SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 15, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MARY AMANDA WHITE, **CASE NO. 13-03648-NPO**

DEBTOR. **CHAPTER 13**

ORDER DENYING MOTION TO HOLD TEXAS ATTORNEY GENERAL IN CONTEMPT AND FOR VIOLATION OF THE AUTOMATIC STAY

This matter came before the Court for hearing on October 3, 2016 (the "Hearing"), on the Motion to Hold Texas Attorney General in Contempt and for Violation of the Automatic Stay (the "Motion") (Dkt. 104) filed by the debtor, Mary Amanda White (the "Debtor"), and the Response in Opposition to Motion to Hold Texas Attorney General in Contempt and for Violation of the Automatic Stay (the "Response") (Dkt. 110) filed by the Office of the Attorney General of Texas (the "OAG") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Bryce C. Kunz ("Kunz") and Richard R. Grindstaff ("Grindstaff") represented the Debtor, Scot M. Graydon ("Graydon") represented the OAG, and Letitia S. Johnson appeared on behalf of James L. Henley, Jr., the standing chapter 13 panel trustee. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Notice of the Motion was proper under the circumstances.

Facts

The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on December 9, 2013 (the "Petition") (Dkt. 1). The Debtor filed her schedules (Dkt. 4) (the "Schedules") contemporaneously with the Petition, in which she did not identify a bank account with National Financial Services, LLC ("NFS"). The Debtor filed amended schedules on February 4, 2014 (Dkt. 33), March 10, 2014 (Dkt. 37), and June 2, 2014 (Dkt. 57),[1] none of which identified an account at NFS.[2]

Apparently, after the Debtor filed the Petition, the OAG, acting pursuant to a Texas court order[3] authorizing the OAG to levy accounts to satisfy outstanding domestic support obligations, placed a levy on an account at NFS (the "NFS Account") owned jointly by the Debtor and her husband, Kelly White ("Kelly White"), in order to satisfy an obligation owed by Kelly White.

[1] The Court will refer to the Schedules and the subsequently amended schedules collectively as "the Schedules".

[2] *See infra* note 4.

[3] Throughout the Hearing, Graydon stated that the OAG acted pursuant to a court order. He never introduced the court order into evidence, but the Debtor never contested the fact that there was a court order that authorized the OAG to levy the NFS Account. Presumably, the child support order referenced by the OAG in the Notice of Lien in Cause Number 3996 in the 39th Judicial District Court, Stonewall County, Texas, is the court order to which Graydon referred. Hereinafter, the Court will refer to the child support order as the "State Court Order."

According to the Notice of Lien Letter (the "Levy Letter") (Hr'g OAG Ex. 1),[4] dated June 3, 2016, the Debtor was notified that pursuant to certain code sections of the Texas Family Code, "a lien or levy has been placed on an account at [NFS]." The parties agree that Kunz sent an e-mail to the OAG on June 21, 2016, informing it that the Debtor filed the Petition and that it should cease attempts to take assets from any account in which she had an ownership interest. (Mot. at 1; Resp. at 3). The parties disagree, however, about whether placing the levy on the NFS Account was a willful violation of the automatic stay. The Debtor argued that the OAG's actions of placing a lien on the NFS Account and not releasing it until it received verification of joint ownership from NFS constituted a willful violation of the automatic stay. The OAG asserted that it did not willfully violate the automatic stay because it was entitled to verify the Debtor's ownership interest before disregarding the State Court Order, and it immediately ceased collection efforts when it received confirmation from NFS that the Debtor had an ownership interest in the NFS Account.

I. Motion

The Debtor filed the Motion on August 23, 2016. The Debtor provided that on or about June 21, 2016, her attorney sent the OAG an e-mail contesting a levy it placed on an unidentified account at NFS, "alerting Texas Attorney General of the ongoing bankruptcy of Mary Amanda White, and requesting that all attempts to take assets from any account of which she was an owner immediately cease." (Mot. at 1). According to the Debtor, the OAG violated the automatic stay

[4] Hearing exhibits will be cited as follows: The Debtor's exhibit will be cited as "(Hr'g Debtor Ex. 1)"; and the OAG's exhibits will be cited as "(Hr'g OAG Ex. ___)".

