

App. 1

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

In re: SEA HAWAII RAFTING, LLC,	No. 18-16098
JAY LAWRENCE FRIEDHEIM,	D.C. No. 1:16-cv-00183-JMS- KJM
Appellant,	MEMORANDUM and ORDER*
v.	(Filed Oct. 24, 2019)
DANE S. FIELD, Trustee in USBC Case 14-01520,	
Appellee.	

Appeal from the United States District Court  
for the District of Hawaii  
J. Michael Seabright, Chief District Judge, Presiding  
Submitted October 22, 2019\*\*  
Honolulu, Hawaii

Before: GRABER, M. SMITH, and WATFORD, Circuit  
Judges.

Jay Lawrence Friedheim appeals from the district  
court's denial of his motion for attorney's fees. Because

---

\* This disposition is not appropriate for publication and is  
not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for  
decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

App. 2

the district court properly found no legal basis for awarding fees, we affirm.

As a general rule, prevailing parties are not entitled to attorney's fees "absent statute or enforceable contract." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). No statute supports Friedheim's request for fees, and the relevant Bankruptcy Rule does not mention attorney's fees in its enumerated list of taxable costs on appeal. Fed. R. Bankr. Proc. 8021(c). Nor does this case implicate a contractual fee-shifting provision. As a result, Friedheim may recover attorney's fees only if the Trustee acted in bad faith or pursued frivolous litigation. *See Alyeska*, 421 U.S. at 258–59 (explaining courts' "inherent power" to award attorney's fees in specific circumstances).

The Trustee's motion for sanctions was neither frivolous nor filed in bad faith. The Trustee filed the motion after the district court concluded that Friedheim had "very likely violated" the bankruptcy court's stay order by attempting to verify the amended complaint in his maritime action. The bankruptcy court agreed with the district court's assessment and granted the Trustee's motion for sanctions. Though we subsequently nullified the basis for such sanctions by holding that bankruptcy stay orders do not apply to maritime cases, *Barnes v. Sea Haw. Rafting, LLC*, 889 F.3d 517, 532–33 (9th Cir. 2018), the Trustee's motion was not unreasonable or meritless at the time it was filed.

Contrary to Friedheim's argument, *Vaughan v. Atkinson*, 369 U.S. 527 (1962), does not support his request for fees. *Vaughan* concerned a seaman's right to recover attorney's fees after his employer refused to pay maintenance and cure. *Id.* at 529–31. The question before us, by contrast, is whether Friedheim can receive reimbursement for the cost of defending himself against sanctions—not whether Friedheim's client can recover attorney's fees for his employer's failure to pay maintenance and cure.

We have considered Friedheim's remaining arguments concerning the district court's failure to apply maritime law and the constitutionality of the Bankruptcy Act, and find them to be unpersuasive.

Friedheim's Motion to Supplement Excerpts of Record on Appeal with Transcript (Dkt. No. 59) is DENIED.

**AFFIRMED.**

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

In re SEA HAWAII RAFTING, LLC,  Debtor,	Civ. No. 16-00183 JMS- KJM
JAY LAWRENCE FRIEDHEIM, and JOHN C. GIBSON,  Appellants,  vs. DANE S. FIELD,  Appellee.	ORDER GRANTING IN PART AND DENYING IN PART APPELLANTS' MOTION TO VACATE SANCTIONS, RELEASE OF SUPERSEDEAS BOND AND FOR FEES AND COSTS RELATED TO OBTAINING MAINTENANCE AND CURE, ECF NO. 68  (Filed May 31, 2018)

**ORDER GRANTING IN PART AND  
DENYING IN PART APPELLANTS' MOTION  
TO VACATE SANCTIONS, RELEASE OF  
SUPERSEDEAS BOND AND FOR FEES  
AND COSTS RELATED TO OBTAINING  
MAINTENANCE AND CURE, ECF NO. 68**

