UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re **1601 W. SUNNYSIDE DR. #106, LLC,** **Debtor.**	**Bankruptcy Case No. 09-41733-JDP**

MEMORANDUM OF DECISION

Appearances:

Randal J. French, BAUER & FRENCH, Boise ID, Attorney for Debtor.

Laura E. Burri, RINGERT LAW CHARTERED, Boise ID, Attorney for BAC.

Mary Kimmel, Attorney for U.S. Trustee, Boise ID.

Introduction

Bank of America ("the Bank"), with its servicing agent BAC Home Loans Servicing, LP ("BAC"), foreclosed on property owned by 1601 West Sunnyside Drive No. 106, LLC ("Debtor"), after that company filed its

bankruptcy petition under Chapter 11.[1] Upon learning of the foreclosure, and after providing the Bank and BAC (collectively "Creditors") a reasonable time to respond to notice that they had violated the automatic stay, Debtor filed a motion in this Court for damages, attorneys' fees, and costs. Dkt. No. 53. Surprisingly, in response to this motion, Creditors took no steps to reverse the foreclosure sale. Instead, in its response to Debtor's motion, BAC disputes Debtor's interest in the property, as well as the stay violation. Dkt. No. 60.[2]

After conducting an evidentiary hearing concerning the motion on November 3, 2010, and receiving additional briefing by Debtor and BAC, the Court took the issues under advisement. Having now considered the evidence, the record, the parties' submissions, and applicable law, this Memorandum constitutes the Court's findings of fact and conclusions of

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

[2] The Bank filed no response to Debtor's motion. The consequences of its failure to do so are discussed below.

law, and resolves this contest. Fed. R. Bankr. P. 7052, 9014.

Facts[3]

E. James Balarezo ("Balarezo"), who owned several rental properties in Arizona, purchased the house located at 3500 N. Hayden Rd. #1703, Scottsdale, AZ ("the Property"), on January 22, 2007. Ex. B. Balarezo borrowed part of the purchase price from Countrywide Home Loans, Inc., and granted the lender a deed of trust on the Property to secure the loan. *Id.* That deed of trust included a provision which allowed the lender to demand full payment of the loan if Balarezo transferred the Property without the lender's prior approval. *See* Ex. B. at 12, § 18. At some later time not clear in the record, the Bank acquired Countrywide's interest in the loan and deed of trust, and retained BAC to service the loan.

Shortly after acquiring the Property, Balarezo, acting on advice of counsel, created several limited liability companies, one for each rental property in his portfolio. Among these LLCs were Debtor and another

[3] All facts, unless otherwise noted, are drawn from testimony provided at the November 3, 2010, hearing on Debtor's motion.

known as 1703 Sunrise, LLC. *See* Exs. 1, 8. Balarezo was the sole manager of each of the LLCs. *See, e.g.*, Ex. 1. The Property was conveyed from Balarezo to 1703 Sunrise, LLC, in March 2007. Ex. 7. BAC claims that it was unaware of this transfer.

More than two years later, when payments on the loan became delinquent, BAC contracted with ReconTrust Company, N.A. ("ReconTrust"), to foreclose on the Property; a trustee's sale was scheduled for November 12, 2009, referred to in the foreclosure sale notice as TS No. 09-0110672. Ex. 8. Two other properties owned by Balarezo-managed LLCs were also scheduled for foreclosure sales by ReconTrust on behalf of Creditor in November 2009, TS Nos. 09-0110554 and 09-0121290. *Id.* Notices concerning all three sales were sent to Balarezo, the original borrower under the notes secured by the trust deeds on the properties. *See id.*

In anticipation of filing for bankruptcy relief, Balarezo consolidated the properties held by his various LLCs by transferring all of them to

Debtor. In particular, the Property was conveyed from 1703 Sunrise, LLC, to Debtor on November 2, 2009. Ex. 4. Debtor filed for chapter 11 bankruptcy relief on November 3, 2009. Dkt. No. 1. Both the Bank and BAC were listed as secured creditors in Debtor's bankruptcy schedules on account of the loan related to the Property. Sch. D, Dkt. No. 1.

