Cir. 1994). In the absence of a strong provision to remedy and, as a result, to deter future violations of the stay, the foundation provided by the automatic stay will be seriously eroded.

These circumstances are the blueprint for legislative departure from the American Rule as to attorneys' fees – important rights belonging to persons in difficult circumstances and deserving of protection that are not necessarily measured by money alone. *See Rivera*, 477 U.S. at 577-78. Congress recognized these factors when it included a fee shifting provision in § 362(h). In the absence of a fee shifting provision, individual debtors' attorneys' would be highly unlikely to pursue vindication of the stay and their clients' rights thereunder, both because their bankrupt clients lack the money to pay hourly fees and because of the relatively small amount of probable damages, making a contingency fee impractical. These facts also make pursuit of such claims unattractive to other than the existing debtor's attorney engaged to handle the bankruptcy case, a *Johnson* factor this court has considered in connection with reaching the lodestar figure. If these or other defendants are encouraged to litigate stay violation claims aggressively even with the probability of a limited damage award but without the risk of having to bear the plaintiff's cost of response to that defense, these or the next lawyers evaluating a claim like Read's will be deterred from pursuing it, to the clear detriment of the individual debtor but ultimately of the bankruptcy system as well. *Curtis v. LaSalle Nat'l Bank (In re Curtis)*, 322 B.R. 470, 483 (Bankr. D. Mass. 2005)("[T]he automatic stay and discharge injunction must be enforced to provide any meaningful protection or incentive."). So while the property and wage loss damages Read has recovered are not substantial in terms of money, and certainly not as much as she sought, they nevertheless represent an

important and typical result. *Cf. Rivera*, 477 U.S. at 574-76 (in affirming fee award of $245,456.25 in civil rights lawsuit that yielded $33,350 in damages, plurality opinion rejects proportionality requirement). The court therefore believes that the deductions it has made from the lodestar amount appropriately reflect the results of the litigation.

The Nicoletti law firm makes one other argument for denying any attorneys' fee recovery to Read.[17] The basis for this argument is Fed. R. Bankr. P. 2016(b). The Nicoletti law firm argues that Widenbaum and Lyzohub violated § 329(a) and Rule 2016(b) and should be denied compensation as a sanction for the violation. Section 329(a) of the Bankruptcy Code requires any attorney representing a debtor in connection with a case to file a statement of compensation paid or agreed to be paid. Rule 2016(b) implements this requirement and states in pertinent part:

> (B) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR
>
> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after to order for relief, or at another time as the court may direct, the statement required by § 329 of the Code…A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Widenbaum timely filed her original Rule 2016(b) statement for representation in the underlying Chapter 7 case. On July, 2, 1999, Read executed the Attorney Fee Agreement with Widenbaum pertaining to this adversary proceeding. The agreement basically provided for representation on an hourly basis at the rate of $195 per hour, which the court has determined to be a reasonable hourly rate. [Exhibit 1 to Widenbaum Dep.]. It also provided for a $1,500 retainer, to be deferred and paid out of any settlement as "client stated she did not have" the retainer funds. This agreement was not disclosed by Widenbaum as part of a Rule 2016(b) statement, but became part of the record of this adversary through the trial proceedings. Also, the evidence shows that Read reimbursed Widenbaum $1,601.75

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Defendants also sought to introduce expert opinion on purported violations of the general ethical rules governing the conduct of Michigan lawyers as a factor for this court to consider in determining attorneys' fees. As such opinions did not relate to the reasonable hourly rate or the hours reasonably expended in this case, the court rejected such evidence as outside the lodestar analysis established by the Supreme Court. This is a federal remedy in a federal court, with the statute mandating an award of fees upon a violation as damages for the benefit of the plaintiff. *Cf. Briggs*, 143 B.R. at 464 n.37 (as attorney fee award under § 362(h) is made on behalf of the prevailing party, court need not address alleged state law ethical issues). The court rejects state standards as applicable to the statutory determination. Any alleged ethical violations occurring in the conduct of the litigation should be pursued in the appropriate state forum.

for costs in this litigation. This payment was likewise not the subject of any Rule 2016(b) statement. To any extent there was a separate agreement between Read and Lyzohub, it was also not the subject of any Rule 2016(b) statement. Read testified, however, that she did not engage Lyzohub but that he was brought into the case by Widenbaum. Defendants argue that Rule 2016(b) statements were required as to the original agreements for representation in this adversary proceeding and as to the cost reimbursement. Further, Defendants argue that counsels' failure to file them precludes any compensation as a sanction for noncompliance with the Bankruptcy Code and Rules, presumably under the authority of *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472 (6th Cir. 1996).

The court agrees with Defendants that supplemental Rule 2016(b) statements were required to be filed. As the court already held above, this adversary proceeding is one "in connection with such a case [under Title 11]" to which § 329 applies.

