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JUN 28 2012

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re:	)	BAP No.	NV-11-1429-PaDKi
	)		
IRENE MICHELLE SCHWARTZ-TALLARD,	)	Bk. No.	07-11730-LBR
	)		
Debtor.	)		
	)		
_____	)		
IRENE MICHELLE SCHWARTZ-TALLARD,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
AMERICA'S SERVICING COMPANY,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on June 15, 2012,  
at Las Vegas, Nevada

Filed - June 28, 2012

Appeal from the United States Bankruptcy Court  
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Appearances: Christopher Burke, Esquire argued for appellant  
Irene Michelle Schwartz-Tallard; Andrew Martin  
Jacobs, Esquire of Snell & Wilmer LLP argued for  
Appellee America's Servicing Company.

\_\_\_\_\_

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:  
2

3 Chapter 13<sup>1</sup> debtor Irene Michelle Schwartz-Tallard ("Debtor")  
4 appeals the order of the bankruptcy court denying her Motion for  
5 Attorney Fees and Costs from America's Servicing Company ("ASC")  
6 for Defending Appeal. We REVERSE and REMAND.

7 **I. FACTS**

8 Debtor filed a chapter 13 petition on March 30, 2007. Among  
9 Debtor's listed secured creditors was ASC, a company that serviced  
10 a loan secured by a mortgage on Debtor's home in Henderson, Nevada  
11 (the "Property"). Though Debtor had made all post-petition  
12 monthly mortgage payments, on February 27, 2009, ASC filed a  
13 motion for relief from the automatic stay in the bankruptcy case,  
14 erroneously claiming Debtor owed mortgage payments for January and  
15 February 2009. Debtor, who was not informed about ASC's stay  
16 relief motion by her former counsel, did not oppose the motion,  
17 and the bankruptcy court entered an order terminating the  
18 automatic stay on April 6, 2009.

19 When Debtor attempted to make her April 2009 mortgage  
20 payment, ASC returned it with a letter indicating her loan was in  
21 "foreclosure status." Debtor called ASC, and its representative  
22 told her the loan status changed when she missed the January and  
23 February payments. Debtor challenged ASC's assertion that she had  
24 defaulted, and provided ASC's representative with the check  
25 numbers she used to make the January and February payments. With  
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27 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 those numbers, ASC's representative located a record of the  
2 payments and admitted a mistake had been made.

3 After retaining new counsel, Debtor filed a motion to set  
4 aside the stay relief order and to reinstate the stay in the  
5 bankruptcy court on May 6, 2009. ASC did not oppose, and the  
6 bankruptcy judge orally granted Debtor's motion at a hearing held  
7 on May 13, 2009, at which ASC did not appear. On May 14, Debtor  
8 sent ASC checks for the April and May 2009 mortgage payments,  
9 along with an explanation that the bankruptcy court had reinstated  
10 the stay on May 13. ASC returned those checks on May 18, stating  
11 it could not accept them because the funds were not certified. On  
12 May 20, ASC caused the Property to be sold at a trustee's  
13 foreclosure sale. The bankruptcy court entered an order  
14 reinstating the stay on June 3, 2009.

15 On June 9, Debtor filed a motion seeking monetary sanctions  
16 against ASC for its willful violation of the automatic stay (the  
17 "Sanctions Motion"). Debtor's sole argument<sup>2</sup> was that sanctions  
18 were appropriate under § 362(k) because ASC had willfully violated  
19 the stay by selling Debtor's home at the trustee's sale on May 20,  
20 even though the bankruptcy court, on May 13, had orally granted

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21  
22 <sup>2</sup> Debtor's argument in the Sanctions Motion was somewhat  
23 vague. In identifying how she believed ASC had violated the stay,  
24 Debtor alleged:

25 In this matter, though as of May 13, 2009 [, ASC]  
26 clearly had actual notice that it was the Court's intent  
27 that the automatic stay be reinstated, [it] blatantly  
28 disregarded the court's instruction and continued  
foreclosure efforts. This type of callous disregard to  
the authority of the court and clear mandates of the  
statutes as set forth in the Bankruptcy Code cannot and  
should not be tolerated.