of § 362[5] because it "has willfully taken money from the account of [the Debtor] at [NFS] on or about August 19, 2016 and has willfully placed a hold on Debtor's account with the same preventing Debtor from accessing property of the estate, despite knowledge of the bankruptcy." (*Id*. at 1-2). The Debtor requested that the OAG "be ordered to pay attorney fees for violation of the stay and be assessed punitive damages, and be assessed any other fees this court deems appropriate, and actual damages," because it continued to violate the stay "despite being made aware of the bankruptcy." (*Id.* at 2). Although the Motion is ambiguous, it appears that the Debtor relies on § 362(k) and the civil contempt powers of the Court as the legal authority for the relief she seeks.

II. Response

The OAG filed the Response on September 19, 2016. The OAG noted that the Debtor did not identify a specific account with NFS in the Motion and did not allege any "specific facts from which this Court could conclude that the OAG took the alleged actions, and attached no evidence to support these conclusory (and factually incorrect) allegations." (*Id.* at 2). Accordingly, the OAG argued that the Motion was "insufficient notice to properly defend itself against such accusations," which violated its due process rights. (*Id.*). The OAG provided that "the Schedules filed under penalty of perjury by [the] Debtor (on four separate occasions) do not identify any account with [NFS]," and even though she amended her schedules several times, "she has never identified for this Court any assets allegedly owned by her with [NFS]." (*Id.*). "Despite her own failure to properly identify an asset with this Court, [the] Debtor asks this Court to hold the OAG in contempt for violation of an automatic stay regarding an asset that she has not

[5] Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

identified for this Court in any filing for the past two and a half years." (*Id.*).

The OAG admitted in the Response that Kunz contacted it by e-mail on June 21, 2016, but pointed out that the e-mail did not identify a specific NFS account and only "warned the OAG against 'attempts to garnish from joint bank accounts' under [the] Debtor's name." (Resp. at 3; Ex. 2). According to the OAG, immediately upon receiving the e-mail from Kunz "a notice was posted on the child support account of Debtor's husband that no attempt should be made to levy any joint account with Debtor as [an] owner." (Resp. at 3). The OAG asserted that it obtained ownership information directly from NFS. (*Id.* at 3-4). After it received the e-mail from Kunz, the OAG checked its records regarding NFS accounts, "and identified two separate accounts at that institution which NFS reported were owned by [the Debtor's husband]." (*Id.* at 4). According to information provided by NFS, the Debtor's husband was the sole owner of the NFS Account, and NFS "did not indicate that either of the accounts were joint accounts with [the Debtor]." (*Id.*; Exs. 1, 3-4, 6).

The OAG argued in the Response that despite its requests for the Debtor to provide information regarding her ownership interest in accounts, "[a]t no point did Mr. Kunz provide the OAG with any documentation to identify any account at NFS in which Debtor was a joint owner." (Resp. at 4). On August 10, 2016, Kunz spoke to an Assistant Attorney General in the Child Support Division of the OAG, Kelley Tesch ("Tesch"), and she informed him that the NFS records indicated that the Debtor was not a co-owner of any account at NFS. (Resp. at 4; Ex. 7). Although the NFS records indicated that Kelly White was the sole owner of the accounts, Tesch, "out of courtesy to Mr. Kunz," directed the OAG Special Collections Unit ("SCU") to contact NFS "to confirm whether this was a sole account or a joint account." (Resp. at 4-5).

Korissa Felan ("Felan"), an SCU officer at the OAG, contacted NFS to clarify ownership of the accounts in question. (*Id.* at 5; Ex. 8). On August 22, 2016, NFS told Felan "that despite the previous information from NFS," the Debtor was a joint owner of an account at NFS, "and that the information previously provided was inaccurate." (*Id.*; Resp. Ex. 8). The day after Felan received confirmation from NFS that the Debtor was a joint owner of the NFS Account, she "prepared a Discretionary Release of Child Support Lien and sent it to NFS." (*Id.*; Resp. Exs. 5 and 8).

