FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
April 19, 2012
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DANIEL WILLIAM COOK and YOLANDA T. COOK, Debtors.	BAP No. NM-11-082
DANIEL WILLIAM COOK, Appellant, v. WELLS FARGO BANK, N.A., Successor to Wells Fargo Bank New Mexico, N.A., SCOTT GARRETT, PAMELA GARRETT, and SCOTT GARRETT AND PAMELA JANE GARRETT FAMILY TRUST, Appellees.	Bankr. No. 04-17704 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before NUGENT, ROMERO, and SOMERS, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

Debtor Daniel William Cook appeals the bankruptcy court's order denying his motion to reconsider the order dismissing his motions for sanctions for alleged violations of the automatic stay. We must decide whether a claim of exemption or a trustee's notice of abandonment confers standing on the debtor to assert

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

violations of the automatic stay. Under the facts of this case, we hold that the debtor lacked standing and AFFIRM the bankruptcy court's order.[1]

I. Factual Background

The parties have been involved in a series of legal disputes, spanning over a decade. Numerous suits, claims, cross-claims, motions, adversary proceedings, and appeals have been filed in state district court, federal district court, and bankruptcy court. The unduly lengthy and tangled procedural and substantive history of this case have been reported in numerous court orders.[2] We repeat here only what is necessary to explain the issues.

At the heart of the controversy is intellectual property, which according to Cook, was originally developed or acquired by Hydroscope Canada ("HCAN"). In 1996, HCAN licensed its intellectual property (the "IP") to Hydroscope USA ("HUSA"), a subsidiary of Hydroscope Group Inc. ("HGI").[3] Thereafter, HUSA pledged its IP license to Wells Fargo Bank, N.A. ("Wells Fargo") as security for a loan to HGI.[4] HGI and HUSA were primarily engaged in sewer pipeline

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[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

[2] *See In re Cook*, Case No. 04-17704-S7, slip op. (Bankr. D.N.M. Apr. 6, 2011) (memorandum opinion dismissing motions for sanctions); *id.*, slip op. (Bankr. D.N.M. Aug. 9, 2011) (order denying debtor's motion for reconsideration). *See also Garrett v. Cook*, 652 F.3d 1249 (10th Cir. 2011); *CBM Group, Inc. v. Bloom (In re Cook)*, Case No. 04-17704-S7, Adversary No. 07-01038-S, slip op. (Bankr. D.N.M. Jan. 31, 2008) (Memorandum Opinion After Trial on the Merits).

[3] Cook's Amended Transfer of Interest Substitution, Entry of Appearance and Motion for Sanctions and Damages Against Wells Fargo Bank, N.A. for Willful Violations of the Automatic Stay and Notice ("Motion for Sanctions Against Wells Fargo") at 5, *in* App. at 1100574.

[4] *Id.*

rehabilitation.[5]

Debtor and his now-deceased wife, Yolanda T. Cook, are the majority shareholders of HGI, which is a holding company that owns HUSA.[6] Cook also owns and controls HCAN, but claims that HCAN is not a subsidiary of HGI or is not among the entities that transferred its corporate claims to him prepetition.[7]

In 1998, Scott Garrett became a minority shareholder and director of HGI.[8] Cook claims that Garrett verbally promised additional investment to become a common shareholder.[9] In 1999, when Cook approached Garrett for additional funding, Cook claims Garrett offered to give HGI a $160,000 loan with a usurious interest rate on condition that the loan be secured by the Cooks' personal residence "coupled with the opportunity for Garrett to potentially negotiate a license for the State of California."[10] HGI accepted those terms. HGI defaulted and Garrett sought foreclosure against the Cooks' residence and judgment against HGI.[11]

In 2001, as part of a settlement agreement between Garrett and HGI and the Cooks ("the Garrett Settlement"), HUSA agreed to sublicense the IP to Scott

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5 Complaint in Adv. No. 04-1240, at ¶ 11, *in* App. at 1100788.

6 *Id.* at ¶3, *in* App. at 1100787.

7 *See* Motion for Sanctions Against Wells Fargo at 4, *in* App. at 1100573 ("[HGI] and its subsidiaries, which does not include [HCAN], transferred pre-Petition [sic] their corporate claims against [Wells Fargo] and others to the Cooks in 2004 . . . ."). *But see* Complaint in Adv. No. 04-1240, at ¶ 3, *in* App. at 1100787 (HUSA owns 100% outstanding shares of HCAN.).

8 Complaint in Adv. No. 04-1240, at ¶¶18-20, *in* App. at 1100791-793.

9 *Id.* at ¶25, *in* App. at 1100795-796.

10 *Id.*, *in* App. at 1100796.

11 *Id.* at ¶ 26, *in* App. at 1100796.

Garrett.[12] Garrett, however, required that Wells Fargo execute a non-disturbance agreement since HUSA had previously pledged the IP license to Wells Fargo. Wells Fargo agreed to execute the non-disturbance agreement if HCAN agreed to pledge a collateral interest in the IP. According to Cook, Wells Fargo failed to execute the non-disturbance agreement.