28 Debtor's Motion for Sanctions at 7.

1 her motion to reinstate the stay. Debtor attached to her motion a  
2 copy of a May 28, 2009, Three Day Notice to Quit served on her by  
3 ASC; a May 28, 2009, Notice of New Ownership that ASC had posted  
4 on the Property; and her affidavit describing how the Notice of  
5 New Ownership had affected her family. Debtor's motion and  
6 supporting documents did not indicate that she was seeking  
7 sanctions under any authority other than § 362(k).

8 In response to Debtor's Sanctions Motion, ASC argued that the  
9 stay had not been reinstated until June 3, 2009, when the  
10 bankruptcy court entered the order reinstating the stay.  
11 Therefore, ASC contended, its actions targeted by Debtor, which  
12 occurred between May 13 and June 3, were not taken in violation of  
13 the stay.

14 The bankruptcy court conducted the hearing on Debtor's  
15 Sanctions Motion on January 7, 2010. At the hearing, it came to  
16 light that during the eight months since the bankruptcy court's  
17 stay-reinstatement hearing, ASC had taken no action to set aside  
18 the foreclosure sale or to reconvey the Property to Debtor.<sup>3</sup> At  
19 the conclusion of the January 7 hearing, the bankruptcy court  
20 found ASC had violated the automatic stay. The court decided  
21 that, even if ASC did not learn of the stay reinstatement until  
22 June 3, when the reinstatement order was entered, ASC violated the  
23 stay by not acting to reconvey the Property to Debtor once ASC  
24 discovered that the foreclosure sale had occurred in violation of  
25 the stay. The bankruptcy court concluded that imposition of

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27 <sup>3</sup> The lender credit bid at the May 20, trustee's sale, and  
28 held title to the Property on January 7. The Property was finally  
reconveyed to Debtor on March 3, 2010.

1 sanctions against ASC was appropriate under § 362(k).

2 In addition, the bankruptcy court awarded sanctions against  
3 ASC under Rule 9011. Because Debtor had made her January and  
4 February 2009 mortgage payments, and because ASC's stay relief  
5 motion represented that those payments had not been made, the  
6 bankruptcy court found that ASC had engaged in sanctionable  
7 conduct under Rule 9011 by filing and pursuing a "false motion."<sup>4</sup>

8 On February 17, 2010, the bankruptcy court entered an order  
9 (the "Stay Violation Order") incorporating its January 7 oral  
10 findings of fact and conclusions of law.<sup>5</sup> According to the  
11 court's Stay Violation Order, because ASC violated the automatic  
12 stay and Rule 9011, Debtor was entitled to recover \$40,000 for  
13 emotional distress and economic damages; \$20,000 for punitive

14 \_\_\_\_\_  
15 <sup>4</sup> At the hearing on Debtor's Sanctions Motion, the  
16 bankruptcy court mistakenly indicated that Rule 9011 had been  
17 alleged in Debtor's motion as one source for the court's authority  
18 to impose sanctions. Debtor's attorney indicated he had asked for  
19 Rule 9011 sanctions in his "pretrial brief." To be precise,  
20 however, the brief, filed a mere three days before the hearing on  
21 Debtor's Sanctions Motion, contended that the bankruptcy court  
22 could "hold a separate hearing and impose sanctions under  
23 Rule 9011(c)(1)(B), if Rule 9011(b) is violated." Pretrial Brief  
24 in Support of Motion for Contempt for Violation of the Automatic  
25 Stay at 7, Bankr. No. BK-S-07-11739-LBR, Dkt. No. 100 (emphasis  
26 added). It therefore appears clear that ASC did not have  
27 effective notice that Rule 9011 may be invoked by Debtor as a  
28 potential legal basis for imposing sanctions against ASC at the  
January 7 hearing.

23 <sup>5</sup> The Stay Violation Order, submitted by Debtor's counsel,  
24 was docketed as an order concerning "Debtor's Motion for Contempt  
25 for Violation of the Automatic Stay and Violation of  
26 F.R.B.P. 9011." Of course, no such motion had ever been filed  
27 with the bankruptcy court. While the bankruptcy court imposed  
28 sanctions against ASC under both § 362(k) and Rule 9011, Debtor's  
motion never referenced Rule 9011. The District Court, in  
reviewing an appeal of the Stay Violation Order, also found that  
"[t]he motion itself nowhere mentions Rule 9011, but only § 362."  
America's Servicing Co. v. Schwartz-Tallard, 438 B.R. 313, 320 (D.  
Nev. 2010).