On November 6, 2009, Debtor sent a fax to ReconTrust, which specifically referenced the trustee's sale numbers for all three scheduled ReconTrust foreclosure sales, and included a copy of the notice of Debtor's chapter 11 filing, together with a copy of Debtor's Schedules A and D, both of which indicated that the Property was owned by Debtor. Ex. 8. Presumably in response to this information, none of the three foreclosures occurred as scheduled in November 2009.

For some reason not clear in the record, however, Creditors proceeded with a foreclosure sale on the Property on February 19, 2010. *See* BAC's Objection to Debtor's Motion at 3, Dkt. No. 60. At the trustee's sale, the Property was sold to Federal National Mortgage Association

("Fannie Mae"), which as of the date of the motion hearing remained as the "owner of record" of the Property. BAC's Supplemental Brief at 4, Dkt. No. 98. Neither Balarezo nor Debtor were contacted about the rescheduled February 19, 2010, sale before it occurred. In addition, neither Creditors nor ReconTrust sought or obtained relief from the automatic stay from this Court to conduct the sale.

Eventually, Balarezo became aware of the foreclosure sale.[4] On May 7, 2010, Debtor's attorney sent Creditors and Fannie Mae a letter setting forth Debtor's position that the Property had been sold in violation of the automatic stay, soliciting an explanation of Creditors' position, and requesting that title to the Property be restored in Debtor to cure the stay violation. Ex. 10. After months passed with no cure, Debtor filed its motion in this Court on July 27, 2010, for award of damages for violation of the automatic stay and other relief. Dkt. No. 53. In particular, the

[4] While not specific in his testimony, Balarezo indicated that he learned of the February 19, 2010, sale "well after the fact." Debtor requested his bankruptcy counsel's help in remedying the foreclosure sale in May 2010.

motion asked the Court to fine Creditors $100 per day until the sale is reversed. Debtor's Brief in Support of Motion at 9, Dkt. No. 54.

After learning of the foreclosure, Debtor remained in possession of the Property, and rented it to TestMasters for $40 per day for three months. TestMasters' representatives also orally committed to Debtor for an additional 87-day lease of the Property at an increased rate of $45 per day, which term was to begin upon expiration of its first lease. In August 2010, during the initial term of the lease, the TestMasters tenant was reportedly contacted at the Property by parties requesting information regarding the Property and TestMasters' lease. As a result of that contact, and now apprehensive about Debtor's rights to the Property, TestMasters declined to renew the lease when it expired. The Property remained vacant for twelve days before Debtor could secure a new tenant. In addition, the new tenant was willing to pay only $33.58 per day for a 45 day lease on the Property. Debtor therefore claims it should recover $2,189, the difference between expected rents under the second

TestMasters' lease and the actual rent under the replacement lease, as compensatory damages from Creditors. Debtor's Closing Argument, Dkt. No. 103.

As of the hearing date, Creditors had taken no action to remedy the alleged stay violation.

Discussion

I. Creditors violated the automatic stay.

Two important legal consequences automatically result from the filing of a bankruptcy petition: a bankruptcy estate is created, and the petition operates as a stay of acts by creditors to collect debts or foreclose liens. *See* §§ 362(a), 541(a).

Debtor's bankruptcy estate included all of its legal or equitable interests in property existing at the time its bankruptcy petition was filed. *See* § 541(a)(1). Because the Property had been conveyed to Debtor the day prior to filing for bankruptcy, *see* Ex. 4, the Property became property of

the bankruptcy estate on November 3, 2009.[5]

As noted above, the filing of Debtor's bankruptcy petition also operated as an automatic stay prohibiting various acts against the bankruptcy estate and debtor. *See* § 362(a). The automatic stay applies to "all entities," and therefore encompasses not only creditors, but also agents retained by creditors to collect debts. *Id.* The stay prevents, among other things: continuation of an action or proceeding against a debtor that was commenced before a bankruptcy case is filed; any act to obtain possession of, or exercise control over, property of the estate; and any act to enforce a lien against property of the estate. § 362(a)(1), (3), (4). While a party in interest may obtain relief from the operation of the stay, that relief must be sought via a motion filed in the Bankruptcy Court. *See* § 362(d);

