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7 UNITED STATES BANKRUPTCY COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

9 In re ) Case No. 10-63228-B-13  
10 Cline Alex Garner, Jr., and )  
Sabrina Louise Garner, ) DC No. GH-1  
11 Debtors. )  
12 \_\_\_\_\_ )  
13 Cline Alex Garner, Jr., and )  
Sabrina Louise Garner, )  
14 Movants, )  
15 v. )  
16 Tobias Teran, an individual, )  
17 Respondent. )  
18 \_\_\_\_\_ )

19  
20 **MEMORANDUM DECISION REGARDING MOTION FOR  
DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY**

21 This disposition is not appropriate for publication. Although it may be cited  
22 for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has  
no precedential value. See 9<sup>th</sup> Cir. BAP Rule 8013-1.

23 Gary L. Huss, Esq., appeared on behalf of the debtors, Cline Alex Garner,  
24 Jr., and Sabrina Louise Garner.

25 No appearance was made on behalf of the respondent, Tobias Teran.

26 Before the court is a motion by the debtors, Cline and Sabrina  
27 Garner (the “Debtors”) for an award of damages resulting from respondent  
28 Tobias Teran’s (“Teran”) violation of the automatic stay. The court issued

1 a memorandum decision dated June, 8, 2011, finding that Teran had  
2 violated the automatic stay. The court has now conducted an evidentiary  
3 hearing on the issue of damages.

4 This memorandum decision contains findings of fact and conclusions  
5 of law required by Federal Rule of Civil Procedure 52(a) (made applicable  
6 to this contested matter by Federal Rule of Bankruptcy Procedure 7052).<sup>1</sup>  
7 The bankruptcy court has jurisdiction over this motion pursuant to 28  
8 U.S.C. §§ 1334 and 157, 11 U.S.C. § 362, and General Orders 182 and 330  
9 of the U.S. District Court for the Eastern District of California. This is a  
10 core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (H) and (O).

11 **Background and Findings of Fact.**

12 This bankruptcy petition was filed under chapter 13 on November  
13 16, 2010. The background of this case is fully set forth in this court's  
14 memorandum decision dated June 8, 2011, and need not be fully repeated  
15 here. In summary, it has been determined that respondent Teran willfully  
16 violated the automatic stay by prosecuting an action against co-debtor  
17 Sabrina Garner ("Sabrina"), in the small claims court after the Debtors filed  
18 their bankruptcy petition and after Teran received notice of commencement  
19 of the case. The court held an evidentiary hearing on the issue of damages  
20 on October 7, 2011. Teran failed to appear at the evidentiary hearing or to  
21 present any evidence on his behalf.

22 Since conclusion of the evidentiary hearing, this chapter 13 case was  
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25 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule references are to  
26 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of  
27 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after*  
October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 dismissed based on the Debtors' inability to make plan payments to the  
2 Trustee.<sup>2</sup> Dismissal of the case does not deprive the court of jurisdiction to  
3 make an appropriate ruling based on a violation of the automatic stay during  
4 the case. *Johnson v. TRE Holdings, LLC (In re Johnson)*, 346 B.R. 190,  
5 194 (9<sup>th</sup> Cir. BAP 2006).

6 At the hearing, Sabrina testified that she had contacted somebody at  
7 Teran's business and told them about the bankruptcy after it was filed and  
8 before the small claims trial. About a month later, she received a copy of  
9 the small claims judgment in the mail. Teran's company then called her  
10 several times in an effort to enforce the judgment. The Debtors paid their  
11 attorney \$550 to write letters to Teran in an effort to get the small claims  
12 judgment vacated, to no avail. Teran was non-responsive and as of this  
13 date, the small claims judgment remains in the record.

14 The ordeal was "upsetting" to Sabrina; however, she did not incur  
15 any medical expenses. She missed about seven hours of work, at a value of  
16 \$18 per hour (\$126), meeting with her attorney and trying to deal with the  
17 problem. The Debtors request an award of actual damages, punitive  
18 damages, and an injunction to compel Teran to correct the problem.