1 damages; and \$20,000 in attorneys' fees. ASC was also ordered to  
2 reconvey the Property to Debtor within two days.

3 ASC appealed the Stay Violation Order on March 2, 2010, to  
4 the District Court. The District Court entered its decision on  
5 September 14, 2010. See Schwartz-Tallard, 438 B.R. 313. In  
6 regard to the stay violation, the District Court decided that ASC  
7 knew, or had received notice, that the stay had been ordered  
8 reinstated by the bankruptcy court by May 17, 2009, and that ASC's  
9 act of causing the foreclosure sale to occur on May 20, and all  
10 its subsequent actions, were a violation of the stay. See id. at  
11 317-19. According to the District Court, from and after the time  
12 the sale occurred, ASC had an ongoing duty to see that the  
13 Property was reconveyed to Debtor, and to mitigate Debtor's  
14 damages. Id. at 320.

15 However, the District Court concluded that the bankruptcy  
16 court's award of damages to Debtor for violating Rule 9011 was  
17 inappropriate because the court had not followed the procedure  
18 required by the Rule.<sup>6</sup> Id. at 320. The District Court remanded  
19 this aspect of the matter to the bankruptcy court, so that if it  
20 elected to do so, proper notice could be given to ASC, and further  
21 proceedings concerning Rule 9011 could be conducted. See id. at  
22 323.

23 In addition, while § 362(k) authorized an award to Debtor for  
24 attorneys' fees as damages, because the bankruptcy court had not

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26 <sup>6</sup> The District Court stated that the bankruptcy court could  
27 still "impose attorney's fees under Rule 9011 if it follow[ed] the  
28 requirements of that rule." Schwartz-Tallard, 438 B.R. at 323.  
The bankruptcy court chose not to follow the Rule 9011 procedural  
requirements, and, on remand, ASC was sanctioned pursuant to  
§ 362(k) only.

1 specifically found that the amount it awarded had been actually  
2 incurred by Debtor, the District Court also remanded that issue to  
3 the bankruptcy court. Id. at 320-23.

4 The bankruptcy court held an evidentiary hearing to determine  
5 the actual amount of Debtor's attorneys' fees on January 13, 2011.  
6 After that hearing, the bankruptcy court entered a judgment  
7 awarding Debtor attorneys' fees of \$20,115.40 "under 11 U.S.C.  
8 § 362(k)." ASC did not appeal that order.

9 On February 26, 2011, Debtor filed a motion in the bankruptcy  
10 court under § 362(k), seeking an award of attorneys' fees and  
11 costs incurred by Debtor for defending ASC's appeal of the Stay  
12 Violation Order to the District Court (Debtor's "Appellate  
13 Attorneys' Fees"). ASC opposed Debtor's motion, arguing that  
14 Debtor's request for Appellate Attorneys' Fees pursuant to  
15 § 362(k) was prohibited under the Ninth Circuit's decision in  
16 Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010), cert. denied  
17 131 S. Ct. 102 (2010). In reply, Debtor argued that Sternberg did  
18 not limit her ability to recover Appellate Attorneys' Fees  
19 pursuant to § 362(k) because she participated in the appeal as an  
20 appellee. In addition, she asserted that her Appellate Attorneys'  
21 Fees were also recoverable pursuant to Rule 9011 and the  
22 bankruptcy court's § 105(a) inherent sanctioning authority.

23 The hearings on Debtor's motion for Appellate Attorneys' Fees  
24 took place on March 30 and July 12, 2011. After hearing the  
25 parties' arguments at the March 30 hearing, the bankruptcy court  
26 denied Debtor's motion at the July 12 hearing for the sole reason  
27 that, as contended by ASC, Sternberg prevented the court from  
28

1 awarding Appellate Attorneys' Fees under § 362(k).<sup>7</sup>

2 The bankruptcy court entered an order denying Debtor's motion  
3 for Appellate Attorneys' Fees on July 26, 2011, "for the reasons  
4 set forth on the record." Debtor filed a timely appeal on  
5 August 8, 2011.

## 6 II. JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C.  
8 §§ 1334(b) and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
9 § 158.

## 10 III. ISSUES

11 1. Whether the bankruptcy court erred in deciding that  
12 Sternberg bars Debtor's request to recover her Appellate  
13 Attorneys' Fees pursuant to § 362(k).