As a result, in 2003, Scott and Pamela Garrett, and the Scott Garrett and Pamela Garrett Family Trust (collectively "Garrett") filed a shareholder derivative action against Cook and others in the Second Judicial District Court in the State of New Mexico, CV-2003-08008, alleging fraud, misrepresentation, breach of fiduciary duty and prima facie tort related to Garrett's investment in and the Cooks' management of HGI (the "State Court Action").[13] In 2004, Garrett added Wells Fargo as a defendant because it held a security interest in the IP.[14] Wells Fargo, in turn, filed third party claims against HGI, HCAN and CBM Group Inc. ("CBM"), another corporation owned and/or controlled by Cook, seeking foreclosure of its security interest in the IP.

Cook and his now-deceased wife filed a Chapter 11 petition on October 21, 2004. Prepetition, HGI and HUSA transferred all their claims against Wells Fargo and others to the Cooks in consideration of Cook assuming all corporate debts.[15]

In December 2004, the Cooks and HGI filed an adversary complaint against

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[12] Motion for Sanctions Against Wells Fargo at 5, *in* App. at 1100574.

[13] Garrett had filed a previous lawsuit that was dismissed. Those details are irrelevant for purposes of this appeal.

[14] First Amended Complaint for Injunctive Relief and Appointment of a Receiver, Accounting, Fraud, Misrepresentation, Breach of Fiduciary Duty, Breach of Contract, Prima Facie Tort, and Unfair Trade Practices, Case No. CV-2003-08008, *in* Appendix of Appellee Wells Fargo Bank ("WFApp.") at 31-59.

[15] Motion for Sanctions Against Wells Fargo at 4, *in* App. at 1100573.

Wells Fargo and Garrett that essentially mirrored the State Court Action.[16] Wells Fargo rejoined by filing a motion to abstain, which was granted.[17]

Worried that Wells Fargo might assert a statute of limitations defense against their claims, the Cooks, as debtors-in-possession of their Chapter 11 bankruptcy estate, along with HGI and HUSA, filed a placeholder complaint against Wells Fargo in the Second Judicial District, CV-2005-09114.[18] This suit was consolidated with the State Court Action. In June 2005, Wells Fargo filed a motion to appoint a Chapter 11 trustee.[19]

According to Cook, in July 2005, more than 180-days postpetition, HCAN sold some of its IP to Cook's bankruptcy estate and some to CBM.[20] In 2006, Garrett filed a third amended complaint in the State Court Action, alleging Cook fraudulently conveyed all of HCAN's assets to CBM in 2005.

In July 2006, the bankruptcy court granted Wells Fargo's motion to appoint a Chapter 11 trustee and then approved the appointment of Linda Bloom as Chapter 11 trustee of the Cooks' bankruptcy estate.[21] In December 2006, Wells

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16 Complaint in Adv. No. 04-1240, *in* App. at 1100786-1100847.

17 Memorandum Brief in Support of [Wells Fargo's] Motion to Abstain, *in* WFApp. at 1-30. On October 19, 2005, the bankruptcy court issued its Proposed Findings of Fact and Conclusion of Law on [Wells Fargo's] Motion to Abstain, recommending the district court order abstention. *Cook v. Garrett Capital (In re Cook)*, Case No. 11-04-17704, Adv. No. 04-1240, slip op. (Bankr. D. N.M. Oct. 19, 2005). On March 19, 2009, the district court adopted the bankruptcy court's recommendation on abstention. *Cook v. Garrett Capital (In re Cook)*, Case No. MIS. 05-0042 (D.N.M. Mar. 19, 2009).

18 This pleading was not provided to this Court.

19 Bankruptcy Docket, Doc. 96, *in* App. at 110087.

20 Purchase and Sale Agreement, *in* WFApp. at 247-57; First Amendment to Purchase and Sale Agreement, in WFApp. at 258-59. *See also* Motion for Sanctions Against Wells Fargo at 7, *in* App. at 1100576 ("Some of HCAN's IP was sold to the Cook Bankruptcy Estate and some to CBM . . . ."); Amended Appellant's Opening Brief at 3 n.2.

21 Order Granting Motion to Appoint Trustee, Doc. 366, *in* App. at 110068;

(continued...)

Fargo filed a motion for summary judgment in the State Court Action, seeking judgment on its claims against HGI, HCAN, HUSA, and CBM.[22] In addition, Wells Fargo sought dismissal of any claims asserted against it by Garrett and Cook.[23] In October 2007, the state district court granted Wells Fargo's motion for summary judgment, but postponed entering a written order to avoid influencing the bankruptcy court's decision on a motion to approve a compromise between the Chapter 11 Trustee, Garrett and Wells Fargo.[24]

In February 2008, after the compromise fell apart, Wells Fargo filed a motion for relief from stay to permit it "to foreclose its security interest in collateral, to the extent that collateral is property of the Cook Bankruptcy estate" in state court.[25] In March 2008, the bankruptcy court converted the Chapter 11 case to a Chapter 7 case.[26] On April 21, 2008, the bankruptcy court granted Wells Fargo relief from stay and annulled the automatic stay with respect to any proceeding that had taken place before the state district court, and modified the stay with respect to any property in which either the estate or the Debtors claim

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[21] (...continued)
Order Granting Motion to Appoint [Linda Bloom as] Trustee, Doc. 379, *in* App. at 110067.