According to the OAG, it never willfully took money from the NFS Account, and, in fact, "at no point was any money taken from that account after [the] Debtor's Counsel contacted the OAG." (*Id.*). The OAG claimed that the Debtor provided "no evidence to support such an assertion that money was taken from the account of Debtor." (*Id.* at 6). The OAG contended that it "relied on information provided from NFS that the two accounts owned by [Debtor's husband] were sole owner accounts, and not accounts jointly owned by Debtor or any other individual." (*Id.*). The OAG argued that it is not a sanctionable offense to require a debtor to demonstrate ownership of an account rather than relying "solely on the verbal representation of her Counsel over information provided by the financial institution in question." (*Id.*).

III. Hearing

A. Debtor

Kunz stated at the Hearing that when the Motion was filed, he believed that money had been taken from the NFS Account, but since then he has learned that stock in the account was sold, which he attributed to the lien that the OAG placed on it. According to Kunz, the OAG violated the automatic stay by placing a lien on the NFS Account and that its failure to remove the lien,

even though Kunz repeatedly told the OAG that the Debtor had filed the Petition, indicated that the OAG's violation was willful. At the Hearing, the Debtor and Kunz testified on behalf of the Debtor. The Debtor entered one (1) exhibit into evidence.

1. Debtor's Testimony

The Debtor testified that her name was put onto the NFS Account as a joint owner in September, 2013, and she became aware that she was a joint owner at that time; however, she did not "deal with the account until about a year ago." (Hr'g at 11:32:15).[6] Although the Debtor admitted to amending the Schedules several times, not listing NFS or identifying the NFS Account in any of the amendments, she claimed that she did not intentionally or willfully omit the NFS Account. According to the Debtor, because she had been communicating with her attorneys and the OAG about the NFS Account since April, she was unaware that she was supposed to amend the Schedules or tell the Court about the NFS Account.

The Debtor and Kelly White used the NFS Account for investments and had access to it in case of an emergency. The Levy Letter notified the Debtor that pursuant to certain code sections of the Texas Family Code, "a lien or levy has been placed on an account at [NFS]. This financial institution has informed us that you may have an ownership interest in this account." (Levy Letter at 1). The Levy Letter informed the Debtor that she could prevent the freezing of the account by filing a contest with the OAG or filing a lawsuit. (*Id.*). In order to contest the levy, the Debtor was required to contact the OAG within ten (10) days from the date of receiving the Levy Letter. (*Id.*). If the Debtor chose to contest the levy, the Levy Letter directed the Debtor to submit any supporting documentation along with the contest. (*Id.*). The Debtor stated that she

[6] The Hearing was not transcribed. Citations are to the timestamp of the audio recording.

was unable to access the NFS Account for about two (2) months after she received the Levy Letter.

Although the Levy Letter was addressed to the Debtor, and notified her that she *may* have an interest in the NFS Account, the Notice of Lien to Financial Institution (the "Notice of Lien") (Hr'g OAG Ex. 1 at 2), also dated June 3, 2016, was not addressed to the Debtor. Instead, the Notice of Lien was addressed only to Kelly White and informed him that a lien arising from a child support order had been entered for unpaid child support in the amount of $32,797.69. (*Id.*). It also informed Kelly White that the lien attached to all of his personal property. The Debtor admitted that the Levy Letter informed her that she could contest the levy on the NFS Account, but she never sent the OAG any information to prove that she actually did have an ownership interest in the NFS account. Instead, the Debtor testified that she directed her attorneys, Kunz and Grindstaff, to send proof to the OAG and relied on them to handle the matter.

2. Kunz's Testimony

Kunz testified that after he sent an email to the OAG on June 21, 2016, the levy on the NFS Account continued; thereafter, he had many conversations with employees of the OAG. According to Kunz, the OAG employees told him they were unsure about whether the Debtor was a joint owner of the account, and when he informed them that she was indeed a joint owner, they asked him to provide proof. Kunz, however, did not receive proof of joint ownership from his client until August 2016, just days before filing the Motion. Accordingly, he admitted that he never provided proof of joint ownership to the OAG and never provided the OAG with an account number for a joint account. (Hr'g at 11:55:44). Kunz stated that when he e-mailed an OAG employee, Marisa Thomas, he provided Kelly White's "IV-D case number," identified the Bankruptcy Case, and contested the garnishment of joint bank accounts at NFS. (Hr'g Debtor Ex.

1). The lien remained on the NFS Account after Kunz notified the OAG that the Debtor filed the Petition.

