

**United States Bankruptcy Court  
Northern District of Illinois  
Western Division**

**Transmittal Sheet for Opinions for Posting**

**Will this opinion be Published? No**

**Bankruptcy Caption: In re Renee M. Budwick**

Bankruptcy No. 13-83623

**Adversary Caption: N/A**

Adversary No. N/A

**Date of Issuance: March 30, 2016**

**Judge: Thomas M. Lynch**

**Appearance of Counsel:**

Attorney for Debtor: Thomas E. Laughlin

**United States Bankruptcy Court, Northern District of Illinois**

<b>NAME OF ASSIGNED JUDGE</b>	Thomas M. Lynch	<b>CASE NO.</b>	13-B-83623
<b>DATE</b>	March 30, 2016	<b>ADV. NO.</b>	
<b>CASE TITLE</b>	In re: Renee M. Budwick, Debtor.		
<b>TITLE OF ORDER</b>	ORDER		

**DOCKET ENTRY TEXT**

The Debtor Renee Budwick's Amended Motion to Find Mark D. Mercer in Contempt (ECF No. 33) is GRANTED IN PART. The matter shall be continued to May 5, 2016 at 10:00 AM at Courtroom 3100, 327 South Church Street, Rockford, IL, 61101, for evidentiary hearing on damages.

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**STATEMENT**

**I. FACTUAL SUMMARY<sup>1</sup>**

The Debtor, Renee Budwick, filed a voluntary petition under Chapter 7 on October 24, 2013. A Section 341 meeting of creditors was held on November 21, 2013, the Chapter 7 Trustee filed a no-asset report on November 22, 2013, the Debtor received a discharge on January 22, 2014, and the case was closed on January 27, 2014.

The Debtor's initial bankruptcy schedules did not list her ex-husband, Mark Mercer, or his solely owned real estate company, River District Apartments, LLC, as a creditor. Nor did her

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<sup>1</sup> The following sets forth the Court's findings of fact as required by Fed. R. Bankr. P. 7052. To the extent any findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

statement of financial affairs list the pending divorce action between her and Mr. Mercer that was commenced in 2012. Somehow, however, Mr. Mercer became aware of the Debtor's bankruptcy case within a month after the petition date and shortly before the bankruptcy case closed he filed an adversary complaint against her on January 17, 2014 through attorney Richard Larsen, seeking to find a debt non-dischargeable under Section 523(a)(6). Attorney Larsen represented Mr. Mercer in his own bankruptcy case before this court – a voluntary Chapter 11 case filed November 6, 2012, which was confirmed on May 19, 2014. (Case No. 12bk84188.)<sup>2</sup> A final decree was entered in the Chapter 11 case on June 18, 2014.

The January 17, 2014 complaint alleges that on February 21, 2012, while Mr. Mercer and the Debtor were still married but living separately, the Debtor entered Mr. Mercer's company's office and without authorization took possession of approximately \$35,000 in cash from the office. Mr. Mercer's company, River District Apartments, rents apartments and homes to the general public in Rockford, Illinois. Mr. Mercer, the company's manager and operating officer as well as sole owner, alleges that the funds taken were rent payments. The funds, he alleges, were to be deposited and used to pay property taxes on Mr. Mercer's rental properties managed by the company. The Debtor filed her answer to the complaint on March 12, 2014.

On June 27, 2014, the Debtor moved to reopen her bankruptcy case for the purpose of disclosing the ongoing marital dissolution action in the Circuit Court of the Seventeenth Judicial Circuit Winnebago County, Illinois. On the same day, the Debtor filed a motion asking this court to "abstain from deciding issues of marital property and other related issues in the marital dissolution case, those being issues uniquely within the province of the State Court on the basis of State Law." The court granted the motion to reopen, a Chapter 7 Trustee was reappointed, and on July 29, 2014, the court granted the motion to abstain. The order granting abstention provided:

1. The parties may proceed with the dissolution action currently pending in the Circuit Court of the 17th Judicial Circuit Winnebago County, Illinois as Case No. 12 D 229 consistent with the appropriate local and state rules and the statutes of the State of Illinois.