14 2. Whether the bankruptcy court abused its discretion in not  
15 awarding Debtor's Appellate Attorneys' Fees pursuant to Rule 9011.

16 3. Whether the bankruptcy court abused its discretion in not  
17 awarding Debtor's Appellate Attorneys' Fees pursuant to the  
18 court's § 105(a) authority.

## 19 IV. STANDARD OF REVIEW

20 We review a bankruptcy court's attorneys' fees decision for  
21 an abuse of discretion. State of Cal. Emp't Dev. Dep't v. Taxel  
22 (In re Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996). In  
23 determining whether a bankruptcy court abused its discretion, we  
24 review whether the bankruptcy court applied the correct rule of  
25 law. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.  
26 2009) (en banc). We then determine whether the court's

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27  
28 <sup>7</sup> In its July 12, 2011, oral decision, the bankruptcy court did not mention § 105(a) or Rule 9011.

1 application of that rule was illogical, implausible, or without  
2 support in inferences that may be drawn from the facts in the  
3 record. Id. (quoting Anderson v. City of Bessemer City, N.C.,  
4 470 U.S. 564, 577 (1985)).

#### 5 V. DISCUSSION

6 On appeal, Debtor argues that she may recover her Appellate  
7 Attorneys' Fees pursuant to § 362(k) despite the ruling in  
8 Sternberg. In the alternative, Debtor asserts that she may be  
9 awarded Appellate Attorneys' Fees pursuant to Rule 9011 and § 105.

10 ASC, on the other hand, argues that, per Sternberg, Debtor's  
11 Appellate Attorneys' Fees are not "actual damages" under § 362(k)  
12 and therefore may not be recovered. ASC also asserts that,  
13 because the District Court and the bankruptcy court determined  
14 that the Stay Violation Order sanctions were based on § 362(k),  
15 and not Rule 9011, that Rule cannot now serve as a basis for an  
16 award of Debtor's Appellate Attorneys' Fees. Finally, ASC  
17 contends that a finding of contempt is a prerequisite to an award  
18 of attorneys fees pursuant to § 105(a), and, since there was no  
19 finding of contempt in this case, § 105(a) does not support a  
20 grant of Debtor's Appellate Attorneys' Fees.

21 Proceedings in the federal courts are typically governed by  
22 the so-called American Rule, which provides that parties must bear  
23 their own attorneys' fees. See Fogerty v. Fantasy, Inc., 510 U.S.  
24 517, 533 (1994). There are, however, limited exceptions to this  
25 general rule against shifting responsibility for attorneys' fees.  
26 See id.; see also Chambers v. NASCO, Inc., 501 U.S. 32, 45-46  
27 (1991). For example, attorneys' fees may be awarded to a  
28 prevailing party when authorized by a statute. Fogerty, 510 U.S.

1 at 533 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,  
2 421 U.S. 240, 247-62 (1975)). In addition, a court may award a  
3 prevailing party attorneys' fees when another party has "acted in  
4 bad faith, vexatiously, wantonly, or for oppressive reasons."  
5 Chambers, 501 U.S. at 45-46 (internal quotations omitted).

6 Here, Debtor contends her Appellate Attorneys' Fees should be  
7 shifted to ASC as statutorily authorized by § 362(k). She also  
8 argues recovery under Rule 9011 and § 105(a) are justified because  
9 ASC acted in bad faith. See Alyeska Pipeline Serv. Co., 421 U.S.  
10 at 247-62; Chambers, 501 U.S. at 45-46. ASC responds that none of  
11 these grounds justifies an award of Debtor's Appellate Attorneys'  
12 Fees. We examine each in turn.

13  
14 **A. Sternberg did not bar the bankruptcy court from awarding  
Debtor her Appellate Attorneys' Fees pursuant to § 362(k).**

15 The bankruptcy court awarded Debtor damages resulting from  
16 ASC's stay violation pursuant to § 362(k).<sup>8</sup> Debtor asserts her  
17 Appellate Attorneys' Fees are part of those damages and are  
18 likewise legislatively authorized pursuant to that statute.  
19 Section 362(k)(1) provides, in part:

20 an individual injured by any willful violation of a stay

21  
22 <sup>8</sup> Debtor repeatedly asserts that the District Court also  
23 upheld the bankruptcy court's award of sanctions pursuant to  
24 Rule 9011. We disagree. The District Court concluded that the  
25 bankruptcy court had not followed Rule 9011's procedural  
26 requirements and, therefore, the bankruptcy court's sanctions were  
27 not supported by Rule 9011. Schwartz-Tallard, 438 B.R. at 320.  
28 The District Court indicated that, on remand, if the bankruptcy  
court chose to follow the Rule 9011 requirements, it may impose  
sanctions pursuant to that Rule. See id. at 323. Providing an  
option to the bankruptcy court to conduct further, procedurally  
proper, proceedings is not the same as endorsing the bankruptcy  
court's Rule 9011 sanctions award. In the end, the bankruptcy  
court did not elect to follow Rule 9011 procedures and did not  
award sanctions pursuant to that Rule.

1 provided by this section shall recover actual damages,  
2 including costs and attorneys' fees, and, in appropriate  
circumstances, may recover punitive damages.

3 ASC, however, argues that, according to the Ninth Circuit's  
4 interpretation of § 362(k) "actual damages" in Sternberg, an award  
5 of Debtor's Appellate Attorneys' Fees is prohibited. To  
6 understand how the Sternberg decision applies to this case, it is  
7 helpful to review the complicated history of the controversy  
8 involved in that case.

9 In Sternberg, the debtor filed two concurrent stay-related  
10 actions: a motion asking the bankruptcy court to vacate a state  
11 court order that he argued was issued in violation of the stay,  
12 and a stay violation adversary proceeding against his ex-wife and  
13 her counsel for not acting to remedy the state court's stay-  
14 violating order. 595 F.3d at 941. In response to the debtor's  
15 motion, and after a hearing, the bankruptcy court granted the  
16 debtor's request to deem the state court order ineffective,  
17 thereby remedying the stay violation caused by the state court  
18 order. Id. at 941-42.

19 Later, even though the stay violation by the debtor's ex-wife  
20 and her counsel had been addressed,<sup>9</sup> the bankruptcy court held a  
21 trial in the adversary proceeding to determine whether the  
22 debtor's ex-wife and her counsel had, at some point, violated the  
23 stay, and, if they had, what damages and sanctions were  
24 appropriate. Id. at 942. Although the bankruptcy court ruled in

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25  
26 <sup>9</sup> As a practical matter, since the bankruptcy court  
27 invalidated the state court's order, the debtor's ex-wife and her  
28 counsel could no longer act to "remedy" the state court's stay  
violation. The debtor's argument that they were violating the  
automatic stay by not acting to address the state court's stay  
violation was, therefore, mooted.

1 favor of the debtor's ex-wife and her counsel, the debtor  
2 appealed, and the district court determined the ex-wife and her  
3 counsel had indeed violated the stay. Id. On remand, the  
4 bankruptcy court awarded the debtor \$92,869.20 in damages on  
5 account of his ex-wife's attorney's conduct in violating the  
6 stay.<sup>10</sup> Id. Debtor's ex-wife's counsel appealed that damages  
7 award. Id. The Ninth Circuit, in Sternberg, addressed whether  
8 the bankruptcy court erred in calculating the damages awarded to  
9 the debtor. Id. at 943.

10 As acknowledged in the Sternberg decision, Congress clearly  
11 intended to allow a party to recover, as damages, the attorneys'  
12 fees incurred by a debtor to enforce the automatic stay. Id. at  
13 946-48. Such an award is different, however, from allowing the  
14 recovery, as damages, of attorneys' fees incurred in a debtor-  
15 initiated court action for damages resulting from a stay  
16 violation.<sup>11</sup> See id. at 946-47. Per Sternberg, in such instances,  
17 any fees incurred "in pursuit of a damage award would not be to  
18 compensate for 'actual damages' under § 362(k)(1)," and would not  
19 be allowable. Id. at 947 (emphasis added).

20 Sternberg explained that whether a debtor may recover  
21 attorneys' fees under § 362(k) hinges on the distinction between  
22

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23  
24 <sup>10</sup> After the stay violation issue was remanded by the  
25 district court, and before the bankruptcy court determined the  
debtor's damages, the debtor's ex-wife settled with the debtor.  
Sternberg, 595 F.3d at 942.

26 <sup>11</sup> Because in Sternberg the stay violation had been remedied  
27 prior to the bankruptcy court's consideration of the debtor's  
28 adversary proceeding, the Ninth Circuit viewed the adversary  
proceeding as "akin to an ordinary damages action." 595 F.3d at  
948.