**I. INTRODUCTION**

Pursuant to 28 U.S.C. § 158, Jay Lawrence Friedheim and John C. Gibson (“Appellants”) appeal an April 15, 2016 Decision and Order of the U.S. Bankruptcy Court for the District of Hawaii sanctioning them \$43,277.73 for violating 11 U.S.C. § 362’s automatic stay (“Decision and Order”). *See* ECF Nos. 1-1,

1-2; *In re Sea Haw. Rafting*, 2016 WL 1599804 (Bankr. D. Haw. Apr. 15, 2016). Friedheim has filed a “Motion to Vacate Sanctions, Release of Supersedeas Bond and for Fees and Costs Related to Obtaining Maintenance and Cure” (“Motion to Vacate”), ECF No. 68.<sup>1</sup> Based on the following, the Motion to Vacate is GRANTED in PART, and the Decision and Order awarding sanctions is VACATED.

## II. DISCUSSION

The Bankruptcy Court found that Appellants violated 11 U.S.C. § 362(a)(4), which provides that certain bankruptcy petitions operate as an automatic stay of “any act to create, perfect, or enforce any lien against property of the estate.” The Bankruptcy Court’s Decision and Order was based on certain acts taken by Appellants in connection with verifying, or attempting to verify, a First Amended Complaint in *Barnes v. Sea Hawaii Rafting, LLC*, Civ. No. 13-00002 (D. Haw.), regarding a lien on the M/V Tehani.

Many of the details of the ongoing *Barnes* litigation are set forth in *Barnes v. Sea Hawaii Rafting, LLC*, 16 F. Supp. 3d 1171 (D. Haw. 2014), *Barnes v. Sea Hawaii Rafting, LLC*, 2015 WL 9459893 (D. Haw. Dec. 22, 2015), and *Barnes v. Sea Hawaii Rafting, LLC*, 889 F.3d 517 (9th Cir. 2018), and the court need not repeat

---

<sup>1</sup> Both Friedheim and Gibson were sanctioned and appealed, although only Friedheim filed the Motion to Vacate. Gibson has not otherwise appeared in the action. Nevertheless, this Order applies to both Appellants.

those details here. But what is particularly relevant is that on January 17, 2017, this court stayed consideration of Appellants' April 21, 2016 appeal of the Decision and Order, pending a decision by the Ninth Circuit in *Barnes*, which was under consideration by the Ninth Circuit at that time. *See* ECF Nos. 64, 65.

On April 19, 2018, the Ninth Circuit issued its Order and Amended Opinion in *Barnes*. *See* 889 F.3d 517. Among other matters, the Ninth Circuit reversed the *Barnes* trial court's findings that Appellants' efforts to verify the First Amended Complaint in *Barnes* were improper and thus also likely violated the bankruptcy stay. *See id.* at 530-32. Following the Ninth Circuit's April 27, 2018 mandate in *Barnes*, this court re-opened this sanctions litigation.

Given the Ninth Circuit's decision, the basis for the Bankruptcy Court's Decision and Order (which relied in significant part on the District Court's findings) no longer exists. That is, Appellants did not violate the automatic stay provisions of 11 U.S.C. § 362. Accordingly, Appellee Dane Field, as Trustee of the bankruptcy estate of Sea Hawaii Rafting, LLC ("Appellee"), has forthrightly agreed to vacating the Bankruptcy Court's Decision and Order sanctioning Appellants (and, even without such agreement, the court would vacate the sanctions). ECF No. 78. The court therefore VACATES the \$43,277.73 award of sanctions against Appellants.