Although Kunz testified that he became aware of the NFS Account "on June 21 when [his] client came in" (Hr'g 12:01:30), he stated that, as of the date of the Hearing, he had not supplemented the record in the Bankruptcy Case to disclose the existence of the NFS Account. According to Kunz, the omission was an oversight that he intended to correct.[7]

3. Argument by Debtor's Counsel

Kunz argued that when the Debtor filed the Petition, the burden shifted to the OAG to ensure that it did not violate the automatic stay. When Kunz sent the e-mail to the OAG on June 21, 2016, notifying it that the Debtor filed the Petition, his notice was sufficient to put the OAG on notice that it was violating the automatic stay because it included the name of NFS, Kelly White's IV-D case number, and informed the OAG that the Debtor may be a joint owner of an account at NFS. To draw a comparison, Kunz noted that while the OAG did not find his notice of joint ownership sufficient, when Felan called NFS and NFS informed her that its previous information was incorrect and that the Debtor actually is a joint owner, NFS's information was sufficient to satisfy the OAG that the NFS Account is a joint account. (Hr'g OAG Ex. 8). Kunz contended that this demonstrates that the OAG waited two (2) months to make a telephone call to NFS that would have been sufficient proof of joint ownership, even though Kunz informed the OAG that the Debtor had a joint account at NFS. (Hr'g 12:28:20).

The Debtor did not disclose the existence of the NFS Account in the Schedules, and, as a result, the OAG would not have discovered its existence by conducting a routine search of the

[7] The day of the Hearing, the Debtor filed an amended Schedule A/B: Property (Dkt. 118), listing the NFS Account as an asset of the estate for the first time. (Dkt. 118 at 5).

record in the Bankruptcy Case. Kunz, however, argued that it was property of the estate subject to the automatic stay because estate property includes unscheduled assets. Thus, even though the NFS Account was not listed on the schedules, it was property of the estate and the automatic stay applied. The OAG had the burden to ensure that it did not violate the automatic stay. Kunz argued that the OAG violated the automatic stay when it levied the NFS Account even though Kunz sent an e-mail informing it that it the Debtor filed the Petition and that she may have a joint ownership interest in an account at NFS.

B. OAG

At the Hearing, Graydon argued that the OAG was acting pursuant to the State Court Order that required it to take certain actions to satisfy outstanding domestic support obligations. The lien it placed on the NFS Account arising from the State Court Order operated under Texas state law. The OAG was unwilling to violate the State Court Order without proof from the Debtor that she was a joint owner of an account at NFS, according to Graydon. No live testimony was offered by the OAG at the Hearing, but the OAG entered nine (9) exhibits into evidence without objection, including the following affidavits: (1) the Affidavit of Candace Woods (Hr'g OAG Ex. 6); (2) the Affidavit of Kelley Tesch (Hr'g OAG Ex. 7); (3) the Affidavit of Korissa Felan (Hr'g OAG Ex. 8); and (9) the Affidavit of Barry Brooks (Hr'g OAG Ex. 9).

Graydon noted that when the Debtor filed the Petition, she did not disclose the NFS Account, although she knew that she was a joint owner in September 2013, before the Petition date. Additionally, the Debtor did not disclose her interest in the NFS Account despite making several amendments to the Schedules. Even though the Debtor did not disclose the NFS Account in the Bankruptcy Case, Graydon argued that she is attempting to hold the OAG in contempt for

violating the automatic stay in regard to that account.

Graydon stated that although Kunz did e-mail the OAG on June 21, 2016, he only stated that the Debtor may be a joint owner on an account at NFS and did not identify any specific account. When the OAG checked its records, which were provided by NFS,[8] there was no indication that the Debtor had an ownership interest in any account at NFS. In child support matters, Graydon said that it is not uncommon to request proof from someone calling from another state. Graydon attempted to acquire proof from Kunz for seven (7) weeks in order to identify an account at NFS in which the Debtor held an interest, but Kunz failed to offer proof of ownership. After the Debtor failed to offer proof of ownership, the OAG contacted NFS, requesting confirmation. NFS then notified the OAG that the information it previously provided the OAG as to the NFS Account was incorrect, and the Debtor did have a joint ownership interest in the NFS Account. The OAG released the lien the next day. Graydon contended that it was not a willful violation of the automatic stay for the OAG to require the Debtor to provide proof that she had an ownership interest in the NFS Account before disregarding the State Court Order.