1 an action to enforce the automatic stay, and a debtor's pursuit of  
2 stay violation damages, and implicates the context and purposes of  
3 the automatic stay. Id. at 947-48. The court observed that the  
4 stay has two primary purposes: (1) to enable a debtor to try and  
5 reorganize during a break from collection efforts, and (2) to  
6 protect creditors by preventing each from pursuing its own  
7 remedies at the expense of all other creditors. Id. at 947  
8 (citing Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d  
9 1139, 1147 (9th Cir. 2004)). Those purposes promote both  
10 financial and non-financial goals. Id. at 947-48 (quoting In re  
11 Dawson, 390 F.3d at 1147). "[O]ne aim of the automatic stay is  
12 financial[, as] the stay gives the debtor time to put finances  
13 back in order, . . . [b]ut another purpose is to create a  
14 breathing spell' for a debtor from his creditors." Id. at 948  
15 (quoting In re Dawson, 390 F.3d at 1147).

16 The court in Sternberg decided that "[p]ermitting a debtor to  
17 collect attorney fees incurred in prosecuting a damages action  
18 would further neither the financial nor the non-financial goals of  
19 the automatic stay." Id. at 948. Prosecuting a damages action  
20 would not further the financial goal of the stay because the  
21 debtor's goal was to "pursu[e] his creditors," rather than to  
22 reorganize his finances. Id. ("We have never said the stay should  
23 aid the debtor in pursuing his creditors, even those creditors who  
24 violate the stay. The stay is a shield, not a sword." (emphasis  
25 added)). Such an action would also not further the stay's non-  
26 financial goal, because it would not result in a breathing spell  
27 for the debtor, since a damages action requires the debtor to  
28 pursue litigation during the intended respite afforded by the

1 automatic stay. Id. Thus, Sternberg determined that while  
2 recovery of attorneys' fees is allowed pursuant to § 362(k) when  
3 related to enforcement of the automatic stay, the attorneys' fees  
4 incurred in a debtor's pursuit of a "damages action for a stay  
5 violation" may not be recovered. Id.

6 In this case, Debtor's defense of ASC's appeal of the  
7 bankruptcy court's decision is fundamentally different from the  
8 damages action in Sternberg, where the Ninth Circuit noted that  
9 the debtor was pursuing a damages action even though the subject  
10 stay violation had been remedied. Here, when ASC appealed the  
11 Stay Violation Order to the District Court, Debtor was required to  
12 defend the bankruptcy court's decision, not only to protect the  
13 award of damages, but also to uphold the bankruptcy court's  
14 determination that ASC had, indeed, violated the stay. See  
15 Schwartz-Tallard, 438 B.R. at 317.

16 Moreover, Debtor's defense of ASC's appeal was consistent  
17 with the goals of the automatic stay identified by the court in  
18 Sternberg. First, defending the bankruptcy court's order assisted  
19 Debtor in her efforts to reorganize her finances. Had she been  
20 required to pay the attorneys' fees she incurred in remedying  
21 ASC's wrongful foreclosure, Debtor's completion of her chapter 13  
22 plan may have been jeopardized.

23 In addition, Debtor was clearly not using the automatic stay  
24 as a sword to pursue damages from ASC. Debtor likely would have  
25 been content to let the bankruptcy court's award of damages stand.  
26 On appeal, Debtor merely defended those damages, and in doing so  
27 incurred the subject attorneys' fees, when ASC appealed the Stay  
28 Violation Order and attacked the bankruptcy court's enforcement of

1 the automatic stay and its award of stay-enforcement damages. As  
2 can be seen, in this instance, Debtor's defensive position in the  
3 appeal did not run afoul of Sternberg's concern for debtors using  
4 the stay to pursue damages instead of reorganizing their finances.

5 Second, rather than allow Debtor the benefit of the stay's  
6 breathing spell, ASC continued its attack on the bankruptcy  
7 court's determination that Debtor's automatic stay had been  
8 violated and that Debtor had incurred damages in enforcing the  
9 stay. As the Ninth Circuit noted, "[m]ore litigation is hardly  
10 consistent with the concept of a 'breathing spell' for the  
11 debtor." Sternberg, 595 F.3d at 948. In other words, an appeal  
12 by a stay violator, which requires a bankruptcy debtor to continue  
13 to participate in litigation to defend her stay and properly  
14 awarded stay-enforcement damages, deprives the debtor of the  
15 benefits of her automatic stay. Simply put, Debtor's defense of  
16 the bankruptcy court's decision was an extension of her efforts to  
17 enforce her automatic stay.