19 **Applicable Law.**

20 Because of its fundamental importance, Congress has provided a  
21 remedy to a debtor who is damaged by a willful violation of the automatic  
22 stay. That remedy is found in § 362(k) (formerly § 362(h)), which reads in  
23 part: "[A]n individual injured by any *willful* violation of a stay provided by  
24 this section *shall recover* actual damages, including costs and attorneys'

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26 <sup>2</sup>This case was dismissed on January 6, 2012. The Debtors refiled a new  
27 chapter 13 petition on February 1, 2012 (case no. 12-10911), and are currently  
awaiting confirmation of a new chapter 13 plan.

1 fees, and, in appropriate circumstances, may recover punitive damages.”  
2 (Emphasis added.)

3 The term “shall recover” in § 362(k) suggests that the award of  
4 actual damages, costs, and attorney’s fees is mandatory if a willful violation  
5 of the automatic stay is found. *Eskanos & Adler, P.C. v. Roman (In re*  
6 *Roman)*, 283 B.R. 1, 7 (9<sup>th</sup> Cir. BAP 2002) (citation omitted). A “willful”  
7 violation is a condition precedent to the recovery of damages under  
8 § 362(k). *Id.*, citing *Fernandez v. GE Capital Mortgage Servs., Inc. (In re*  
9 *Fernandez)*, 227 B.R. 174, 180 (9<sup>th</sup> Cir. BAP 1998) *aff’d mem.*, 208 F.3d  
10 220 (9<sup>th</sup> Cir. 2000).

11 Other than subsection (k), the rest of § 362 is silent on what remedies  
12 are available to a party injured by a willful violation of the stay. However,  
13 courts have not read § 362 to mean that seeking statutory damages under  
14 subsection (k) is the only available remedy but have allowed the injured  
15 party to seek a number of potential remedies, including injunctive relief.  
16 *See, e.g., In re Harris*, 374 B.R. 611, 615 (Bankr. N.D. Ohio 2007) (“[T]he  
17 debtor [may] (1) seek to avoid the action which violated the stay; (2) bring  
18 an action against the creditor for contempt; (3) seek injunctive relief; and/or  
19 (4) seek statutory damages pursuant to 11 U.S.C. § 362(k)(1).”).

20 To remedy a violation of the automatic say, the court should have the  
21 power to grant relief that would bring the parties back to the status quo. *See*  
22 *In re C.W. Mining Co.*, 625 F.3d 1240, 1247 (10<sup>th</sup> Cir. 2010) (affirming  
23 bankruptcy court’s civil contempt order voiding creditors’ actions that  
24 violated stay where such relief returned parties to status quo). Injunctive  
25 relief, in the form of ordering the creditor to vacate the post-petition  
26 judgment, may be proper, especially given that a creditor has an affirmative  
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duty to remedy his violation of the automatic stay. *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1192 (9<sup>th</sup> Cir. 2003) (citation omitted); *Cal. Emp't Dev. Dep't v. Taxel* (*In re Del Mission Ltd.*), 98 F.3d 1147, 1151 (9<sup>th</sup> Cir. 1996) ("To effectuate the purpose of the automatic stay, the onus to return estate property is placed upon the possessor."); *see also Taub v. Taub* (*In re Taub*), 427 B.R. 208, 221 (Bankr. E.D.N.Y. 2010) (recognizing that additional order directing compliance with terms of automatic stay is generally not required but granting order anyway given parties' animosity between each other).

#### **Analysis and Conclusions of Law.**

**Actual Damages.** The first issue to address is the question of actual damages. The Bankruptcy Code requires the court to award the entire amount of actual damages reasonably incurred as a result of the stay violation. *Beard v. Walsh* (*In re Walsh*), 219 B.R. 873, 876 (9<sup>th</sup> Cir. BAP 1998), *citing Stainton v. Lee* (*In re Stainton*), 139 B.R. 232, 235 (9<sup>th</sup> Cir. BAP 1992). Based on her testimony, Sabrina's actual out-of-pocket expenses are \$676 (\$550 in attorney's fees plus \$126 in lost wages). This will be awarded as actual damages.