Discussion

In the Motion, the Debtor argued that the OAG should be held in contempt of court for violating the automatic stay of § 362. It appears that the Debtor sought relief under § 362(k) in the Motion. Before determining whether the OAG should be held in contempt or sanctioned, the Court must first determine whether the automatic stay applied to the NFS Account, an unscheduled asset. If it does, the Court will then determine whether the OAG willfully violated the stay by requiring proof of joint ownership of the NFS Account before removing the lien it placed on the

[8] 42 U.S.C. § 666(c)(1)(G) governs the exchange of data between NFS and the OAG. The OAG "developed a system of meeting the requirements of federal law . . ." (Resp. at 3).

NFS Account pursuant to the State Court Order.

I. Contempt in Bankruptcy

This Court has previously noted that a contempt action may be either criminal or civil in nature. *In re Adams,* 516 B.R. 361, 369 (Bankr. S.D. Miss. 2014). "If the intent behind the contempt order is to punish, then the order is for criminal contempt," but if "the intent of the contempt order is to 'coerce compliance with a court order or *to compensate another party for the contemnor's violation,*' the order is civil." *Id.* (quoting *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 612 (5th Cir. 1997)). The Court is authorized by § 105(a) to issue sanctions pursuant to its civil contempt power. *McKenzie v. Biloxi Internal Med. Clinic, P.A. (In re McKenzie),* Adv. No. 09-05006-NPO, 2010 WL 917262, at *3 (Bankr. S.D. Miss. Mar. 10, 2010) (citing *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613). The Fifth Circuit Court of Appeals had held that the "language of [§ 105] is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code." *Id.* (quoting *In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d at 613); *see also Harris v. Wash. Mut. Home Loans, Inc. (In re Harris)*, 297 B.R. 61, 70 (Bankr. N.D. Miss. 2003) ("[Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.") (quotation omitted).

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *Am. Airlines, Inc. v. Allied Pilots Ass'n,* 228 F.3d 574, 585 (5th Cir. 2000) (quoting *United States v. U.S. Mine Workers of Am.*, 330 U.S. 258,

303-04 (1947)). As this Court noted in *In re McKenzie*, "[a]ppropriate fines for civil contempt generally include the parties' actual damages incurred and reasonable attorney's fees." *In re McKenzie*, 2010 WL 917262, at *3 (quoting *French v. Am. Gen. Fin. Servs. (In re French)*, 401 B.R. 295, 314 (Bankr. E.D. Tenn. 2009)). The remedies to be awarded are "within the discretion of the court, and the party seeking contempt must put on credible evidence showing the amount of the loss sustained." *Id.* (quotations & citations omitted).

Because "the automatic stay is essentially a court-ordered injunction, any creditor who violates the stay may be held in contempt of court." *In re Adams*, 516 B.R. at 369. In *In re Adams*, a factually similar case, this Court addressed the debtors' motion for civil contempt for an alleged stay violation. In *In re Adams*, the debtors filed a motion to find a creditor in contempt, arguing that the creditor repossessed their vehicle in violation of the automatic stay. *Id.* at 366-67. The Court held that "[a]ny entity that *willfully* violates the automatic stay is subject to the bankruptcy court's civil contempt power." *Id.* at 369 (emphasis added). Further, in order for a violation of the automatic stay to be willful, "the creditor must act with knowledge of the stay." *Id.* The bankruptcy court may award damages to the debtor if it finds that the creditor is in contempt for a willful violation of the automatic stay. *Id.* Additionally, § 362(k) provides for an award of "actual damages, including costs attorneys' fees, and, in appropriate circumstances," punitive damages, for a willful violation of the automatic stay. 11 U.S.C. § 362(k)(1). In the Bankruptcy Case, the Court, therefore, must determine whether the OAG willfully violated the stay before it can address the proper disposition of the Motion. If the OAG did not act willfully, the Motion should be denied.