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[5] The legal consequences of the filing of Debtor's bankruptcy petition are not impacted by any transfer restrictions in the deed of trust on the Property. While the trust deed gave the lender the option to demand payment-in-full if the Property was transferred without its permission, the trust deed did not prohibit or restrict the Property's conveyance. *See* Ex. B. Via Balarezo's deed to 1703 Sunrise, LLC, in March 2007, and 1703 Sunrise, LLC's deed to Debtor on November 2, 2009, effectively transferred ownership of the Property to Debtor.

Rule 4001.

The foreclosure proceedings against the Property were commenced prior to Debtor's bankruptcy filing. While discontinued for a time, for some reason, Creditors proceeded with the foreclosure sale on February 19, 2010, well after Debtors' petition was filed and Creditors' foreclosure agent, ReconTrust, was notified of that filing. Creditors did not seek or obtain relief from the automatic stay before conducting the foreclosure sale. The sale constituted not only an act by Creditors to collect a prebankruptcy debt, but also an act by Creditors to enforce a lien against property of Debtor's bankruptcy estate, conduct which violated the automatic stay.[6]

Moreover, a creditor's knowing failure to act to remedy a continuing stay violation is, itself, a violation of the automatic stay. *See, e.g.*, *Eskanos &*

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[6] In addition, any acts taken by Creditors to contact Debtor's tenants occupying the Property would also violate the automatic stay. However, because Debtor's proof concerning the details of this alleged contact was sketchy, the Court is unable to find that such a stay violation occurred in this case.

Adler, P.C. v. Leetien, 309 F.3d 1210, 1213–15 (9th Cir. 2002) (finding that a creditor did not have to take any additional action for an outstanding collection action to be a continuation of prebankruptcy action against the debtor, and a violation of the automatic stay); *California Emp't Dev. Dep't v. Taxel* (*In re Del Mission Ltd.*), 98 F.3d 1147, 1151 (9th Cir. 1996) (holding that knowing retention of estate property after a stay violation is an "exercise [of] control" over that property in violation of the stay).

Simply put, in this case, Creditors violated the automatic stay when they caused the foreclosure sale on the Property to occur after the filing of Debtor's bankruptcy case, and when they failed to take any action to reverse that sale when they became aware of the stay violation.

II. Debtor may recover damages from Creditors.

The nature and amount of damages recoverable for a violation of the automatic stay differ depending on whether the party injured by the violation is an individual, or some other entity. Entities other than

"individuals,"[7] including corporations, may recover for stay violations under § 105(a), the Bankruptcy Court's civil contempt and sanctioning authority, which authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." § 105(a); *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1189–90, 1196 (9th Cir. 2003).

For a bankruptcy court to find civil contempt, the party requesting sanctions must show, by clear and convincing evidence, that the other party violated a specific and definite order of the court. *Id.* at 1190–91 (quoting *Renwick v. Bennett* (*In re Bennett*), 298 F.3d 1059, 1069 (9th Cir.

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[7] An individual injured by a willful stay violation may seek relief under § 362(k)(1), which provides for recovery of "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, . . . punitive damages." "Individual" in this context does not include corporations or other business entities. *Johnston Envtl. Corp. v. Knight* (*In re Goodman*), 991 F.2d 613, 618–19 (9th Cir. 1993) (analyzing "individual" under § 362(k)(1)'s predecessor, § 362(h)). Because the Debtor is an LLC, it cannot invoke § 362(k)(1) as a remedy for Creditors' stay violation.

2002)). The automatic stay is such a specific and definite court order. *Id.* at 1191. However, a stay violation must be "willful" to warrant civil contempt sanctions. *Id.* (citing *Havelock v. Taxel* (*In re Pace*), 67 F.3d 187, 191 (9th Cir. 1995)). According to the case law,

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

In re Pace, 67 F.3d at 191.