The Motion to Vacate seeks other relief as well. Specifically, Appellants seek reimbursement of costs,

App. 7

such as amounts paid for obtaining a supersedeas bond to preserve rights on appeal, as well as Appellants' attorney's fees paid or owing to a bankruptcy attorney "to defend us in the sanctions motion," ECF No. 68 at 5, and for "Barnes's lawyer for helping him get Maintenance and Cure," ECF No. 82 at 8. The court DENIES this other relief sought in the Motion to Vacate.<sup>2</sup>

Under Federal Rule of Bankruptcy Procedure 8021, Appellants are entitled to file a bill of costs with the bankruptcy clerk after entry of judgment on appeal.<sup>3</sup> Thus, Appellants' current request for an award

---

<sup>2</sup> The request for release of the supersedeas bond is no longer necessary. On May 10, 2018, the court issued an Order to Exonerate Bond, ordering that the "surety is released from any further liability on its bond, the surety's obligation has been fulfilled, and the bond is fully exonerated by this Court as to Jay Lawrence Friedheim[.]" ECF No. 74. The court believes that its May 10, 2018 Order, along with the present Order vacating the sanctions, are sufficient. If, however, any additional relief is required, Appellants may file an appropriate motion seeking limited and specific relief.

<sup>3</sup> Rule 8021, as amended in 2014, provides in part:

**(c) Costs on appeal taxable in the bankruptcy court.** The following costs on appeal are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

- (1) the production of any required copies of a brief, appendix, exhibit, or the record;
- (2) the preparation and transmission of the record;
- (3) the reporter's transcript, if needed to determine the appeal;
- (4) premiums paid for a supersedeas bond or other bonds to preserve rights pending appeal; and
- (5) the fee for filing the notice of appeal.

App. 8

of costs is DENIED without prejudice to seeking relief by filing a bill of costs in accordance with Rule 8021 after this court enters judgment. The court expresses no opinion as to whether an award of costs is appropriate under Rule 8021.

Appellants, however, have not cited any binding or persuasive authority allowing for the award of attorneys' fees under the current procedural posture.<sup>4</sup> Rule 8021 (or its predecessor, the former Federal Rule of Bankruptcy Procedure 8014) "does not include attorneys' fees as one of the costs to be taxed, except, arguably, where the appeal is frivolous or brought in bad faith." *Williams v. Transam Trucking, Inc.*, 384 B.R. 582, 585 (D. Kan. 2008) (citing *Rush v. Rush*, 100 B.R. 55, 57 (D. Kan. 1989)). *Cf. Grove v. Fulwiler (In re Fulwiler)*, 624 F.2d 908, 910 (9th Cir. 1980) (discussing a bankruptcy judge's award of attorneys' fees "on the basis of the inherent power of a court of equity to award fees where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"). But

---

**(d) Bill of costs; objections.** A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the bankruptcy clerk, with proof of service, an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the bankruptcy court extends the time.

<sup>4</sup> As the court has stressed previously, the present proceeding is limited to an appeal of the Bankruptcy Court's Decision and Order sanctioning Appellants. And so Appellants' request for attorney's fees to the extent based on obtaining *maintenance and cure* for Barnes under *Vaughn v. Atkinson*, 369 U.S. 527, 530-31 (1962), is not properly before this court.



neither Appellee’s underlying proceedings seeking sanctions, nor its actions in opposing Appellants’ appeal, were frivolous or in bad faith. Appellee sought sanctions in the bankruptcy court based in significant part on conclusions of the District Court in *Barnes*. *See* 2015 WL 9459893, at \*5 n.12 (“Barnes’s successive attempts at verification very likely violated one or both of the automatic bankruptcy stays in effect at the time. . . . [A]t the time Barnes filed his attempts at verification, the stay had not been lifted as to the Sea Hawaii Rafting bankruptcy proceeding. . . . Thus, Barnes’s verification filings violated the stay in the Sea Hawaii Rafting bankruptcy proceeding, and are therefore void.”). That the Ninth Circuit disagreed with the District Court in a published opinion does not make Appellee’s position frivolous—especially given the *Barnes* litigation’s relatively complicated procedural posture, involving multiple admiralty and bankruptcy issues. In short, there is no basis for the award of attorneys’ fees in this appeal.<sup>5</sup>