18 At bottom, Sternberg determined that the attorneys' fees  
19 sought by the debtor were not part of the debtor's damages  
20 resulting from the stay violation as required by § 362(k). Id. at  
21 945-48. In doing so, the Sternberg panel found the term "actual  
22 damages" to be ambiguous. Id. at 947. For a meaning, the court  
23 adopted a definition from Black's Law Dictionary specifying that  
24 actual damages are "[a]n amount awarded . . . to compensate for a  
25 proven injury or loss; damages that repay actual losses." Id.  
26 (quoting BLACK'S LAW DICTIONARY 416 (8th ed. 2004)). As Sternberg  
27 continued, in stay violation settings, the "proven injury is the  
28 injury resulting from the stay violation itself." Id. Once a

1 stay violation has been remedied, "any fees the debtor incurs  
2 after that point in pursuit of a damage award would not be to  
3 compensate for 'actual damages' under § 362(k)(1)." Id.

4 Of course, in Sternberg, the point at which the stay  
5 violation had been "remedied" was clear. Id. at 941-42. The  
6 debtor's ex-wife did not appeal the bankruptcy court's vacation of  
7 the state court's order, and the primary issue remaining in the  
8 debtor's adversary proceeding was the amount of damages  
9 attributable to the conduct of debtor's ex-wife and her counsel.

10 Id. In contrast, here, while the Property was finally reconveyed  
11 to Debtor the day after ASC filed its notice of appeal, Debtor was  
12 forced to defend that appeal to validate the bankruptcy court's  
13 ruling that ASC had violated the stay, and to preserve her right  
14 to collect the pre-remedy damages awarded by the bankruptcy court.

15 "Clearly, fees and costs experienced by an injured party in  
16 resisting the [stay] violator's appeal are part of the damages  
17 resulting directly from the stay violation." Beard v. Walsh

18 (In re Walsh), 219 B.R. 873, 878 (9th Cir. BAP 1998).<sup>12</sup> Put

19 another way, Debtor's Appellate Attorneys' Fees, incurred to  
20 ensure the continuity of the stay, and to protect her stay-  
21 enforcement damage award, are no less damages "resulting from the  
22 stay violation itself" merely because she had to defend their  
23 enforcement at the appellate level rather than the bankruptcy  
24 court, and because the appeal took place after the Property was

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25  
26 <sup>12</sup> Sternberg admittedly rejected the BAP's determination in  
27 Walsh that § 362(k)'s predecessor, § 362(h), required an injured  
28 party to be made whole. Sternberg, 595 F.3d at 947. At the same  
time, Sternberg did not invalidate Walsh's finding that damages  
incurred on appeal are actual damages directly resulting from the  
stay violation itself. See id.

1 reconveyed to her.

2 In sum, the attorneys' fees incurred by Debtor in defending  
3 the bankruptcy court's Stay Violation Order on appeal were actual  
4 damages pursuant to § 362(k)(1). The bankruptcy court therefore  
5 abused its discretion when it decided that Sternberg prohibited  
6 recovery of those fees. We REVERSE the bankruptcy court's  
7 decision.

8 **B. The bankruptcy court did not abuse its discretion in not  
9 awarding Debtor Appellate Attorneys' Fees pursuant to  
Rule 9011.**

10 On appeal, the District Court concluded that the bankruptcy  
11 court awarded Debtor damages pursuant to § 362(k)(1). Schwartz-  
12 Tallard, 438 B.R. at 320. At the same time, the District Court  
13 decided that Rule 9011 was not an appropriate basis for recovery  
14 of Debtor's damages in this case because the bankruptcy court did  
15 not adhere to the Rule's procedural requirements. Id. If the  
16 bankruptcy court so desired, however, the District Court  
17 authorized it, on remand, to invoke proper Rule 9011 procedures  
18 and, after further notice and a hearing, to award sanctions  
19 pursuant to that Rule. Id. at 323. However, the bankruptcy court  
20 chose not to do so, and, ultimately, no Rule 9011 damages were  
21 awarded.