[22] Wells Fargo's Motion for Summary Judgment, *in* App. at 1100598-1100606.

[23] *Id.*

[24] *See* Order Granting Summary Judgment and Final Summary Judgment Against [HGI, HUSA, HCAN, and CBM] ("Summary Judgment Order") at 2, *in* App. at 1100633 ("On October 2, 2007, Judge Valerie Mackie Huling orally announced her ruling, which was to grant the motion. [She] elected not to enter a written order at that time because she did not want her ruling to influence a decision that [the bankruptcy court] was preparing to make on a settlement motion and other motions before him."); Bankruptcy Docket, Motion to Approve Compromise, Doc. 503, *in* App. at 110056.

[25] Motion for Relief from Automatic Stay, *in* WFApp. at 186-90.

[26] Order Converting Chapter 11 Case to Chapter 7 Case, *in* App. at 1100717-1100721.

an interest.[27] On August 5, 2008, the bankruptcy court clarified its April 21, 2008 Order, stating the stay relief granted included:

> any actions taken by the State District Court, either previously or in the future, to accord any party any procedural or substantive relief (for example, striking or not striking defenses) in connection with the foreclosure action of [Wells Fargo] against any property that it considers to be its collateral. Thus even if Wells Fargo were to have violated the stay at some point in the past, the effect of the annulment of the stay was to validate the State District Court adjudications, regardless of whether Wells Fargo is subsequently found to have violated the stay prior to its annulment.[28]

In February 2009, the state district court entered an order granting summary judgment in favor of Wells Fargo on its claims against HGI, HUSA, HCAN, and CBM.[29] The state district court foreclosed Wells Fargo's security interest in certain property owned by HGI and its related entities. The state district court also dismissed with prejudice Garrett's and the Cooks' claims against Wells Fargo. With respect to the Cooks, the state district court found:

> 1. Wells Fargo did not sue the Cooks.
>
> 2. Wells Fargo's summary judgment motion did not seek a recovery against the Cooks or [their] bankruptcy estate, or any assets owned by the Cooks or [their] bankruptcy estate, but rather limited its requested relief to the entry of judgments against the Hydroscope entities for the debt owed and the entry of foreclosure relief against particular collateral owned by [CBM[or the Hydroscope companies. [Wells Fargo's] summary judgment motion sought to dismiss the Cooks' claims against [Wells Fargo], as to which only [Wells Fargo] (and not the Cooks) would have defenses. The Cooks filed no opposition whatsoever to [Well Fargo's] motion seeking to dismiss [their] claims. If, as Cooks contend, their defenses to dismissal of their claims belonged to Cooks and not to their bankruptcy trustee, the Cooks should have opposed the motion, but did not. Their bankruptcy trustee, who did own [their] claims, did not oppose their

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[27] Order Granting Stay Relief (Docs 679 and 712) and Additional Relief Concerning Abandonment, *in* App. at 1100536-1100539.

[28] Order Reiterating, Clarifying and Expanding as Needed April 21, 2008 Order Granting Stay Relief and Other Relief (Doc. 740) at 2, *in* App. at 1100543.

[29] Summary Judgment Order, *in* App. at 1100632-1100642.

dismissal.

3. The Cooks would, as a matter of law, possess no defenses to [Wells Fargo's] claims against the Hydroscope entities [or] assets belonging to the Hydroscope entities or [CBM].

4. Because the Cooks have no defenses to the requested relief against the corporations, extending further briefing opportunity to the Cooks would not change that fact. The corporations against whom relief is sought, have had a full and fair opportunity to brief the summary judgment motion, and have not shown either a genuine issue of material fact or a legal reason to deny [Wells Fargo's] motion.[30]

Cook filed several post-judgment motions, but before they could be heard, he appealed the state district court's decision to the New Mexico Court of Appeals. On January 26, 2010, the New Mexico Court of Appeals dismissed his appeal and remanded to the state district court for disposition of the outstanding motions.

In July 2009, Cook filed two motions for sanctions for willful violations of the automatic stay: one against Wells Fargo and the other against Garrett.[31] Cook alleged that Wells Fargo violated the automatic stay pursuant to 11 U.S.C. §§ 362(a)(1), (a)(3), and (a)(5)[32] when it filed its motion to strike and its motion for summary judgment in the State Court Action.[33] Garrett allegedly violated the

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[30] *Id.* at 2-3, *in* App. at 1100633-634.

[31] *See* Cook's Amended Motion for Sanctions Against Wells Fargo, *in* App. at 1100571-596; Transfer of Interest Substitution and Motion for Sanctions and Damages Against [Garrett] for Willful Violations of the Automatic Stay, *in* App. at 1100645-666. The bankruptcy court previously denied two similar motions for sanctions, finding the actions complained of did not violate the automatic stay. *See* Order Resulting from Preliminary Hearing on Debtors' Motion for Sanctions [] and Amended Creditors [HGI, HUSA, HCAN, and CBM's] Joinder [Therein], *in* App. at 1100333-335.