---

<sup>5</sup> The court also DENIES Appellants’ Motion to Add Supplemental Exhibits to Opening Brief on Sanctions Order, ECF No. 72. Appellants seek unnecessarily to supplement the record with tangential documents filed in the Bankruptcy Court after the Ninth Circuit’s 2018 decision. *Friedheim v. Field*, Civ. No. 16-00183 JMS-KJM, Order Granting in Part and Denying in Part Appellants’ Motion to Vacate Sanctions, Release of Supersedeas Bond and for Fees and Costs Related to Obtaining Maintenance and Cure, ECF No. 68

**III. CONCLUSION**

The Bankruptcy Court's April 15, 2016 award of \$43,277.73 in sanctions against Appellants is VACATED. Specifically, the Final Judgment against Jay L. Friedheim and John C. Gibson, entered by the Bankruptcy Court in Case No. 14-01520 on April 20, 2016, and recorded on April 22, 2016, in the Bureau of Conveyances, State of Hawaii, at Doc. No. A-59561260, is VACATED.

Appellants' request for an award of attorneys' fees in this proceeding is DENIED. Appellants' request for costs is DENIED without prejudice to filing a bill of costs in accordance with Federal Rule of Bankruptcy Procedure 8021 with the bankruptcy clerk.

The Clerk of Court shall enter Judgment in favor of Appellants and close the case file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 31, 2018.

[SEAL]      /s/ J. Michael Seabright  
J. Michael Seabright  
Chief United States District Judge

---

App. 11

**Date Signed:** [SEAL] SO ORDERED  
**April 15, 2016** /s/ Robert J. Faris  
Robert J. Faris  
United States Bankruptcy  
Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF HAWAII

In re	Case No. 14-01520
SEA HAWAII RAFTING, LLC,	Chapter 7
Debtor.	Re: Docket No. 82

**MEMORANDUM OF DECISION ON**  
**TRUSTEE'S MOTION FOR SANCTIONS FOR**  
**VIOLATION OF THE AUTOMATIC STAY**

(Filed Apr. 15, 2016)

**I. Background**

Chad Barnes was injured while working aboard the M/V Tehani, a vessel owned by Sea Hawaii Rafting, LLC ("SHR"). In 2013, Mr. Barnes filed a suit in admiralty in federal district court (the "USDC Lawsuit").<sup>1</sup> He named as defendants the Tehani, SHR, and SHR's sole member, Kristen Kimo Henry.

---

<sup>1</sup> *Chad Barry Barnes v. Sea Hawaii Rafting, LLC, et al.*, (Civil No. 13-00002 ACK-RLP, D. Hawaii). This court takes judicial notice of the record in the USDC Lawsuit pursuant to Fed. R. Evid 201. Filings in the USDC Lawsuit will be identified as (USDC dkt. \_\_\_) and filings in this bankruptcy case will be identified as (Dkt. \_\_\_).

The district court to grant summary judgment in Mr. Barnes' favor as to liability, holding that he was entitled to maintenance, cure, and wages under maritime law from the date of the accident, July 3, 2012.<sup>2</sup> Mr. Barnes filed several motions for summary judgment on the issue of the amount of the maintenance payment,<sup>3</sup> but the district court denied each such motion, finding that there were genuine issues of material fact concerning the reasonable cost of living for a seaman in Mr. Barnes' locale.<sup>4</sup>

On July 7, 2014, Mr. Barnes filed a motion for partial summary judgment as to unseaworthiness, negligence *per se*, and Jones Act Negligence.<sup>5</sup> But before the motion was heard, Mr. Henry filed a chapter 13 bankruptcy petition and SHR filed a chapter 7 bankruptcy petition.

Mr. Henry's chapter 13 plan confirmation was delayed because he originally listed the Tehani as one of his assets. That meant that Mr. Barnes was a secured creditor (by virtue of his alleged maritime lien on the vessel), so the plan could not be confirmed until resolution of the dispute about the validity and amount of Mr. Barnes' claim.