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<sup>2</sup> Mr. Mercer's initial schedules listed Renee Budwick as a spouse or former spouse in response to SOFA question 16. But, neither the schedules nor the SOFA listed any debt to or from Ms. Budwick, nor did either mention the divorce proceedings. Neither his Amended Schedule F filed 2/26/13 (Case No. 12-B-84188, ECF No. 51), nor Amended Schedule B and Amended SOFA filed 3/12/13 mentioned the divorce case or any debt to or from Ms. Budwick. (ECF Nos. 67, 68.) Mr. Mercer's Amended Disclosure Statement filed December 12, 2013 mentioned that he "also has a potential claim against his estranged spouse Renee Budwick in the sum of \$32,000.00. This claim will not likely be collectable as she is in bankruptcy, case no. 13-83623." (ECF No. 161.)

2. This Court abstains to the Court of said Circuit and the Judge assigned to that case for entry of Orders consistent with any findings of fact and conclusions of law it shall make after appropriate hearings and/or argument consistent with all the general terms of 750 ILSC 5/501 et seq. and specifically, but not limited to the following sections: Section 5/501 Temporary Relief, Section 5/501.1 Dissolution Action Stay, Section 5/502 Agreement, Section 5/503 Disposition of Property, Section 5/504 Maintenance, Section 5/505 Child Support; Contempt; Penalties, and Section 5/508 Attorney's Fees; Client's Rights and Responsibilities Respecting Fees and Costs.
3. The Debtor shall request of the State Court Judge that he not enter a final and appealable Order on any issue without the Proposed Order being reviewed by this Court for review of the affect of the Bankruptcy Code on his rulings, or if any.
4. The Debtor shall request her dissolution counsel to provide bankruptcy counsel with copies of all proceedings in the dissolution action, copies of which Orders shall be provided to the Interim Trustee.
5. The Interim Bankruptcy Trustee is authorized to intervene in the dissolution case if he or she deems it to be appropriate. If the Trustee, after appropriate investigation, determines that this bankruptcy case is a no-asset case, he may issue a no-asset report. If such a no-asset report is filed, the case will proceed in the normal matter according to local and federal bankruptcy rules of procedure.

(ECF No. 25.) The parties represented to this court that the liability for the \$35,000 conversion claim alleged in the adversary complaint would be addressed by the state court in the divorce proceeding, and therefore the adversary proceeding remains pending before this court in accordance with the abstention order.

Although the motion to reopen the case stated that the main purpose was to disclose the pending marital dissolution action, the Debtor never actually amended her Statement of Financial Affairs or schedule of assets to schedule that litigation. She did amend her Schedule F to list Mark Mercer and River District Apartments on May 13, 2015, disclosing claims of \$35,000 to River District Apartments and \$32,000 to Mark Mercer, and a personal injury claim of unknown value to Mark Mercer. (ECF No. 37.)

On an unspecified date, Mr. Mercer sought help from attorney Jim Hursh. On or about January 26, 2015, attorney Hursh filed a "complaint in theft" against the Debtor in the Winnebago County Circuit Court on behalf of River District Apartments, LLC, for the alleged theft of \$35,000 from River District Apartments on February 21, 2012. This was the same alleged incident at issue in the pending adversary proceeding brought by Mr. Mercer individually. Mr. Mercer testified

that attorney Hursh had told him that there was a “two-year”<sup>3</sup> statute of limitations for theft and that Mr. Mercer was unaware that filing the action would violate the automatic stay. About a week after the state court complaint was filed, Mr. Mercer was contacted by his bankruptcy counsel, attorney Larson, who informed him that the filing was in violation of the automatic stay. Mr. Mercer testified that he then contacted attorney Hursh and told him to cease all actions because they were in violation of the automatic stay. Although Mr. Mercer testified that the state court complaint was dismissed within one week of it being filed, such testimony was contrary to the written evidence presented by the Debtor. The Debtor submitted a copy of a Rule 222 Disclosure by Attorney Hursh which is stamped by the clerk of the circuit court as having been filed on February 23, 2015, and the affidavit of attorney Hursh filed in support of that Disclosure which is dated February 20, 2015. (ECF No. 29, Exs. F, G; Pl.’s Ex. 1.) Mr. Mercer presented no written evidence that the state court action was ever actually dismissed, and the Rule 222 disclosure of attorney Hursh seems to indicate that, contrary to Mr. Mercer’s recollection at trial, the matter was still being pursued in the state court by Mr. Mercer almost a month after the complaint was filed. The Debtor testified that she was served with the complaint in January 2015 and told her attorney about it, but never had to personally appear in the case.