[32] All future references to "Code", "Section," and "§" are to Title 11, United States Code, unless otherwise specified.

[33] Cook's Amended Motion for Sanctions Against Wells Fargo at 21-24, *in* App. at 1100590-1100593. Cook cites thirty alleged violations of the automatic stay by Wells Fargo. They all relate to pleadings filed in connection with Well Fargo's motion to strike and its motion for summary judgment in the State Court

(continued...)

stay by aiding and abetting Wells Fargo's stay violations and taking positions contrary to Cook. On April 6, 2011, the bankruptcy court denied these motions for sanctions and held that: (1) Cook lacked standing to bring the stay violations motions because causes of action for stay violations are estate property and can only be asserted by the trustee, (2) there was no violation of the automatic stay since the bankruptcy court had previously annulled it, and (3) Cook was barred by the Rooker-Feldman doctrine and collateral estoppel from bringing these stay violations motions (the "Sanctions Dismissal Order").[34] Cook sought reconsideration of the Sanctions Dismissal Order. The bankruptcy court denied Cook's motion for reconsideration.[35] Cook appealed the Reconsideration Order to this Court.

II. Appellate Jurisdiction and Standard of Review

This Court has jurisdiction over this appeal. Cook timely filed his notice of appeal from the bankruptcy court's final order and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of New Mexico.[36]

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[33] (...continued)
Action.

[34] Sanctions Dismissal Order, *in* App. at 1100367-388.

[35] Memorandum Opinion on Debtor's Amended Motion to Reconsider Dismissal of Sanctions Motions Against Wells Fargo Bank and Garrett (the "Reconsideration Order"), *in* App. at 110099-127.

[36] 28 U.S.C. § 158(b); Fed. R. Bankr. P. 8001(e); Fed. R. Bankr. P. 8002(a); *In re San Miguel Sandoval*, 327 B.R. 493, 505 (1st Cir. BAP 2005) (Bankruptcy court order denying reconsideration is "final" appealable order if underlying order was final appealable order, and together the orders end litigation on merits.); *Eddleman v. U.S. Dept. of Labor*, 923 F.2d 782 (10th Cir. 1991), *overruled, in part, on other grounds*, *Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson*, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992); *In re Jones*, 369 B.R. 745, 747 (1st Cir. BAP 2007) (a bankruptcy court's order determining whether there has been a violation of the automatic stay is a final order).

We review orders on motions to reconsider for abuse of discretion.[37] Courts reviewing an order denying reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure often examine the underlying order the appellant seeks to reconsider in determining whether refusing to reconsider it was an abuse of discretion.[38] To the extent the bankruptcy court based its ruling on discretionary factors, we review for abuse of discretion; to the extent its ruling was based on its findings of fact and conclusions of law, however, we apply the traditional review reserved for those determinations; clearly erroneous for the findings of fact and *de novo* for the legal conclusions.[39] A party's standing is a question of law that is reviewed *de novo*.[40]

III. Discussion

We begin by noting that the bankruptcy court showed remarkable restraint and patience in this case. Cook's arguments were often confusing and repetitive. The bankruptcy court attempted to address each and every argument raised by Cook, and countered every alleged factual misapprehension. It is not necessary for this Court to address every argument raised by the parties.[41] If this Court has not addressed a specific argument, it means we deem them to lack sufficient merit

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37 *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727-28 (10th Cir. 1993).

38 *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (An appeal from the denial of a motion to reconsider construed as a Rule59(e) motion permits consideration of the merits of the underlying judgment, while an appeal from the denial of a Rule 60(b) motion does not preserve the underlying judgment for appellate review.).

39 *Lyons*, 994 F.2d at 727-28.

40 *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008).

41 *Mainiero v. Jordan*, 105 F.3d 361, 365 (7th Cir. 1997) (quoting *State v. Waste Mgmt. of Wis.*, Inc., 261 N.W.2d 147, 151 (Wis. 1978) ("[A]n appellate court is not a performing bear required to dance each and every tune played on an appeal . . . Any of the . . . issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention.")).

or importance to warrant individual attention.

A. Merits of the Sanctions Dismissal Order

Standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.[42] One purpose of standing is to prevent a flood of litigation by those who have only an ideological stake in the outcome of a proceeding.[43] The Supreme Court has defined standing in this way–

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action[.]'[44]

In other words, the plaintiff or movant must allege (1) injury or threat of imminent injury, (b) that the injury is fairly traceable to the conduct complained of, and (c) that a favorable decision by the court would redress the injury.[45]

Cook argues he has standing to bring these stay violations motions based on the Trustee's abandonment on July 1, 2009, his claim of exemption, and pursuant to the plain language of § 362(k). Cook claims that as the debtor, he holds a possessory interest in all property abandoned by the Trustee, including stay violations.

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42 *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

43 *See United States v. Richardson*, 418 U.S. 166, 192 (1974).