Mr. Barnes moved for relief from the automatic stay on May 15, 2015, in Mr. Henry's bankruptcy case,

---

<sup>2</sup> USDC dkt. 44.

<sup>3</sup> USDC dkt. 58, 94 and 157.

<sup>4</sup> USDC dkt. 77 and 120. The third motion (USDC dkt. 157) was withdrawn (USDC dkt. 198).

<sup>5</sup> USDC dkt. 108.

## App. 13

to allow Mr. Barnes to proceed with the USDC Lawsuit. On June 22, 2015, this court granted the relief from stay motion, in part. The motion was granted to allow the district court “to value to its conclusion” Mr. Barnes’ claim. The purpose was to allow the district court to decide the validity and amount of Mr. Barnes’ secured claim, because that decision appeared essential to the confirmation of Mr. Henry’s chapter 13 plan. This court denied Mr. Barnes’ request, however, that he be allowed to enforce his claim (because all of Mr. Henry’s creditors were to be paid through the chapter 13 plan).<sup>6</sup>

After some months, the chapter 13 trustee produced a certificate of title showing that SHR, not Mr. Henry, owned the vessel.<sup>7</sup> That meant that Mr. Barnes could only be an unsecured creditor of Mr. Henry’s bankruptcy case,<sup>8</sup> paving the way for confirmation of Mr. Henry’s chapter 13 plan.<sup>9</sup>

---

<sup>6</sup> *In re Henry*, Case No. 14-01475, dkt. 84.

<sup>7</sup> *In re Henry*, Case No. 14-01475, dkt. 123.

<sup>8</sup> Bankruptcy Code § 506(a) (“An allowed claim of a creditor secured by a lien on *property in which the estate has an interest* . . . is a secured claim. . . .”) (emphasis added).

<sup>9</sup> Mr. Barnes claims that Mr. Henry listed the Tehani on his bankruptcy schedules in order to mislead Mr. Barnes or his attorneys. I disagree. In the first place, Mr. Barnes’ briefs in the USDC Lawsuit show that his counsel was aware that the vessel was owned by SHR and not Mr. Henry. (USDC dkt. 149 at 5). Further, Mr. Henry had nothing to gain by erroneously describing the ownership of the vessel. In fact, that error unnecessarily delayed confirmation of Mr. Henry’s plan and probably cost him additional attorneys’ fees.

App. 14

In the meantime, Mr. Barnes filed another motion for summary judgment in the USDC lawsuit.<sup>10</sup> The district court noted that Mr. Barnes had not sought relief from the stay as to SHR and determined that the case would not proceed against Mr. Henry only because the parties were so interrelated.<sup>11</sup>

Mr. Barnes' counsel apparently realized that his amended complaint was not verified, contrary to the admiralty rules. On July 23, 2015, Mr. Barnes' counsel attempted to correct the defect by filing an affidavit of verification of the first amended complaint.<sup>12</sup> The attempted correction was also defective, and, in any event, it was done after Mr. Barnes had received only partial relief from the automatic stay as to Mr. Henry and before he even sought any relief from the automatic stay as to SHR.

On September 11, 2015, Mr. Barnes filed a motion for relief from the automatic stay motion in the SHR bankruptcy case.<sup>13</sup> On November 25, 2015, this court granted the motion in part. The stay was terminated to allow the district court to determine Mr. Barnes' maritime lien claim against assets of SHR's bankruptcy estate but denied as to enforcement of the lien.<sup>14</sup>

---

<sup>10</sup> USDC dkt. 157.

<sup>11</sup> USDC dkt. 158.

<sup>12</sup> USDC dkt. 159.

<sup>13</sup> Dkt. 31.

<sup>14</sup> Dkt. 64.