II. Property of the Estate

Immediately upon the filing of a bankruptcy petition, § 362 "operates as a stay of the commencement or continuation or all non-bankruptcy judicial proceedings against the debtor. The stay is automatic and springs into being immediately upon the filing of a bankruptcy petition." *Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F.3d 338, 343-44 (5th Cir. 2003) (quotations & citations omitted). The automatic stay "is extremely broad in scope and, aside from the limited exceptions of subsection (b), applies to almost any type of formal or informal action taken against the debtor or the property of the estate." 3 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed. 2016).

Section 541, which governs property of the estate, constitutes "an expansive definition of property that becomes 'property of the estate' when a debtor files a bankruptcy case." *In re Miller,* 347 B.R. 48, 52-53 (Bankr. S.D. Tex. 2006). Essentially, "any property right in which debtor had an interest when the bankruptcy case was filed becomes property of the estate," which includes "all legal or equitable interests of the debtor in property as of the commencement of the case." *Id.* (quotation omitted). "There is no requirement that the property be listed in the debtor's Bankruptcy Schedules; the property becomes property of the estate merely because the debtor had the property right on the date the bankruptcy case was filed." *Id.* Accordingly, although the NFS Account was unscheduled at the time the alleged violation of the automatic stay occurred, it was still property of the estate because the Debtor had an interest in the NFS Account at the time she filed the Petition. The automatic stay, therefore, applied to the NFS Account.

III. Automatic Stay

Once a bankruptcy petition is filed, the automatic stay arises, prohibiting creditors from

taking certain actions against the debtor or against property of the bankruptcy estate. 11 U.S.C. § 362. Section 362(a) "operates as a stay of acts including 'any act to obtain possession of property of the estate or of property from the estate or to *exercise control over property of the estate'* as well as 'any act to create, perfect, or enforce any lien against property of the estate." *Leverette v. Community Bank (In re Leverette),* Adv. No. 12-05005-KMS, 2013 WL 5350902, at *2 (Bankr. S.D. Miss. Sept. 25, 2013) (quoting § 362(a)(3),(4) (emphasis added)). The automatic stay is a fundamental protection afforded to the debtor by bankruptcy law and allows the debtor a "breathing spell" from his or her creditors. *Id.*; *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 301 (5th Cir. 2005). While the Bankruptcy Code provides for various remedies for a violation of the automatic stay, only a party that willfully violates the automatic stay may be held in contempt of court. *In re Adams,* 516 B.R. at 369.

Although the Debtor initially argued that the OAG removed funds from the NFS Account, Kunz stated at the Hearing that the NFS Account contained stock and the OAG authorized the stock to be sold. The Debtor, however, did not provide any proof to support her contention that stock was sold from the NFS Account. More specifically, there was no evidence that the OAG sold the stock from the NFS Account or that it directed any other entity or person to sell the stock. Ultimately, Kunz was unsure of who even had the stock. Nonetheless, the OAG violated the automatic stay by placing a lien on the NFS Account, in which it turned out that the Debtor did have an ownership interest. Although the OAG did violate the stay by placing a lien on the NFS Account, the Court finds, for the following reasons, that the violation was not willful and, therefore, the Motion should be denied.

A. Willful Violation Required

As the Court discussed in Section I, it is authorized to exercise its contempt powers for a willful violation of the automatic stay. 3 COLLIER ON BANKRUPTCY ¶ 362.12[2]. If a creditor's "conduct is willful, even if based upon advice of counsel, contempt is an appropriate remedy;" however, when a violation of the stay is inadvertent, contempt is not an appropriate remedy." *Id.* Further, a creditor "has a duty to undo actions taken in violation of the automatic stay," and its "[f]ailure to undo a technical violation may elevate the violation to a willful one." *Id.* Similarly, § 362(k) requires a stay violation to be appropriate in order for sanctions to be appropriate. Thus, the Motion should only be granted if the Court finds that the OAG's actions *willfully* violated the automatic stay.

A willful stay 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 Chesnut,* 422 F.3d at 302 (quotations omitted). The Fifth Circuit has held that there are three (3) elements for a willful violation claim under § 362(k): "(1) [the creditor] must have known of the existence of the stay; (2) [the creditor's] acts must have been intentional; and (3) [the creditor's] acts must have violated the stay." *Young v. Repine (In re Repine),* 536 F.3d 512, 519 (5th Cir. 2008) (citing *In re Chesnut,* 422 F.3d at 302). Accordingly, the Debtor was required to prove that the OAG knew that the stay existed, that it acted intentionally, and that its acts violated the automatic stay.