44 *Warth*, 422 U.S. at 498-99 (citation and footnote omitted).

45 *Id.* at 500.

1. The Trustee's Notice of Abandonment, filed on July 1, 2009, did not confer standing upon Cook to bring the stay violations motions.

Section 554 governs abandonment of property of the estate and provides three methods for abandonment of estate property: (a) after notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate; (b) on motion by a party and after notice and a hearing, the court may order the abandonment of certain property; or (c) once a bankruptcy case is closed, any assets that have been properly scheduled, but not otherwise administered, are abandoned by operation of law.[46] Cook argues the bankruptcy court "overlooked the fact that all estate property was properly abandoned by the Chapter 7 trustee pursuant to [] § 554(a)."[47] Cook claims the Chapter 7 trustee abandoned all remaining estate property when he filed a "Notice of Abandonment" (the "NOA") and a Report of No Distribution ("RND") on July 1, 2009.[48]

The bankruptcy court concluded that nothing had yet been abandoned because there were no orders abandoning property and the case had not yet closed.[49] Cook argues that no timely objections were made, thus no hearing or

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[46] 11 U.S.C. § 554.

[47] Amended Appellant's Opening Brief at 13.

[48] We reject Cook's argument that the bankruptcy court confused the NOA of July 2009 with the Trustee's RND filed on June 2, 2008. *See* Amended Appellant's Opening Brief at 14. The bankruptcy court referenced both pleadings separately in its Sanctions Dismissal Order and noted that it had previously ruled that the RND of June 2008 did not result in an abandonment because § 554 had not been strictly complied with. *See* Memorandum Opinion on Abandonment, *in* WFApp. at 276. The bankruptcy court then went on to discuss the effect of the July 2009 NOA and ruled that it too did not result in an abandonment for the same reasons – lack of notice, lack of an objection deadline, and because the case had not yet closed. The bankruptcy court conducted a separate § 554 analysis of the July 2009 NOA.

[49] Sanctions Dismissal Order at 9-10, *in* App. at 1100375-1100376.

court order approving the Trustee's abandonment was required, citing § 102(1).[50] Section 102(1)(B) "authorizes an act without an actual hearing *if such notice is given properly* and if – (i) such a hearing is not requested timely by a party in interest; or (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act."[51] In other words, a hearing, and thus a court order, is unnecessary if no one objects to the notice.[52] The notice, however, must comply with the requirements of § 554(a) and Rule 6007(a) of the Federal Rules of Bankruptcy Procedure[53] to be deemed "given properly." Section 554's requirements are exacting.[54]

Bankruptcy Rule 6007(a) requires notice of a proposed abandonment by the trustee be sent to the U.S. Trustee and to all creditors, indenture trustees and official committees.[55] The notice must state that any objection must be filed and served by a party in interest within 14 days (then 15) of the date of mailing of the notice, or within the time fixed by the court.[56]

The NOA reads:

> COMES NOW Philip J. Montoya, the Chapter 7 Trustee herein, and gives notice that he abandons all remaining property of

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[50] Section 102(1)(A) states "after notice and a hearing" means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.

[51] 11 U.S.C. § 102(1)(B) (emphasis added).

[52] 4 William L. Norton Jr., *Norton Bankr. L. & Prac. 3d* § 74:9, at 74-28 (2008).

[53] All future references to the Bankruptcy Rules are to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

[54] *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609, 618 (7th Cir. 2002).

[55] Fed. R. Bankr. P. 6007(a).

[56] *Id.*; 4 *Norton Bankr. L. & Prac. 3d* § 74:12, at 74-31.

the estate.[57]

The RND is a text entry on the bankruptcy docket and reads:

> Chapter 7 Trustee's Report of No Distribution: I, Philip J. Montoya, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 16 months. Assets Abandoned: $ 487085961.00, Assets Exempt: Not Available, Claims Scheduled: $ 9989980.00, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment: $ 9989980.00. Filed by Trustee Philip J. Montoya. (Montoya, Philip) (Entered: 07/01/2009 at 10:18:21)[58]

Neither the NOA nor the RND provided a deadline for the filing of any objection to the notice. They did not reference Bankruptcy Rule 6007(a) or state that objections may be filed. The record also contains no evidence of the Trustee sending the NOA to anyone, let alone to all the creditors. The Trustee electronically filed the NOA, but there is no certificate of service indicating to whom he sent the NOA.[59] The NOA and the RND alone are not sufficient to effectuate an administrative abandonment in the absence of a Bankruptcy Rule 6007(a) notice being given.

Cook's reliance upon the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors & Deadlines (the "341 Notice") as evidence of compliance with

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[57] Notice of Abandonment filed July 1, 2009, *in* App. at 1100253.

[58] Bankruptcy Docket, *in* App. at 1100026.

[59] The CM/ECF system generates an email notice upon the filing of a pleading notifying the recipient that a certain party has filed a certain pleading. *See* Notice of Electronic Filing, *in* App. at 1100528. This system-generated notice contains a link to the pleading, but the pleading itself is not sent. Generally, the system-generated notice is sent by the Bankruptcy Clerk to certain parties in interest and not to all creditors. A party may not rely upon the CM/ECF system to comply with Bankruptcy Rule 6007.