## App. 15

In the USDC Lawsuit, Mr. Barnes' counsel attempted again to correct the missing verification. However, the filing failed to correct the problem.<sup>15</sup>

The district judge directed the parties to address several issues, including how the limited relief from stay in the SHR affected the district court's ability to adjudicate claims against Mr. Henry and the effect, if any, on Mr. Barnes filing a corrected verification of his amended complaint.<sup>16</sup> Mr. Barnes filed, on December 3, 2015, a memorandum that disagreed with this court's orders lifting the stay because they were susceptible to misunderstanding and requested that the district court proceed on all causes of action, as if no bankruptcy proceeding had been filed.<sup>17</sup> (Notwithstanding Mr. Barnes' disagreement with the relief from stay orders, the district court determined that it would proceed under the orders' restrictions.<sup>18</sup>) In a supplemental brief, Mr. Barnes justified the post-bankruptcy filing of the verifications as a mere "technicality" missing from the amended complaint but necessary for purposes of arresting the Tehani. Mr. Barnes also argued that the limited lifting of the stay in the SHR bankruptcy did not affect the district court's ability to

---

<sup>15</sup> USDC. dkt. 184. The errata containing the notary's signature on the affidavit stated that there was only one page, which meant the verified complaint had not been attached to the affidavit when it was signed. The notary, in essence, only verified one page.

<sup>16</sup> USDC dkt. 185.

<sup>17</sup> USDC dkt. 186.

<sup>18</sup> USDC dkt. 187.

adjudicate the claims. He suggested that the district court should test the effect of the bankruptcy court ruling by arresting the Tehani and waiting to “see what the 9th Circuit says about it.”<sup>19</sup>

Mr. Barnes also made yet another attempt to verify the complaint.<sup>20</sup> SHR’s bankruptcy trustee responded that the multiple verifications filed by Barnes violated the automatic stay and were void. The trustee also argued that absent verification of the complaint, the district court was without *in rem* jurisdiction over the Tehani.<sup>21</sup>

Mr. Barnes’ counsel also made a new argument. He asserted that the Bankruptcy Code of 1984 was unconstitutional and that the bankruptcy court lacked the constitutional power to restrict the district court from adjudicating Barnes’ claim in the absence of Mr. Barnes’ voluntary consent.<sup>22</sup>

The district court then heard and decided one of Mr. Barnes’ motions for partial summary judgment. The court ruled that the attempts to verify his complaint, after the first amended complaint was filed, were ineffective. Without a verified complaint, the district court ruled that it lacked *in rem* jurisdiction over the Tehani, and it dismissed all claims against the

---

<sup>19</sup> USDC dkt. 188.

<sup>20</sup> USDC dkt. 191.

<sup>21</sup> USDC dkt. 194.

<sup>22</sup> USDC dkt. 193.



Tehani.<sup>23</sup> Mr. Barnes initiated an interlocutory appeal from this ruling.<sup>24</sup>

In preparation for trial, the district court ordered the parties to seek further guidance or instructions from the bankruptcy court, in both bankruptcy cases, regarding the extent to which the district court could determine the ultimate liability of the defendants, including whether it could pierce the corporate veil and hold Mr. Henry liable for SHR's liability.<sup>25</sup> SHR's chapter 7 trustee and Mr. Henry filed similar requests for instructions.<sup>26</sup> This court entered an order, on February 17, 2016, that permitted SHR to remain as a nominal defendant for the purposes of adjudicating Mr. Henry's ultimate liability issue in the district court.<sup>27</sup> The USDC Lawsuit remains pending.

SHR's chapter 7 trustee seeks sanctions against Mr. Barnes and his attorneys, Jay L. Friedheim and John C. Gibson. The trustee argues that they violated the automatic stay and this court's order when they made repeated attempts to perfect a lien against the Tehani and to persuade the district court to disregard the bankruptcy court's orders.<sup>28</sup> Memoranda in support and in opposition to the motion were filed. A hearing on the motion sanctions took place on March 7, 2016. I

---

<sup>23</sup> USDC dkt. 197.

<sup>24</sup> USDC dkt. 201.

<sup>25</sup> USDC dkt. 200; USDC dkt. 197 at 20 n 16.