Creditors were informed of Debtor's interest in the Property, and given information about Debtor's bankruptcy filing, at least by November 6, 2009, when Debtor faxed notice of the filing and copies of its bankruptcy schedules to ReconTrust, Creditors' foreclosure agent. *See Wiggins v. Peachtree Settlement Funding* (*In re Wiggins*), 273 B.R. 839, 863 (Bankr. D. Idaho 2001) (holding that a "[creditor] is charged with the knowledge

obtained by its agent."). But Debtor's fax advising of the bankruptcy filing was not sufficient alone, in the contempt context, to impose Creditors with knowledge of the automatic stay. *Zilog, Inc. v. Corning* (*In re Zilog, Inc.*), 450 F. 3d 996, 1008 (9th Cir. 2006) (discussing *In re Dyer*, 322 F.3d at 1191–92). Indeed, reluctant to hold an unwitting creditor in contempt, courts have hesitated finding contempt of the automatic stay without a creditor's explicit receipt of notice of the stay's existence. *Id.* However, once a creditor is given notice of the stay, that creditor has an affirmative duty to remedy any stay violation, including violations that occurred prior to the creditor's becoming aware of the stay. *See In re Dyer*, 322 F.3d at 1192 (citing *In re Del Mission Ltd.*, 98 F.3d at 1151); *Eskanos & Adler, P.C.*, 309 F.3d at 1213–15.

On May 7, 2009, Debtor's attorney sent Creditors a letter clearly asserting that Creditors' foreclosure of the Property occurred in violation of the automatic stay in Debtor's bankruptcy case. The letter reminded

Creditors that a stay violation, if not remedied, may subject Creditors to contempt, and allowed Creditors an opportunity to explain why the post-bankruptcy foreclosure was not a stay violation. No explanation was provided, and Creditors did nothing to remedy the violation. Such a lackadaisical approach to notice of the stay violation is problematic. Not only had the foreclosure sale violated the automatic stay, but Creditors' apparent election not to remedy that violation constituted a further, willful violation of the automatic stay subject to civil contempt sanctions under § 105(a). Indeed, because the unremedied stay violation continues to impair Debtor's interest in the Property even now, Creditors' inaction is further evidence of their unwillingness to comply with the law. Debtor has shown by clear, convincing, undisputed evidence that Creditors knowingly violated the automatic stay when, after being notified that the foreclosure sale had occurred in violation of that stay, they took no action to remedy that violation. Creditors' conduct justifies the imposition of

sanctions.

III. Debtor's remedies.

1. The Foreclosure Sale was Void and Debtor's Title to the Property Must be Restored.

Creditors are required to remedy their stay violations. *See In re Dyer*, 322 F.3d at 1192. When stay violations occur via property transactions, such transactions are void. *See Schwartz v. United States* (*In re Schwartz*), 954 F.2d 569, 571 (9th Cir. 1992). Creditors' foreclosure sale was void under the Bankruptcy Code. Because they caused Debtor to lose title to the Property, to remedy their contempt, Creditors must take action to restore Debtor's title to the Property, subject to any liens and encumbrances that existed immediately prior to the void foreclosure sale. *See Williams v. United Inv. Corp.* (*In re Williams*), 124 B.R. 311, 318 (Bankr. C.D. Cal. 1991).

BAC argues that Debtor's motion is procedurally insufficient to

restore the Property to Debtor, and that, per Rule 7001, Debtor must commence an adversary proceeding against Creditors and Fannie Mae before title to the Property can be ordered restored. *See* Rule 7001(1) (indicating that "a proceeding to recover . . . property" is an adversary proceeding). But BAC's argument misperceives the nature of this proceeding. Debtor's motion does not directly seek to recover its prebankruptcy title to the Property; the motion asks for an order requiring Creditors to act to restore its title, and for an award of damages for Creditors' violation of the automatic stay. As explained by the BAP,

> Bankruptcy Rule 7001 sets forth ten proceedings which are to be filed as an adversary proceeding. A sanctions request for willful violation of the automatic stay is not included within the Rule nor can it be logically implied within Bankruptcy Rule 7001 proceedings.