Bankruptcy Rule 6007 is misplaced.[60] The 341 Notice described the abandonment procedure as follows:

> Unless a request for notice is filed and served upon the trustee by a party in interest within 15 days after the date of mailing of this notice, the trustee may abandon any property deemed burdensome or of inconsequential value to the estate without further notice.[61]

The 341 Notice is a computer generated form prepared and mailed by the Clerk to all interested parties. The Trustee did not send the 341 Notice. In addition, the boilerplate language above is vague as it does not place parties interested in a particular piece of property on notice that they would need to file objections in order to obtain a court hearing. The 341 Notice is also confusing as it refers to filing "a request for notice" rather than an objection to a notice of abandonment. The date given for objecting references the wrong event. Bankruptcy Rule 6007 provides that a party may file an objection within 14 days of the mailing of the notice of proposed abandonment, not the mailing of the 341 Notice.

We conclude the 341 Notice, the NOA, and the RND did not give proper notice of abandonment pursuant to § 554 and Bankruptcy Rule 6007.[62] Because proper notice had not been given, the bankruptcy court correctly concluded that nothing had yet been abandoned.[63] Thus, the NOA did not grant Cook standing to

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[60] 341 Notice, *in* App. at 1100234-239.

[61] *Id.* at 1100235.

[62] *See In re Killebrew*, 888 F.2d 1516, 1523 (5th Cir. 1989) (holding that the notice of abandonment contained in the notice of commencement of case was inadequate because it was vague as to what property would be abandoned); *Nebel v. Richardson (In re Nebel)*, 175 B.R. 306, 310-311 (Bankr. D. Neb. 1994) (holding trustee's notice of abandonment of assets contained in notice of commencement of case inadequate where notice was in boilerplate language, dates given for objecting did not coincide with requisite period to file objections, trustee had not examined debtor when commencement notice was issued, and determination of what property would be abandoned was not made until one month after notice was sent to interested parties).

[63] Because Cook does not claim abandonment under § 554(b) and (c), we need not discuss those subsections nor review the bankruptcy court's conclusions that

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bring the stay violations motions.

2. Cook's claim of exemption in estate-owned intellectual property does not confer standing upon him to bring the sanctions motions.

Cook argues that he has standing to pursue damages for alleged stay violations because the alleged violations affected property that he claimed exempt. Cook amended his schedules and claimed the IP exempt in November 2006.[64] In finding Cook lacked standing to bring the stay violations motions, the bankruptcy court implicitly held that a claim of exemption does not confer standing to pursue damages for violations involving property claimed exempt.

Courts are split regarding whether a Chapter 7 debtor has standing to pursue a claim for violation of the automatic stay based upon actions taken against property the debtor has claimed exempt.[65] All of these cases involve a bank's administrative freezing of funds in the debtor's bank account upon the bank receiving notice of the filing of the debtor's bankruptcy case. The banks would then immediately contact the Chapter 7 trustee in the debtor's case and advise that it considered the funds in the account property of the bankruptcy

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[63] (...continued)
abandonment had not occurred under those subsections.

[64] *See* Bankruptcy Docket, Doc. 412, *in* App. at 1100064. A copy of Cook's amended Schedule C was not provided to this Court.

[65] *Compare In re Mwangi*, 432 B.R. 812, 822-23 (9th Cir. BAP 2010) (section 522's right to claim exemptions in property of the estate bestows standing on debtors to pursue a claim for stay violations); *Moreira v. Digital Employees Fed. Credit Union (In re Moreira)*, 173 B.R. 965, 973 (Bankr. D. Mass. 1994) (holding that debtor has standing to challenge setoff of an account that the debtor claimed exempt) *with In re Young*, 439 B.R. 211, 218 (Bankr. M.D. Fla. 2010) (rejecting *Mwangi* and holding no standing because debtor cannot establish injury in fact); *Bucchino v. Wells Fargo Bank, N.A. (In re Bucchino)*, 439 B.R. 761, 771 (Bankr. D.N.M. 2010) (no standing to assert claim under §362(k) because debtor suffered no injury; only Chapter 7 trustee has standing to assert stay violation in these circumstances). *See also Jimenez v. Wells Fargo Bank, N.A. (In re Jimenez)*, 335 B.R. 450, 455-56 (Bankr. D.N.M. 2005) (*Jimenez I* – debtor had standing to assert a stay violation based on the denial of access to funds that she claimed exempt), *rev'd*, 406 B.R. 935 (D.N.M. 2008) *(Jimenez II* – debtor did not have standing to assert a violation of the stay under the facts of this case).

estate and payable only to or upon the trustee's order. The debtors claimed the imposition of the administrative freeze, which prevented them from accessing their funds, violated the automatic stay. The banks rejoined that the debtor lacked standing to pursue it for denial of access to funds because only the Trustee as "owner" may assert claims against it for any actions with respect to those funds during the time period that the funds belonged to the bankruptcy estate.