22 On this record, we find no abuse of discretion in the  
23 bankruptcy court's decision to decline to award Debtor her  
24 Appellate Attorneys' Fees pursuant to Rule 9011. Moreover,  
25 Rule 9011 does not authorize this Panel to award Debtor her  
26 Appellate Attorneys' Fees.

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1 **C. The bankruptcy court did not abuse its discretion in not**  
2 **awarding Debtor's Appellate Attorneys' Fees pursuant to its**  
3 **inherent sanctioning authority under § 105(a).**

4 Section 105(a) authorizes a bankruptcy court to "issue any  
5 order, process, or judgment that is necessary to carry out the  
6 provisions of [title 11]." Neither the bankruptcy court nor the  
7 District Court found that the damages imposed against ASC were  
8 appropriate as § 105(a) contempt sanctions. Even so, Debtor now  
9 asks this Panel to hold that § 105(a) authorizes Debtor's  
10 Appellate Attorneys' Fees.

11 In exceptional circumstances, where an appellate court first  
12 determines that all other statutory or rule sources authorizing  
13 damages are not "up to the task," the court may find that awarded  
14 sanctions were justified under § 105(a). See Miller v. Cardinale  
15 (In re Deville), 280 B.R. 483, 494-97 (9th Cir. BAP 2002), aff'd  
16 361 F.3d 539 (9th Cir. 2004) (awarding damages as § 105(a)  
17 sanctions after finding the bankruptcy court's only other  
18 potential source for awarding damages, Rule 9011, inapplicable due  
19 to a failure to follow the Rule's procedural requirements).  
20 However, the prerequisites to invoking § 105(a) are not met here.  
21 For example, an award pursuant to a bankruptcy court's § 105(a)  
22 power is typically not appropriate if another statute or the Rules  
23 otherwise support a sanctions award. Chambers, 501 U.S. at 50.  
24 Here, as we hold above, the bankruptcy court may award Debtor her  
25 Appellate Attorneys' Fees pursuant to § 362(k). As a result,  
26 there is no reason for this Panel to consider whether sanctions  
27 are somehow justified pursuant to § 105(a).

28 Also, prior to invoking § 105(a), a bankruptcy court must  
determine that the party to be sanctioned was provided sufficient

1 notice of the potential sanctions to satisfy due process. In re  
2 Deville, 280 B.R. at 496-97. "Generally, the notice regarding  
3 sanctions must specify the authority for the sanction, as well as  
4 the sanctionable conduct." Id. at 496. Debtor's Sanctions Motion  
5 was based on § 362(k) only; it did not mention Rule 9011 or  
6 § 105(a). Yet, a motion may also be sufficient to satisfy due  
7 process as to § 105(a) if it informs a party that sanctions are  
8 pursued for actions taken for "improper purposes," and that the  
9 sanctions are sought in addition to those sought under otherwise  
10 specified authority. In re Deville, 280 B.R. at 497. Debtor's  
11 Sanctions Motion did not assert that ASC had acted in bad faith,  
12 vexatiously, wantonly, for oppressive reasons, or for other  
13 improper purposes. Because Debtor did not provide ASC with  
14 sufficient notice to allow it to present objections to the  
15 imposition of § 105(a) sanctions, we will not now conclude that  
16 the bankruptcy court should have relied upon § 105(a) as a basis  
17 for awarding Debtor her Appellate Attorneys' Fees.

## 18 VI. CONCLUSION

19 Because Debtor was forced to defend ASC's appeal to preserve  
20 the benefit of the bankruptcy court's ruling remedying the ASC  
21 stay violation and awarding her damages, Sternberg did not  
22 preclude the bankruptcy court from awarding Debtor her Appellate  
23 Attorneys' Fees. The attorney's fees Debtor incurred on appeal  
24 were a portion of Debtor's stay-enforcement damages for purposes  
25 of § 362(k) actual damages. We therefore REVERSE the decision of  
26 the bankruptcy court denying Debtor's request for an award of  
27 attorney's fees, and REMAND this matter to the bankruptcy court  
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1 for further proceedings consistent with this decision.<sup>13</sup>

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<sup>13</sup> ASC contends no award of Appellate Attorney's Fees is appropriate in this case because it prevailed on two of the three issues it raised on appeal to the District Court. Since this argument implicates the amount of Debtor's damages incurred on appeal, this argument is one properly made to the bankruptcy court on remand.

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