Fortune & Faal v. Zumbrun (*In re Zumbrun*), 88 B.R. 250, 252 (9th Cir. BAP 1988) (discussing actions under § 362(k)'s predecessor, § 362(h)). *See also In*

re Dunning, 269 B.R. 357, 367–68 (Bankr. N.D. Ohio 2001) (indicating that an action seeking to void a post-petition offset of a debtor's bank account due to violation of the automatic stay was not an action seeking recovery of money or property, and is not among the proceedings enumerated in Rule 7001).

Moreover, even when a motion for violation of the automatic stay seeks to recover money or property, courts have not required an adversary proceeding. *See, e.g.*, *In re Dunning*, 269 B.R. at 367–68. In large part, this is due to the fact that the Bankruptcy Rules relating to contested matters incorporate many of the due process protections associated with adversary proceedings. Rule 9014(c); *In re Zumbrun*, 88 B.R. at 252; *Dean v. Global Fin. Credit, LLC* (*In re Dean*), 359 B.R. 218, 223–24 (Bankr. C.D. Ill. 2006); *In re Forty-Five Fifty-Five, Inc.*, 111 B.R. 920, 922–23 (Bankr. D. Mont. 1990).

In short, BAC's reliance solely on the "recover[y] [of] . . . property" language of Rule 7001(1) as a defense to Debtor's motion is misguided.

Debtor's utilization of a motion in seeking relief from Creditors' stay violations via contempt is appropriate, and Creditors' due process rights have been sufficiently protected by Rule 9014's contested matter procedures. On this record, while the Court cannot order Fannie Mae to redeed the Property to Debtor, the Court is completely comfortable ordering Creditors to take any actions necessary to restore Debtor's prebankruptcy title to the Property.

2. Debtor Has Not Proved a Right to Compensatory Damages.

Compensatory damages are recoverable by a debtor for a creditor's stay violation under a § 105(a) civil contempt motion. *See In re Dyer*, 322 F.3d at 1193 (citing *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002)). "Compensatory damages" include those damages that are "sufficient in amount to indemnify the injured person for the loss suffered," essentially placing the injured party in as good a position as it would have been in absent violation. *See* BLACK'S LAW DICTIONARY 445

(9th ed. 2009). In order to recover such damages, the party asserting compensatory damages must specifically prove not only the right to damages, but also the amount of damages. *In re Wiggins*, 273 B.R. at 880. In proving compensatory damages, the existence and amount of damages must be based upon more than mere conjecture. *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 824 (9th Cir. 2001); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 361 (9th Cir. 1996).

While Balarezo testified at the hearing that TestMasters orally agreed to enter an additional lease on the Property, the Court was given no documentation supporting either the existence or amounts of the first or second leases. In addition, there was no testimony from TestMasters witnesses indicating that it planned to enter into another lease for the Property—all the Court was given was Balarezo's understanding that such was TestMasters' intention. Debtor bears the burden of proving entitlement to compensatory damages, and has not provided adequate

proof of loss of rental income due to Creditors' foreclosure action.

The Court declines to award money damages to Debtor based solely on Balarezo's testimony that TestMasters had orally agreed to re-let the property, but decided not to do so when contacted by others about its possession of the Property.[8]

3. Debtor May Recover Attorneys' Fees and Costs.

"[A]ttorneys' fees are an appropriate component of a civil contempt award." *In re Dyer*, 322 F.3d at 1195. Costs are also appropriately awarded under § 105(a). *In re Pace*, 67 F.3d at 193. Recoverable attorneys' fees and

[8] For what it's worth, even if Debtor had offered evidence from TestMasters that it would have leased the Property for an additional 87 days at $45 a day but for the alleged contact by Creditors' agent, the Court would still decline to award compensatory damages for the 42 days between the end of the replacement lease and the anticipated end of the TestMasters lease. Debtor's claimed loss based on that period is unfounded. The evidence showed that Debtor had control of the Property to lease it to others, and, as of the hearing, no loss had occurred. Honoring Debtor's claim for compensation could potentially result in double payment for that period if Debtor were to find a second replacement tenant.

costs sought as a component of a civil contempt award for a stay violation are limited to the time and effort devoted to remedying the violation. *See In re Dyer*, 322 F.3d at 1195.