The court disagrees, however, that an appropriate sanction is disallowance of all fees and costs sought under § 362(h). In *Downs*, the Sixth Circuit required debtor's counsel to disgorge his retainer and completely denied all fees as a sanction for nondisclosure. The Sixth Circuit found that such a serious sanction was justified in *Downs* because the nondisclosure occurred in willful disregard of the fee disclosure obligations that was nontechnical in nature. The attorney acted in "callous disregard" of his duties by affirmatively concealing his fee arrangement during a deposition and during evidentiary hearings. In contrast, the failure of Widenbaum and Lyzohub to file Rule 2016(b) statements was inadvertent and technical in nature. It has been evident to all involved from the very commencement of this litigation that Read would seek payment of her attorneys' fees through the fee shifting provision of § 362(h); the fees have long been the proverbial elephant in the room in this case and no doubt an impediment to settlement. The fee agreement, the fees sought and Read's reimbursement of expenses have been fully disclosed and included in the court record, albeit not within the time frame contemplated by Rule 2016(b) for supplemental disclosure. But no intent to conceal either the fee agreement or the reimbursement has been shown. The failure to file timely Rule 2016(b) disclosure statements is certainly careless, but the court cannot find that it justifies a sanction of complete denial of fees as being willful. *Cf*. *Henderson*, 273 F.3d at 720 (bankruptcy court did not deny all fees, but was within its discretion to deny substantial fees for violation of disclosure obligation even where no intent to deceive). The Sixth Circuit cautioned in *Downs* that "[w]hen a court metes out a sanction, it must exercise such power with restraint and discretion. The sanction levied must be commensurate with the egregiousness of the conduct." *Downs*, 103 F.3d at 478.

Indeed, in this case, the court does not believe that any sanction is necessary for the failure to file the Rule 2016(b) statement, because full and voluntary disclosure on the record has occurred and was always intended by counsel to occur. Rather, the question here is more one of timeliness than of total disregard or subversion of either Read's rights or the system. Moreover, to the extent any sanction is deemed appropriate, the court has already disallowed for other reasons more than $60,000 of the fees requested. A reasonable sanction for nondisclosure could not under the circumstances of this case possibly exceed the amount of fees already disallowed by the court.

Accordingly, the court finds that attorneys' fees in the total amount of $23,729 are reasonable, and awards that amount to Read to be paid by check to be issued jointly in the names of attorneys Widenbaum and Lyzohub.

Finally, the court awards Read the sum of $4,081.28 reflected in counsel's fee statements as reimbursement of costs reasonably incurred. These costs are not disputed by Defendants. As Read has reimbursed counsel for a portion of these costs, the costs awarded are to be paid as follows: $1,601.75 to Read, $2,442.05 to Widenbaum, and $37.48 to Lyzohub.

D. Punitive Damages

Section 362(h) also gives the court discretionary authority to award punitive damages. Punitive damages are only awarded where the violator's conduct is egregious or vindictive. *Johnson*, 253 B.R. at 861-62; *Flack* ,239 B.R. at 163; *In re Seal*, 192 B.R. 442, 456 (Bankr. W.D. Mich. 1996); *cf*. *Curtis*, 322 B.R. at 486-87 (an institutional creditor's response to an obvious stay violation by employing its superior resources may sometimes amount to a continuation of improper conduct justifying imposition of punitive damages).

In this case, the Nicolleti law firm's conduct was neither egregious nor vindictive. A legal assistant employed by the firm took immediate, albeit insufficient, steps to halt the execution of judgment against Read. Ultimately, the court did not find that anyone at the Nicoletti law firm directed Hindman to proceed after becoming aware of the bankruptcy filing. The record does not show a conscious disregard of the automatic stay and its import. These facts do not rise to the level of egregious conduct. Thus, punitive damages are not appropriate in this case.

III. Defendants' Third-Party Claims Against Hindman

Defendants assert state law claims of contribution and/or indemnification against Hindman based

on the following allegations: 1) Hindman failed to follow their instructions to call the office of the Nicolleti law firm before executing the judgment against Plaintiff; 2) he disregarded the messages left for him to discontinue any further enforcement action against Plaintiff; and 3) he executed an expired writ. But the court has already found that Hindman did not receive the messages left by Nicolleti's legal assistant and that the Order for Execution of Judgment had not expired, leaving only the issue of whether he failed to follow the instruction to call the law office before execution.

At the close of the evidence, Hindman moved for dismissal of Defendants' third-party claims under Fed. R. Civ. P. 52(c),[18] which provides in relevant part:

> If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In support of his motion, Hindman argues that 1) Defendants' contribution claim is not a viable claim under Michigan law, 2) Defendants are not entitled to indemnification under any theory applicable under Michigan law, and 3) the doctrine of quasi-judicial immunity bars Defendants' claims. The court discusses Hindman's first and second argument below. But because the court finds that he is not liable to Defendants on either the contribution or indemnification claim, the court need not address the issue of quasi-judicial immunity.

A. Contribution

Under Michigan law, "[e]xcept as otherwise provided in [the Revised Judicature Act], when 2 or more persons become jointly or severally liable in tort for the same injury to a person . . . there is a right of contribution among them even though judgment has not been recovered against all or any of them." M.C.L. § 600.2925a(1). But "[t]he right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability. . . . A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability." M.C.L. § 600.2925a(2).