On May 4, 2015, Mr. Mercer filed a small claims complaint for battery in the Winnebago County Circuit Court against the Debtor, seeking damages of \$9,900. At the evidentiary hearing before this court on the pending motion, Mr. Mercer testified that the complaint sought damages for injuries he incurred when Ms. Budwick allegedly punched him in the nose around May 10, 2013. Mr. Mercer claimed that he filed the small claims complaint *pro se* after speaking with a personal injury lawyer. According to Mr. Mercer, the lawyer told him that if he did not file the complaint by May 10, 2015, he would lose his right to bring the claim.<sup>4</sup> He further claimed that, after independently researching the issue, he was under the mistaken belief that tort claims were automatically non-dischargeable. Mr. Mercer testified that he was contacted by his bankruptcy attorney within a week after the small claims filing and learned that, because he had not sought to except the claim from discharge in the bankruptcy case, he needed to stop the case. He then

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<sup>3</sup> Mr. Mercer testified that he believed there was a two-year statute of limitations, but the dates are consistent with a three-year period. In Illinois the general criminal statute of limitations for theft is three years if a felony or 18 months if a misdemeanor. 720 ILCS 5/3-5(b). The statute of limitations for civil conversion is five years. 735 ILCS 5/13-205.

<sup>4</sup> The Illinois civil statute of limitations for actions for damages for an injury to person is 2 years. 735 ILCS 5/13-202.

prepared a motion to dismiss the small claims complaint which he filed on May 21, 2015. (Def.'s Ex. 2.) However, prior to Mr. Mercer preparing and serving his motion to dismiss, the Debtor's counsel filed her own motion to dismiss on May 20, 2015, which also sought sanctions under Illinois Supreme Court Rule 137(a). (Def.'s Ex. 6.) At the first return date on the small claims complaint, May 26th, Mr. Mercer orally asked the state court to dismiss the complaint. The Debtor's counsel in the matter, Laura Hunt, objected to dismissal and asked the court to sanction Mr. Mercer, and the state court continued the matter to June 26, 2015, and then again to July 27, 2015, on the Debtor's counsel's request. On July 27, 2015, the state court dismissed the small claims matter with prejudice and ordered Mr. Mercer to pay \$750 in attorneys' fees and \$187 in litigation costs to the Debtor's counsel attorney Hunt. (Order, Def.'s Ex. 5.) On September 3, 2015, the state court in the small claims action found that Mr. Mercer had failed to comply with the July 27th order, and entered a judgment order, *nunc pro tunc* to July 27, 2015, for the \$750 plus costs of suit. (Def.'s Ex. 7.) The evidence presented thus far in this case is inconclusive as to whether Debtor incurred any legal fees or other expenses in connection with the small claims matter beyond the amount of the state court's award.

On March 27, 2015, the Debtor filed her motion for civil contempt against Mr. Mercer, arguing that he willfully violated the automatic stay by causing the January 26, 2015 complaint against the Debtor to be filed. (ECF No. 29.) On May 8, 2015, the Debtor amended her motion, adding an additional claim for his commencement of the May 4, 2015 small claims action. The parties have stipulated that this court has jurisdiction to decide and enter a final order on the amended motion. (ECF No. 56.) The court held an evidentiary hearing on December 8, 2015, at which the Debtor and Mark Mercer were the only witnesses. After closing argument, Mr. Mercer's counsel represented that Mr. Mercer had filed a motion to reconsider the sanctions order of the small claims court, and that such matter had been set for December 11, 2015. However, at the next status hearing before this court on February 8, 2016, the parties indicated that there were no new developments since the trial before this court.