<sup>26</sup> Dkt. 69; *In re Henry* (Case No. 14-01475), dkt. 140

<sup>27</sup> Dkt. 117.

<sup>28</sup> Dkt. 82.

stated on the record that I found Barnes' attorneys' actions sanctionable but took under advisement the calculation of sanctions.

## II. Standard

The filing of a voluntary bankruptcy petition under 11 U.S.C. § 301 operates as a stay of certain actions against the debtor or property of the estate pursuant to section 362(a) of the Bankruptcy Code.<sup>29</sup> If the automatic stay is violated, a bankruptcy trustee may recover damages under 11 U.S.C. § 105.<sup>30</sup>

---

<sup>29</sup> 11 U.S.C. § 362(a) operates as a stay to prevent:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

\* \* \*

- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

<sup>30</sup> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). 11 U.S.C. § 362(k) is not available here because a trustee is not an "individual" within the meaning of

To recover under section 105, the trustee must show “by clear and convincing evidence that the contemptors violated a specific and definite order of the court.”<sup>31</sup> Since the automatic stay was created by statute and applies, across the board, to all bankruptcy cases, it is a specific and definite court order.<sup>32</sup>

The trustee need not establish that there was bad faith or a specific intent to violate the order. The trustee only needs to show “willfulness” – that the offending party knew of the stay and the offender’s actions were intentional.<sup>33</sup> A stay violation “is willful if the creditor knew of the bankruptcy case and acted intentionally in such a way that the stay was violated. The fact that the creditor may have acted in good faith and reasonably believed that its conduct did not violate the stay does not make its conduct not willful.”<sup>34</sup>

Under section 105, a trustee can recover damages in the form of attorneys’ fees and costs as sanctions for

---

that section. *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995).

<sup>31</sup> *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003) quoting *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *In re Cordle*, 187 B.R. 1, 4 (Bankr. N.D. Cal. 1995), citing *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989).

civil contempt.<sup>35</sup> This award is not mandatory but discretionary.<sup>36</sup>

### III. Discussion

#### A. *Violation of Automatic Stay.*

There is clear and convincing evidence that Mr. Barnes' numerous attempts to verify the amended complaint, in order to create a maritime lien post petition, were in violation of the automatic stay and this court's order.<sup>37</sup> The court granted relief from the automatic stay so the district court could determine whether Mr. Barnes had a valid maritime lien and, if so, in what amount. The court did not grant Mr. Barnes leave to create a maritime lien on the estate's property. In the Ninth Circuit, it is clear that if a plaintiff fails to file a verified complaint, no lien attaches to the vessel, *in rem*.<sup>38</sup> Therefore, Mr. Barnes' attempts to verify the complaint, after the bankruptcy case was filed, violated the automatic stay and this court's order partially lifting the stay.

Mr. Barnes also violated the stay when his counsel, on several occasions, urged the district court to disregard the bankruptcy court's orders. In a memorandum filed on December 3, 2015, Mr. Barnes

---

<sup>35</sup> *In re Pace*, 67 F.3d at 193.

<sup>36</sup> *Id.*

<sup>37</sup> 11 U.S.C. § 362(a)(4) prohibits an act to create, perfect or enforce a lien against property of the estate.

<sup>38</sup> *Madeja v. Olympic Packers, LLC*, 310 F.3d 628, 637 (9th Cir. 2002).

requested that the district court proceed as if there was no bankruptcy filing because the relief from stay order was susceptible to misunderstanding. In a supplemental brief filed on December 10, 2015, counsel for Mr. Barnes also urged the district court to act independently “of any pontifications of the court in Bankruptcy” and to test the bankruptcy court’s order by arresting the Tehani to “see what the 9th Circuit says about it.”<sup>39</sup> Urging a court to ignore the automatic stay and the bankruptcy court’s limited relief from the stay is itself a violation of the stay.