**Emotional Distress.** The Motion alleges that Sabrina has suffered "shock, emotional distress and pain." Emotional distress damages may be awarded for a willful violation of the automatic stay, but only where the stay violation has also caused "significant economic loss." *Stinson v. Bi-Rite Restaurant Supply, Inc.* (*In re Stinson*), 295 B.R. 109, 122 (9<sup>th</sup> Cir. BAP 2003). Here, Sabrina testified that she was upset by the ordeal. Undoubtedly she was surprised, and possibly even angered when she first learned of the small claims judgment, but that does not automatically

1 translate to compensable damages. Sabrina's actual damages were not  
2 significant and there was no evidence that Sabrina has incurred any medical  
3 expense or suffered any compensable physical or emotional injury as a  
4 result of this problem.

5 **Injunctive Relief.** Sabrina also requests an injunction to compel  
6 Teran to take whatever action is necessary to expunge the small claims  
7 judgment and remove it from the record. As it is now apparent that such an  
8 order would be a futile effort, the request for injunctive relief will be  
9 denied. It is clear that any remedial action will have to come from the  
10 Debtors and is best addressed through the award of punitive damages  
11 below. As a matter of law, the small claims judgment is and always has  
12 been void. *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571  
13 (9<sup>th</sup> Cir. 1992). To the extent that the outstanding judgment impairs the  
14 Debtors' credit rating, the damages resulting from having the small claims  
15 judgment in the record, if any, can be remedied by an appropriate order of  
16 this court correcting the record. The Debtors' counsel can lodge such an  
17 order with the small claims court and provide a copy to the credit reporting  
18 agencies if necessary.

19 **Punitive Damages.** Finally, Sabrina also requests sanctions, or  
20 punitive damages, based on Teran's refusal to correct his error. Punitive  
21 damages will be awarded for a violation of the automatic stay only if  
22 Teran's conduct was malicious, wanton or oppressive. *Ramirez v. Fuselier*  
23 *(In re Ramirez)*, 183 B.R. 583, 590 (9<sup>th</sup> Cir. BAP 1995) (citations omitted).  
24 Even where the debtor can establish actual damages, punitive damages  
25 generally require a showing of reckless or callous disregard for the law or  
26 the rights of others. *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 228  
27

1 (9<sup>th</sup> Cir. 1989). In no event should punitive damages be awarded in the  
2 absence of actual damages. *McHenry v. Key Bank (In re McHenry)*, 179  
3 B.R. 165, 168 (9<sup>th</sup> Cir. BAP 1995).

4 This court has already found that Teran willfully violated the  
5 automatic stay. The evidence does not support a finding that Teran acted  
6 with malice when he first obtained the small claims judgment. However,  
7 that issue is not the end of the inquiry. Even after that ruling was issued,  
8 Teran blatantly ignored the problem created by his actions. A creditor who  
9 violates the automatic stay through the prosecution of state court litigation  
10 has an affirmative duty to correct the error. *Sternberg v. Johnston (In re*  
11 *Sternberg)*, 595 F.3d 937, 945 (9<sup>th</sup> Cir. 2010). Teran's recalcitrance  
12 strongly supports a finding of malice and wanton disregard for his  
13 obligations. The court finds that an award of punitive damages is  
14 appropriate in the amount of \$1,000.

15 **Conclusion.**

16 Based on the foregoing, the court finds and concludes that Sabrina  
17 Garner has been actually damaged by Teran's willful violation of the  
18 automatic stay in the amount of \$676. In addition, Sabrina Garner is  
19 entitled to an award of punitive damages in the amount of \$1,000 and an  
20 order which can be recorded in the small claims action and distributed to  
21 the credit reporting agencies declaring the small claims judgment to be  
22 void. Debtors' counsel shall submit an appropriate order.

23 Dated: March 16, 2012

24  
25 /s/ W. Richard Lee  
26 W. Richard Lee  
27 United States Bankruptcy Judge  
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