Hindman relies on *Kokx v. Bylenga*, 617 N.W. 2d 368 (Mich. App. 2000), for the proposition that Michigan's 1995 tort reform legislation eliminated joint liability and thus eliminated claims for

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Hindman also brought his motion to dismiss under Fed. R. Civ. P. 41(b) and (c). However, his motion is not based on Plaintiff's failure to prosecute or to comply with the Federal Rules or any order of the court as provided in that rule. Thus, Rule 41 is not the appropriate rule on which to rely in support his motion.

contribution among joint tortfeasors. In *Kokx*, the court explained that under the revised statutes, a defendant cannot be held liable for damages beyond the defendant's pro-rata share, except under certain circumstances specified by statute. *Id.* at 372. But the court recognized that "because joint liability remains in certain circumstances, the Legislature would have no reason to repeal § 2925a, which provides for a right of contribution '[e]xcept as otherwise provided in this act. . . .' " *Id.* Thus, the court held only that "to the extent that the statutes enacted as part of the Legislature's 1995 tort reform do not allow a person to be held responsible for paying damages beyond the person's pro-rata share of responsibility . . ., claims for contribution are no longer viable." *Id.* at 373.

Because Michigan's tort reform legislation has no effect on the joint liability that may be imposed under a federal statute such as § 362(h), and because § 362(h) does not limit a defendant's liability to his pro-rata share of responsibility, under the reasoning in *Kokx*, the right to contribution under M.C.L. § 2925a among persons jointly liable under § 362(h) has not been eliminated. Hindman's argument to the contrary is not well taken.

Nevertheless, under § 2925a, a contribution claim exists only if the person against whom the claim is asserted is jointly liable for an injury to another. In this case, the court found that Hindman had no knowledge of Plaintiff's bankruptcy. Because a person is not liable for damages under § 362(h) unless the that person violated the stay with knowledge of the debtor's bankruptcy, Hindman cannot be found jointly liable for the stay violation in this case. Hindman is, therefore, entitled to judgment on Defendants' contribution claim.

B. Indemnification

"Generally, if one person's wrongful act results in the imposition of liability on another who was without fault, indemnity may be obtained from the actual wrongdoer." *Farmer v. Christensen*, 581 N.W.2d 807, 812 (Mich. App. 1998). In Michigan, a right to indemnification arises from three sources: common law, implied contract, and express contract. *Id.* at 811 *; Allard v. Benjamin (In re DeLorean Motor Co.)*, 65 B.R. 767, 769 (Bankr. E.D. Mich. 1986) (citing *Langley v. Harris Corp.*, 321 N.W.2d 662 (Mich. 1982)). But common law and implied contractual indemnity are not available unless the party seeking indemnification is free from active negligence in causing the plaintiff's injury. *DeLorean Motor Co.*, 65 B.R. at 769, 771-72; *Langley*, 321 N.W.2d at 665. Active negligence exists "[i]f a party breaches a direct duty owed to another, and this breach is the cause of the other party's injury..." *Langley*, 321 N.W.2d at 665. In this case, there is no evidence of an express contract and the Nicolleti law firm

is not entitled to indemnification under theories of common law or implied contractual indemnity. The Nicoletti law firm owed a duty to Read to take the steps necessary to halt execution of the judgment against her property, and its failure to do so resulted in Read's injury in this case. Under Michigan law, such active negligence precludes recovery on an indemnification claim. Hindman is entitled to judgment on this claim.

IV. Hindman's Claim for Attorney Fees

In his Third Party Counter Complaint, Hindman alleges a claim for indemnification against the Nicolleti defendants and an entitlement to an award of reasonable attorney fees. Notwithstanding the fact that the only claims against Hindman in this proceeding were brought by the Nicolleti Defendants,[19] at trial, he asked that such fees be imposed against Read.[20] Generally, under the "American Rule," which applies to litigation in the bankruptcy courts, a prevailing litigant may not collect attorney's fee from his opponent unless authorized by federal statute or an enforceable contract between the parties. *In re Sheridan*, 105 F.3d 1164, 1166 (7th Cir. 1997). Hindman cites no authority in support of his claim for attorney fees. Finding no legal basis for such an award, Hindman's request for attorney fees will be denied. In addition, Hindman's indemnification claim will be dismissed as moot.

CONCLUSION

For the foregoing reasons, the court finds that Read is entitled to judgment on the amended complaint in her favor against the Nicolleti law firm in the total amount of $30,799.40, which includes damages for personal property loss of $1,800.00, lost wages of $1,189.12, $23,729.00 in attorneys' fees and $4,081.28 in costs, and that Paul Nicolleti is entitled to judgment on the amended complaint in his favor. The court further finds that Al Hindman is entitled to judgment in his favor on the Third-Party Complaint. Hindman's counterclaims against the Nicolleti defendants for indemnification and/or contribution will be dismissed as moot. And finally, Hindman's claim for attorney fees against Read is denied.

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19 The court denied Read's motion to add Hindman as a co-defendant in this case. [Doc. # 108].

20 Hindman's "Third Party Counter Complaint" alleges no claim against Plaintiff nor does it seek an award of attorney fees from Plaintiff.

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Mary Ann Whipple
United States Bankruptcy Judge