Counsel for Mr. Barnes contend that simply fulfilled their duty to be zealous advocates for their client. But the duty of zealous advocacy does not excuse an attorney from the duty to comply with the law.<sup>40</sup> Urging one court to ignore another court’s order is not zealous advocacy but mere foolishness.

The chapter 7 trustee asserts counsel for Mr. Barnes violated the stay when counsel argued that the bankruptcy court lacked constitutional authority to restrict the district court from adjudicating Mr. Barnes’ claims without his knowing and voluntary consent. This argument is frivolous. The bankruptcy court has constitutional authority to adjudicate claims asserted by creditors against debtors, bankruptcy estates, and their property. The Congressionally-enacted automatic stay, not the bankruptcy court, precludes other courts

---

<sup>39</sup> USDC dkt. 188.

<sup>40</sup> Haw. R. Prof. Cond. – Preamble: A Lawyer’s Responsibilities.

from deciding those issues. The constitutional issue presented by the case on which Mr. Barnes relied arises only when a debtor or trustee is asserting claims against a nonconsenting third party that do not arise under federal bankruptcy law.<sup>41</sup> But a frivolous argument is not necessarily a violation of the automatic stay. I decline to hold that Mr. Barnes' frivolous constitutional argument violated the automatic stay.

### ***B. Willfulness***

There is no serious dispute that the violations were willful. Mr. Barnes and his counsel knew that the automatic stay was in effect and knew that this court had modified it only in part. Their actions that violated the stay were deliberate, not accidental. Even if they did not intend to violate the stay—an assumption that defies credibility in light of their brazen statements to the district court—their acts were still willful.

### ***C. Discretionary Factors***

An award of damages under section 105 is discretionary. I will exercise my discretion to refrain from imposing sanctions on Mr. Barnes. There is no indication that Mr. Barnes is personally responsible for what has occurred in this case. Although a client is ordinarily responsible for his attorney's actions, I will not sanction

---

<sup>41</sup> *Wellness In't Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015).

Mr. Barnes. The attorneys, not Mr. Barnes, should pay the price for the attorneys' misconduct.

***D. Calculation of Damages***

The chapter 7 trustee's counsel requested attorneys fees totaling \$50,770.97.<sup>42</sup> The trustee requested and was permitted additional time to submit supplemental information evidencing voluntary time sheet reductions made to support the request for reasonable fees. Counsel for Mr. Barnes was also given additional time to respond. The fourth declaration of trustee's counsel reduced the request from \$50,770.97 to \$43,692.39, after taking into account the billing adjustments.<sup>43</sup>

I have carefully and independently reviewed the supplemental documents submitted by both sides and will award the chapter 7 trustee and his professionals the sum of \$40,939.50 plus GE tax of \$1,929.07 and expenses of \$409.16 for a total sum of \$43,277.73.<sup>44</sup>

---

<sup>42</sup> The trustee initially requested fees, GE taxes and costs of \$25,831.30 from November 25, 2015, to December 31, 2015, but filed a second declaration requesting additional fees, taxes and costs for January 2016, increasing the total to \$40,749.29 (dkt. 100). Thereafter, a third declaration for fees, taxes and costs incurred in February 2016 adjusted the grand total to \$50,770.97. (Dkt.126)

<sup>43</sup> Dkt. 136.

<sup>44</sup> In addition to the reductions suggested by the chapter 7 trustee's counsel, I have reduced the time posted on December 9, 2015, by 0.6 minutes and the time posted on January 22, 2016, by 0.3 minutes, because the services reflected in the time entries do

#### **IV. Conclusion**

The chapter 7 trustee's motion for sanctions for violation of the automatic stay is GRANTED. The trustee will be awarded a total of \$43,277.73. Counsel for the chapter 7 trustee shall submit an appropriate separate judgment. Mr. Barnes' counsel are to remit payment not later than 30 days after entry of the judgment.

**END OF DECISION**

---

not appear to relate to the sanctionable conduct. This reduces the fees (including GE tax) by \$414.66.

---