In *Mwangi*, the Ninth Circuit BAP held that § 522's right to claim exemption in property of the estate bestows standing on debtors for purposes of § 362(k).[66] The Ninth Circuit BAP reasoned that a debtor who claimed property exempt held an "inchoate interest" in the property pending allowance or disallowance of the claim of exemption.[67] The Ninth Circuit BAP, however, did not explain how the right to claim an exemption, coupled with an inchoate interest, results in an injury in fact to the debtor that is fairly traceable to the alleged violation.[67]

In *Jimenez I*, the bankruptcy court concluded that the debtor had standing to assert a stay violation based on the bank's administrative freeze of the account funds because she had exercised her right to exempt the account funds.[68] The bankruptcy court held that when the bank froze the accounts, the debtor had

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[66] *Mwangi*, 432 B.R. at 822.

[67] *Id.* at 820-821.

[67] Indeed, courts within the Ninth Circuit have refused to follow *Mwangi*. *See Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, Case No. 2:11-CV-01753, 2012 WL 1150406 (D. Nev. Apr. 6, 2012). After remand, the bankruptcy court dismissed the adversary with prejudice because the debtors (1) lacked standing to pursue any alleged stay violation as only a trustee has such standing; and (2) could not allege injury to any inchoate rights as they had no basis, absent the Trustee's approval, to demand possession of the funds unless and until the funds revested with the debtors. The district court affirmed the bankruptcy court's dismissal of the adversary, explicitly rejecting the proposition that a debtor's mere claim of exemption removes that property from the estate.

[68] *Jimenez I*, 335 B.R. at 456.

already exercised her right to exempt the account funds, and therefore, had a direct economic interest in the funds. The bankruptcy court reasoned:

> [A]s between the debtor and the trustee, the debtor is the most motivated to protect estate property to which the debtor has an exemption claim, and the debtor should not be denied the protection that the stay affords under the broad language of § 362(a)(3). Wells Fargo's argument confuses rights to use property with rights to enforce the stay as to the property. The stay language of § 362(a)(3) focuses on protection of property and does not expressly limit its enforcement. The limitation proposed by Wells Fargo is contrary to the purpose of the automatic stay, to protect debtors. *B.F. Goodrich Employees Federal Credit Union v. Patterson (In re Patterson)*, 967 F.2d 505, 512 n. 9 (11th Cir. 1992) (commenting on § 362(a)(3), "Congress deliberately has written the statute to give debtors 'breathing room' after filing their petition."). Wells Fargo would have this Court assign a time period within which either the debtor or the Chapter 7 trustee could pursue claims under § 362(a)(3) . . . . [U]nder Wells Fargo's view, the debtor could lose access to account funds and the protection of the stay with respect to those funds for a significant period of time. This Court sees no reason to apply these Code provisions in a way that significantly reduces the protection afforded to debtors, which are available for all other types of estate property. Therefore, the Court concludes that Plaintiff's claimed exemption in the funds is a sufficient justiciable interest to assert stay protection.[69]

After finding standing existed, the *Jimenez I* court found that Wells Fargo had expressly and wilfully violated the stay provision of § 362(a)(3), and was not excused by its policy, ostensibly created to comply with the turnover provision. Wells Fargo appealed.

In *Jimenez II*, the district court reversed the bankruptcy court's standing determination and concluded that the debtor did not have standing to pursue an alleged violation of the automatic stay under the facts of the case.[70] The district court found that the debtor's claim of exemption did not confer standing because, when the administrative freeze was in force, the time for objection to exemptions had not yet expired and the accounts would have remained inaccessible to the debtor in any event until her claim of exemption was allowed. The district court

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[69] *Id.* at 455-456 (footnotes omitted).

[70] *Jimenez II*, 406 B.R. at 945.

noted that "property is not summarily removed from the bankruptcy estate immediately upon the debtor's claim of exemption . . . . [P]roperty that the debtor claims is exempt does not cease being property of the estate until the exemption is allowed or until the time for making objection expires."[71] The district court reasoned that conferring standing upon a mere claim of exemption would defeat the procedure set forth in the Bankruptcy Rules for the orderly determination of claims of exemption.[72] It noted that "[i]f the debtor were permitted to use estate property before the claim of exemption was allowed, either by order of the court or operation of law, the procedure for determining exemptions could easily be thwarted. Debtors would have incentive to exhaust the assets they claimed were exempt as quickly as possible before objections were lodged."[73] The district court agreed with the bankruptcy court in *In re Williams*[74] that "[o]nce debtor's bank account rights have become exempt property, the debtor can pursue enforcement of [Bank's] contractual obligation (instead of pursuing contempt)."[75] The district court also reversed the bankruptcy court's conclusion that the bank had violated the stay, finding the bank did not take any action to interfere with the orderly liquidation of estate or to prevent the trustee from evaluating the available assets and determining proper distribution.[76] The bank did not obtain possession of the property or exercise control over it, but sought guidance from the trustee.

In *Young*, the bankruptcy court concluded that a debtor did not have standing to seek sanctions where the exempt status of the property had not been

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71 *Id.* at 942.