Debtor's attorney has submitted affidavits documenting his services in prosecuting the contempt motion indicating that Debtor has incurred attorneys' fees of $6,135 and costs of $19 in efforts to remedy Creditors' stay violation. Dkt. Nos. 67, 93, 104. Creditors have offered no significant objection to the amount sought. Upon review by the Court, it appears all of the fees and costs claimed are appropriately awarded to Debtor as damages in this case.

4. Non-Compensatory Damages are Not Appropriate at this Time.

The § 105(a) contempt authority is a civil contempt authority, and only civil sanctions are available. *In re Dyer*, 322 F.3d at 1192. Punitive damages are not available. *Id.* ("We have never authorized punitive (*i.e.*

criminal) sanctions under the contempt authority of § 105(a).”). Punitive damages have a dual purpose: punishing conduct and “deter[ring] similar conduct in the future.” *In re Wiggins*, 273 B.R. at 882.

While, as a general rule, punitive damages are not an appropriate remedy for § 105(a) contempt proceedings, “relatively mild” non-compensatory fines may be acceptable in some circumstances. *In re Dyer*, 322 F.3d at 1193–94 (citing *Zambrano v. Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989)). No specific amount has been established to determine when a non-compensatory fine crosses the threshold from “relatively mild” to “serious.” What has been made clear, however, is that “Congress has conferred no power to *punish* for a violation of § 362(a) other than the punitive damage authority in § 362(h).” *In re Dyer*, 322 F.3d at 1195 (quoting *Sosne v. Reinert & Duree, P.C.* (*In re Just Brakes Corporate Systems, Inc.*), 108 F.3d 881, 885 (8th Cir. 1997)) (italics in original).

Often, where “relatively mild” non-compensatory fines have been

allowed, they are narrowly limited to the amount necessary for rule enforcement. *See Zambrano*, 885 F.2d at 1479–80 (explaining that "[w]ithout a narrow sanctions power, district courts might have difficulty preserving the vitality of local rules against repeated disobedience short of wielding its greater, less surgical, . . . powers over parties."); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 519–22 (9th Cir. 1983) (finding a fine of $250 appropriate where the amount was specifically authorized by local rules). Several guidelines may ensure that non-compensatory fines are appropriately limited. *See Zambrano*, 885 F.2d at 1480. As the Ninth Circuit has explained,

> First, . . . sanctions must be consistent with the Federal Rules and with other statutes. Second, the order must be necessary for the court to "carry out the conduct of its business." There must be a close connection between the sanctionable conduct and the need to preserve the integrity of the court docket or the sanctity of the federal rules. Third, the order must be consistent with "principles of right and justice."

> Finally, any sanction imposed must be proportionate to the offense and commensurate with principles of restraint and dignity inherent in judicial power. This last principle includes a responsibility to consider the usefulness of more moderate penalties before imposing a monetary sanction.

Id. (footnotes and citations omitted).

Debtor argues that the Court should impose a $5,000 lump-sum non-compensatory fine against Creditor, which amount is less than other courts have allowed. The Court, however, finds that, at least at this time, the effect of the requested non-compensatory damages would be strictly to punish Creditor and deter similar conduct. *See* Debtor's Supplemental Brief at 6, Dkt. No. 90 ("Debtor also requests that the Court impose a non-compensatory fine of $5,000 to deter this kind of conduct from recurring in the future . . . ."). Other sanctions besides non-compensatory fines are available to assist the Court in implementing the policies of the Code in this case; a non-compensatory fine is not necessary to preserve the validity

of the automatic stay, the bankruptcy rules, or the local rules. The Court recognizes that mild non-compensatory fines are acceptable in some contempt circumstances, and, if Creditors persist in their determination not to remedy their stay violations, the argument for such a fine becomes more persuasive. But, at this time, the Court declines to exercise its discretion to impose a lump-sum fine against Creditors.