## II. JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. A “court retains jurisdiction to enforce its injunctions,” and therefore this court has jurisdiction to enforce the injunction arising out of this court’s order of discharge. *Cox v. Zale Del., Inc.*, 239 F.3d 910, 917 (7<sup>th</sup> Cir. 2001). Such injunction arises under 11 U.S.C. § 524 and is therefore a matter arising under title 11 and is a “core proceeding” under 28 U.S.C. § 157(b)(2)(I) and (O). Because matters such as this “stem[] from the bankruptcy itself,” this court has constitutional and statutory authority to enter a final order in this proceeding. *Stern v. Marshall*, 546 U.S. 500 (2011). Additionally, the parties have expressly consented to this court entering final orders in this matter. (Stipulation, ECF No. 56.)

### III. DISCUSSION

Although the Debtor argues that Mr. Mercer violated the automatic stay, the court takes judicial notice that before either event at issue here the court issued a discharge order in the Debtor’s bankruptcy case on January 22, 2014. (ECF No. 14.) The Debtor does not allege that Mr. Mercer took any action against property of the estate, and the automatic stay as to acts other than acts against property of the estate terminates upon the grant of a Chapter 7 discharge. 11 U.S.C. §362(c)(2)(C). Both the state court complaints were filed by Mr. Mercer after the Debtor received a discharge and, therefore, if he has committed a violation, it is a violation of the discharge.

Discharge in a bankruptcy case “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived.” *In re Taylor*, 793 F.3d 814, 819 (7<sup>th</sup> Cir. 2015) (citing 11 U.S.C. § 524(a)(2)). Because Section 524(a)(2) not only prohibits but enjoins collection suits, a “creditor who attempts to collect a discharged debt is violating not only a statute but also an injunction and is therefore in contempt of the bankruptcy court that issued the order of discharge.” *Cox v. Zale Del., Inc.*, 239 F.3d 910, 915 (7<sup>th</sup> Cir. 2001). Through its contempt powers, the bankruptcy court is permitted to “sanction a party for violating the discharge injunction only if the party took some action prohibited by § 524(a)(2)—i.e., an action to collect, recover or offset any [discharged] debt ... of the debtor.” *Taylor*,

793 F.3d at 819. Although it is unsettled whether bankruptcy courts have criminal contempt powers, “[t]heir power to determine civil contempt is explicitly conferred.” *Zale Del.*, 239 F.3d at 916-17 (citing Fed. R. Bankr. P. 9020(b); 11 U.S.C. §105).<sup>5</sup>

A violation of the discharge injunction must be willful to warrant a finding of civil contempt and sanctions. *In re Montgomery*, No. 12 C 9328, 2013 WL 1943293, at \*4 (N.D. Ill. May 7, 2013) (citing *In re Pincombe*, 256 B.R. 774, 782 (Bankr. N.D. Ill. 2000)). Willfulness “requires that the creditor knows about the discharge injunction and intends to commit the acts that violate the injunction.” *Id.* (citing *In re Andrus*, 184 B.R. 311, 315 (Bankr. N.D. Ill. 1995)).<sup>6</sup> Standard remedies for a violation of the discharge “include restitution of the costs of defending or responding to the creditor's actions, reasonable attorney's fees, and compliance with the discharge injunction.” *Montgomery*, 2013 WL 1943293, at \*6 (citing *Cox*, 239 F.3d at 916; *In re Sekendur*, 334 B.R. 609, 622 (Bankr. N.D. Ill. 2005)). Courts have awarded both attorneys’ fees incurred in defending the underlying action brought in violation of the discharge and fees incurred in bringing the action for contempt. *Id.*

Here, it is undisputed that after the Debtor received her discharge, Mr. Mercer directly or through counsel commenced two separate actions to establish and recover pre-petition claims against the Debtor as a personal liability. Mr. Mercer argues that the River District Apartments action is potentially excepted from the discharge because his adversary proceeding seeking exception of his debt for the allegedly converted funds under Section 523(a)(6) is still pending. But it is undisputed that the only plaintiff named in the state court action is River District Apartments, LLC, while the only plaintiff named in the adversary proceeding is Mr. Mercer individually.