B. No Willful Violation Occurred

At the Hearing, a majority of the evidence and testimony centered on the first element of willfulness: whether the OAG knew that the automatic stay was in effect. The OAG does not

dispute that it placed a lien on the NFS Account. Instead, it argued that it did not know that the automatic stay was in effect because after conducting an investigation, it appeared that the Debtor was not a joint owner of the NFS Account. If the Debtor lacked an ownership interest in the NFS Account, the automatic stay would not have been applicable. The question, then, is whether Kunz's e-mails and telephone calls were sufficient to satisfy the knowledge requirement, even though the records initially provided to the OAG by NFS indicated that Kelly White was the sole owner of the NFS Account and the OAG lacked information proving ownership.

In *In re Johnson*, this Court was tasked with determining when a creditor has "knowledge" that an automatic stay is in effect. *Johnson v. Magee Rentals, Inc. (In re Johnson)*, 478 B.R. 235 (Bankr. S.D. Miss. 2012). The creditor disputed that the knowledge element of the three-prong test was satisfied, arguing that it will not rely on a debtor's word that he or she filed a bankruptcy petition, and instead required written confirmation. *Id.* at 240. According to the creditor, it received no paperwork from the bankruptcy court, the clerk, or the debtor's attorney notifying it that she had filed for bankruptcy. *Id.* at 242. Subsequently, the creditor took collection actions against the debtor. *Id.* at 243. The Court noted that there is a split of authority regarding when a creditor has knowledge of the existence of the automatic stay. *Id.* at 246. Generally, "[k]nowledge of a pending bankruptcy is considered the same as knowledge of the existence of the stay," but there is a split of authority regarding whether written notice is required. *Id.* (citing *In re Lile*, 103 B.R. 830, 836-37 (Bankr. S.D. Tex. 1989)).

Some courts have held that written confirmation of the filing of the bankruptcy petition is required. *Id.* (citing *Collier v. Hill (In re Collier)*, 410 B.R. 464, 472 (Bankr. E.D. Tex. 2009)). Others have found that oral notice of a pending bankruptcy case is all that is required. *Id.* (citing

In re Lile, 103 B.R. at 836). "At least one of those courts has reasoned that once a party receives notice of the filing of the petition, by any means, '[i]t is the responsibility of [the] part[y] stayed to ascertain whether a bankruptcy case has truly been commenced.'" *Id.* (citing *In re Freemyer Indus. Pressure, Inc.*, 381 B.R. 262, 267 (Bankr. N.D. Tex. 2002)). After considering both approaches, the Court adopted the rationale of those courts that have held that oral notice is sufficient to satisfy the "knowledge" element. *Id.* "Requiring written notice of the filing of a bankruptcy petition to establish 'knowledge' for purposes of § 362(k) would encourage a 'race to the courthouse,' which is antithetical to the twofold purpose of the automatic stay." *Id.* at 247. Because the creditor in *In re Johnson* was informed orally by the debtor that she had filed bankruptcy, the Court found that it had knowledge that she filed a bankruptcy petition. *Id.*

The Bankruptcy Case is distinguishable from *In re Johnson*. The OAG does not dispute that it had knowledge of the Bankruptcy Case. Accordingly, the question before this Court is whether, when a creditor relies on incorrect information provided by a financial institution, oral notice that does not identify a specific bank account is sufficient to satisfy the knowledge requirement regarding the applicability of the automatic stay. In *In re Johnson*, this Court held that when a debtor orally informs the creditor that she filed a bankruptcy petition, it becomes the creditor's responsibility to ascertain whether a bankruptcy case was actually initiated. *In re Johnson*, 478 B.R. at 246. Similarly, when a debtor orally informs a creditor that he or she is the joint owner an account subject to the automatic stay, the creditor bears the burden of determining whether the account actually is subject to the automatic stay. In *In re Leverette*, the bankruptcy court held that when a party has knowledge of a bankruptcy filing, that party has the duty "to seek further information which should reveal the applicability and scope of the automatic stay." 2013

WL 5350902, at *2 n.17 (citing *In re Lile*, 103 B.R. at 837).