5. A Daily Fine is Appropriate to Coerce Creditors' Compliance with the Automatic Stay.

"Civil penalties must either be compensatory or designed to coerce compliance." *In re Dyer*, 322 F.3d at 1192 (citing *F.J Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137–38 (9th Cir. 2001)). A fine is coercive in nature if a contemnor is able to purge the fine through compliance with the court's order. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829–30 (1994); *In re Dyer*, 322 F.3d at 1192.

It is clear from the evidence that, even if Creditors did not know of

Debtor's bankruptcy stay before, they received explicit notification of the stay in May 2010. Moreover, even after Debtor filed the contempt motion, Creditors have chosen to do nothing to undo their illegal acts. As noted above, such inactivity itself constitutes a continuing stay violation.

Creditors obviously require additional motivation to act to remedy their stay violations. As Debtor suggested, the Court finds that the imposition of a prospective fine of $100 per day is required to enforce the stay, and to coerce Creditors to comply with its terms, until such time as the foreclosure sale is reversed and Debtor's title to the Property is restored.[9] If, after thirty days from the date of this Court's order, Creditors have still not remedied their contempt and paid the coercive fine, the Court will, upon Debtor's request, consider increasing the amount of the daily fine and imposing other monetary sanctions to gain Creditors' compliance.

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[9] Because this is a coercive fine, it is payable to the Court, not to Debtor. *See Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1482 (9th Cir. 1992) citing *General Signal Corp. V. Donallco, Inc.,* 787 F.2d 1376, 1380 (9th Cir. 1986).

IV. Bank of America's liability.

Above, the Court has referred to Creditors collectively in discussing the stay violations and in designing appropriate relief for Debtor. Indeed, Debtor's motion sought damages against both the Bank and BAC**,** and both entities were served with the motion and other pleadings. Dkt. Nos. 53, 54, 55. Even so, the Bank has neither responded to the motion nor appeared to defend its conduct. The evidence clearly shows the "creditor" in this instance is the Bank, and BAC was acting as a servicing agent of that creditor. The Court finds that the Bank was afforded sufficient notice of, and due process to respond to, the motion. It apparently chose not to do so. The Court therefore presumes the Bank was content to let BAC carry its water in defense of the motion. *See Kline v. Deutsche Bank Nat'l Trust Co.* (*In re Kline*), 420 B.R. 541, 548 (Bankr. D.N.M. 2009) (finding knowledge acquired by an agent is imputed to its principal for purposes of determining whether a principal's stay violation is willful); *In re Risner*, 317

B.R. 830, 836 (Bankr. D. Idaho 2004) (holding that general principles of agency warrant finding a principal liable for its agent's stay violations). To be clear, on this record, the Court finds the Bank and BAC both violated the automatic stay and are jointly and severally liable for all the sanctions and damages imposed pursuant to this decision.

Conclusion

Creditors violated the automatic stay when they foreclosed on the Property after Debtor filed for bankruptcy. The foreclosure sale was void. But, while Creditors obviously learned of their stay violation by May 2010, to date they have taken no action to remedy that violation and to restore Debtor's title to the Property. Creditors' ongoing inaction amounts to a continuing, willful violation of a specific court order, and constitutes civil contempt. Per this Court's § 105(a) authority, the Court orders Creditors to take all necessary acts to reverse the foreclosure sale and to restore Debtor's prebankruptcy title to the Property. Moreover, to enforce the

Bankruptcy Code and coerce Creditors to comply with the law, the Court finds Creditors should be fined $100 per day until Debtor's title to the Property is properly restored. Finally, the Court finds Debtor is entitled to recover from Creditors attorneys' fees of $6,135 and costs of $19 incurred in securing Creditors' compliance with the automatic stay.

A separate order will be entered.

Dated: December 30, 2010

Honorable Jim D. Pappas
United States Bankruptcy Judge