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<sup>5</sup> The court in *Zale Delaware*, while noting that punitive damages are expressly authorized for violations of the automatic stay under Section 362(k), “saved ... for another day” both the issue of whether bankruptcy courts have criminal contempt powers and whether bankruptcy courts can issue punitive damages for the violation of the *discharge* injunction. 239 F.3d at 917.

<sup>6</sup> “Decisions vary as to whether the creditor's subjective intent is relevant to ‘willfulness.’” *Id.* (Comparing *Taboriski v. U.S. I.R.S.*, 141 B.R. 959, 965–67 (N.D. Ill. 1992)) (specific intent not required to find willful violation of automatic stay); *Pincombe*, 256 B.R. at 783 (courts should not focus on the subjective intent of alleged violators in determining whether a violation of the post-discharge injunction is willful); *Helms v. Bridges (In re Bridges)*, No. 89 B 16271, 1993 WL 98666, at \*5 (Bankr. N.D. Ill. Mar. 30, 1993) (creditor's mistaken belief his actions were justified does not preclude court from finding violation of automatic stay), with *In re Ban*, 457 B.R. 733, 738 (Bankr. N.D. Ill. 2011) (denying sanctions because of condominium association's good-faith belief that debt was subject to a discharge exception); *OakFabco, Inc. v. Am. Standard, Inc. (In re Kewanee Boiler Corp.)*, 297 B.R. 720, 736–37 (Bankr. N.D. Ill. 2003) (denying contempt sanctions based on creditor's good-faith, colorable basis for asserting there had been no discharge).



Pursuant to Section 523(c)(1) of the Bankruptcy Code, except as provided in Section 523(a)(3)(B), a debtor is discharged from a debt that would otherwise be non-dischargeable under Section 523(a)(2), (4) or (6) “unless, *on request of the creditor to whom such debt is owed*, and after notice and a hearing, the court<sup>7</sup> determines such debt to be excepted from discharge.” 11 U.S.C. § 523(c)(1) (emphasis added). Pursuant to Bankruptcy Rule 4007(c) such complaint must be filed with the bankruptcy court “no later than 60 days after the first date set for the meeting of creditors under § 341(a). Fed. R. Bankr. P. 4007(c). The Debtor’s 341 meeting was set, held and concluded on November 21, 2013. Although Mr. Mercer filed his adversary complaint on January 17, 2014, within 60 days of the meeting, the complaint does not include River District Apartments as a plaintiff, and makes no reference to the alleged physical attack at issue in his small claims complaint.<sup>8</sup>

Section 523(c)(1) has an exception for certain unscheduled debts made non-dischargeable by Section 523(a)(3)(B). That provision excepts from discharge a debt “neither listed nor scheduled under Section 521(A)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit ... if such debt is of a kind specified in [Section 523(a)(2), (4) or (6)], timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, *unless such creditor had notice or actual knowledge of the case in time for such timely filing and request*.” 11 U.S.C. § 523(a)(3) (emphasis added). The fact that Mr. Mercer was able to timely file his own adversary complaint under Section 523(a)(6) with respect to the alleged theft or conversion of funds establishes that he had actual knowledge of the bankruptcy in time to file an adversary complaint either with respect to the alleged battery or on behalf of River District Apartments, LLC. Mr. Mercer’s knowledge of the bankruptcy can be

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<sup>7</sup> The “court” referenced in Section 523 is the bankruptcy court, which has sole jurisdiction to make such determination. *Klingman v. Levinson*, 831 F.2d 1292, 1294 (7<sup>th</sup> Cir. 1987) (citing *Brown v. Felsen*, 442 U.S. 127 (1979)) (dischargeability of debts of the type described in Sections 523(a)(2), (4) and (6) “was an issue that Congress intended the bankruptcy courts, rather than the state courts, to decide”).