In *In re Johnson*, the creditor made no attempt to verify the filing of a bankruptcy petition. In the Bankruptcy Case, the OAG satisfied its burden of seeking further information in order to determine the applicability and the scope of the automatic stay. Citing the Levy Letter, Kunz informed the OAG that any further actions to levy any joint bank account at NFS would violate the automatic stay. After receiving an e-mail from Kunz informing the OAG that the Debtor filed the Petition, the OAG requested proof of joint ownership since its records, provided by NFS, indicated that the NFS Account was owned solely by Kelly White. In fact, the Debtor has never provided proof of joint ownership to the OAG and even failed to include the NFS Account in the Schedules until after the Hearing. After failing to provide proof of joint ownership to the OAG, the Debtor filed the Motion. At that point, after relying on information furnished by NFS, the OAG contacted NFS directly to inquire about the Debtor's account. It was only then that NFS informed the OAG that the information it previously provided was incorrect and that the Debtor was a joint owner on the NFS Account. The day after receiving confirmation, the OAG released the lien on the NFS Account. As the Court noted previously, a creditor "has a duty to undo actions taken in violation of the automatic stay," and its "[f]ailure to undo a technical violation may elevate the violation to a willful one." 3 COLLIER ON BANKRUPTCY ¶ 362.12[2]. The OAG satisfied its obligation to undo its actions that violated the automatic stay by immediately releasing the lien when it learned that the Debtor was in fact a joint owner of the NFS Account. Its immediate release of the lien upon receiving confirmation mitigates the stay violation, and indicates that the violation was not willful.

At the Hearing, Kunz argued that the OAG found sufficient an oral representation by NFS

that the Debtor was a joint owner of the NFS Account, but it had failed to accept his oral representations that the Debtor was a co-owner of the NFS Account. According to Kunz, if the oral representation from NFS satisfied the OAG, then Kunz's telephone calls should have satisfied it as well. The Court, however, notes a fundamental difference between receiving confirmation directly from a financial institution that an individual has an ownership interest in an account and the earlier oral representations of the individual's attorney that she *may* have an interest in an account. Additionally, NFS identified the NFS Account specifically, whereas neither the Debtor nor her attorneys identified a specific account at NFS in which she had a joint ownership interest. The Court finds that when the OAG directly contacted NFS in August, it was reasonable in relying on the oral representations of NFS that the Debtor has an ownership interest in the NFS Account.

The Court finds that the OAG did not have knowledge that the automatic stay applied to it until it received confirmation from NFS on August 22, 2016, that the Debtor was a co-owner of the NFS Account. Although knowledge of the Bankruptcy Case is generally sufficient, the aforementioned facts mitigate a finding of willfulness. The OAG previously investigated Kunz's claims that the Debtor had an interest in the account, and reasonably relied on information provided by NFS that showed she was not a joint owner. Because the OAG satisfied its burden by seeking information regarding the applicability of the automatic stay and removed the lien the day after receiving confirmation, the Court finds that it lacked knowledge that the automatic stay applied to the NFS Account until August 22, 2016. Accordingly, its violation of the stay was not willful and the OAG cannot be held in contempt of court.

Conclusion

A finding that any purported violation of the automatic stay was willful is a prerequisite to

holding the OAG in contempt of court and issuing sanctions or awarding damages to the Debtor. The Court finds that any actions the OAG took in violation of the automatic stay were not willful. The OAG lacked knowledge that the automatic stay applied to the NFS Account until August 22, 2016, when it called NFS and received confirmation that the Debtor had a joint ownership interest in the NFS Account. The OAG previously took steps to determine the applicability of the automatic stay and released the lien the day after receiving confirmation from NFS.

This entire dispute could have been avoided. Had the Debtor or her attorneys properly disclosed the NFS Account in the Schedules or provided the NFS Account number to the OAG when it requested verification, the OAG would have been able to identify the NFS Account and remove the lien. Instead, NFS initially provided incorrect information to the OAG, and, because the OAG had no contrary evidence, it reasonably relied on the information provided by NFS. The OAG then placed the lien on the NFS Account pursuant to the State Court Order. The Court finds that the OAG was reasonable in verifying joint ownership of the NFS Account before disregarding the State Court Order. Accordingly, any violation of the stay was not willful, and the OAG should not be held in contempt or sanctioned under § 362(k). Thus, the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##