<sup>8</sup> Mr. Mercer cannot now save at least the small claims claim by attempting to amend the timely adversary complaint. The small claims count cannot relate back to the date of the original pleading since it is not a claim “that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading.” *Citizens for Appropriate Rural Roads v. Foxx*, 2016 WL 828148 (7<sup>th</sup> Cir. Mar. 3, 2016) (citing Fed. R. Civ. P. 15(c)(1)(B)). The case may be different for the River District Apartments claim. *See Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1018 (7<sup>th</sup> Cir. 1988); *Staren v. Am. Nat’l Bank & Trust Co. of Chi.*, 529 F.2d 1257, 1263 (7<sup>th</sup> Cir. 1976) (substitution of corporate plaintiff for individual plaintiff on essentially same claim after statute of limitations has run “is not significant when the change is merely formal and in no way alters the known facts and issues on which the action is based.”). But Mr. Mercer made no attempt to amend the adversary complaint prior to commencing the state court action.

imputed to River District Apartments, LLC, since he is the sole owner, manager and operating officer of that entity.

Mr. Mercer argues that, even if neither claim at issue in the state court actions was in fact excepted from discharge, he *believed* the claims to be nondischargeable and relied on counsel in so concluding. After weighing the testimony of Mr. Mercer, the court finds this argument to lack credibility. First, if he lays blame on state court counsel, it is notable that Mr. Mercer did not call attorney Hurst as a witness. As to the attorney he supposedly talked with before filing the small claims complaint, Mr. Mercer did not even present evidence of his or her name. Moreover, the testimony of Mr. Mercer showed him to be sufficiently sophisticated to understand the discharge injunction. Mr. Mercer is experienced in business, owning his own real estate business, which rents to multiple tenants. As a general matter, one would hope that a landlord – who might at some point have tenants that file for bankruptcy – would have some knowledge of the discharge of debts in bankruptcy. But even if none of his tenants had ever filed for bankruptcy, Mr. Mercer is no stranger to bankruptcy, having successfully navigated his own Chapter 11 case through to confirmation shortly before he committed the acts at issue here.

Moreover, at the time Mr. Mercer commenced the state court actions, he was represented by bankruptcy counsel in this very bankruptcy case for his adversary proceeding against Ms. Budwick to find a debt non-dischargeable. Through the adversary complaint, Mr. Mercer's attorney appeared of record in this bankruptcy case prior to the discharge. Thus, his attorney was on the service list of those who received notice of the discharge order from the Clerk's office. (ECF No. 15.)<sup>9</sup> It is simply beyond belief that he did not understand the nature of the discharge or that he was prohibited from commencing state court actions against the Debtor on prepetition claims when he was represented by bankruptcy counsel and had in fact properly filed an adversary complaint seeking to find one of his debts nondischargeable. But even if the court were to give Mr. Mercer all benefit of the doubt with respect to the January 26, 2015 complaint, there is simply no possible excuse for the May 4, 2015 small claims complaint. Before filing the small claims

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<sup>9</sup> "It is well established that notice or knowledge by an attorney acquired during the time he is acting within the scope of his employment is imputed to his client." *In re Snider Farms, Inc.*, 125 B.R. 993, 998 (Bankr. N.D. Ind. 1991) (citing *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 633–34 (7th Cir.1986)).

complaint, not only had Mr. Mercer's bankruptcy counsel specifically warned him that the January complaint had to be dismissed and that he could not file such complaints without leave of the bankruptcy court, but the Debtor had already filed the pending motion for contempt against him. This, more than anything, shows that Mr. Mercer was acting in willful disregard of the discharge injunction when he filed or caused to be filed both state court complaints.

Having found that Mr. Mercer willfully violated this court's discharge order, the court is prepared to hold him in contempt. However, there remains the question of damages and how Mr. Mercer may purge himself of contempt. Although some evidence was presented as to the costs incurred by the Debtor in defending against the small claims count and in prosecuting this motion, there remain several factual questions for this court, such as the status of compliance with the state court's sanctions order and the time spent by counsel at trial. The matter will therefore be continued for further hearing on damages.

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Thomas M. Lynch  
United States Bankruptcy Judge