72 *Id.*

73 *Id.* at 943.

74 *In re Williams*, 249 B.R. 222 (Bankr. D.D.C. 2000).

75 *Id.* at 223.

76 *Jimenez II*, 406 B.R. at 946.

resolved at the time of the hearing on the sanctions motion.[77] The bankruptcy court reasoned that "if a debtor were deemed to have standing . . . the result would be that a bank, to avoid such sanctions, would honor a debtor's request with the result that in cases in which the exemption were subsequently disallowed, the estate would be deprived of assets to pay creditors."[78] The bankruptcy court commented:

> This Court has seen innumerable instances where the existence of substantial funds in a debtor's bank account, often undisclosed in the schedules, was discovered by the trustee at the meeting of creditors after all such funds had been dissipated. Invariably, the debtor has no money at that time to turn over to the trustee. In such instances, the remedies available to a trustee are few and inadequate. One such remedy may be to deny the debtor's discharge. Another may be to enter a judgment against the debtor in favor of the trustee for the amount of the funds taken by the debtor. Or the trustee can consider bringing actions against the other and often innocent recipients of the transfers. None of these alternatives is either conducive to the debtor's "fresh start" or an efficient way to administer property of the estate. Clearly, the procedure followed by the Bank in this case is a preferred alternative and allows the property of the estate to be properly established and administered efficiently and consistent with the various provisions of the Bankruptcy Code referenced above.[79]

We find the line of cases that hold a mere claim of exemption does not confer standing more persuasive. The purpose of the automatic stay is to protect debtors, but it also protects the estate and allows for liquidation to proceed in an orderly manner. Bankruptcy Rule 4003 prescribes the procedure for making and resolving objections to a debtor's claimed exemptions. The Bankruptcy Code clearly contemplates judicial determination of a claim of exemption in the event there are objections.

Upon the filing of a bankruptcy petition, an estate is created, which is comprised of all legal or equitable interests of the debtor in property as of the

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77 *In re Young*, 439 B.R. 211 (Bankr. M.D. Fla. 2010).

78 *Id.* at 218.

79 *Id.*

commencement of the case.[80] The Trustee is the representative of the estate in a Chapter 7 case.[81] The Trustee shall collect and reduce to money the property of the estate.[82] It is the Trustee to whom the obligation to turnover property of the estate runs.[83] And it is the Trustee who has the right to use property of the estate.[84] A Chapter 7 debtor has none of these rights. A claim of exemption is just a claim; it does not mean the debtor is entitled to the property claimed. Property claimed exempt does not become the debtor's until the claim is allowed or by operation of law if no timely objection is made.[85] Claiming an exemption does nothing more than preserve one's rights to it, if it is allowed or no one timely objects. Doing otherwise would encourage debtors to claim an exemption, whether valid or not, simply to gain standing, which could lead to multiple motions complaining of the same conduct and to duplication of effort, confusion, waste and delay.[86] As the *Price* court noted:

> Common sense supplies the rationale underlying the Code's policy that other parties in interest have no unilateral authority to perform the duties of a trustee. Multiple prosecutions of the same claims would lead to duplication of effort, confusion, waste and delay. Unilateral intervention by a party in interest, however laudable that party's motivation, may conflict with a trustee's strategy and result in a smaller, rather than a larger, recovery. An unauthorized plaintiff may disclaim any duty to protect the interests of the estate. The court and the trustee would lack the degree of control over a volunteer plaintiff necessary to insure that the duty being assumed is faithfully and competently performed. In short, a

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80 11 U.S.C. § 541.

81 11 U.S.C. § 323.

82 11 U.S.C. § 704.

83 11 U.S.C. § 542.

84 11 U.S.C. § 363.

85 11 U.S.C. § 522; Fed. R. Bankr. P. 4003.

86 *Price v. Gaslowitz (In re Price)*, 173 B.R. 434, 440 (Bankr. N.D. Ga. 1994).

bankruptcy estate, like a ship, can have but one captain.[87]

In this case, Wells Fargo and Garrett timely objected to Cook's claim of exemption.[88] Cook's claim of exemption has not been allowed by court order to date.[89] Accordingly, the IP remains in the estate until the case closes or the objection to the exemption is resolved.[90]

Because the IP belongs to the estate, Cook has no interest in the outcome of any alleged stay violations. In other words, Cook has not been injured. Rather, Cook's bankruptcy estate, a separate legal entity from Cook, is the alleged injured party. Cook's injury, if any, is a result of the appointment of a Chapter 11 trustee in his case and conversion of his Chapter 11 case to a Chapter 7.[91] These events divested him of authority to pursue the causes of actions involving the IP. Cook had standing as a debtor-in-possession, but lost it when a Chapter 11 trustee was appointed to his case in July 2005. The Chapter 11 trustee no longer had authority over the estate's property when the case was converted to a Chapter 7

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87 *Id.*

88 Both Wells Fargo and Garrett filed objections to Cook's amended claim of exemption within thirty days of Cook's amendment of his schedules. *See* Bankruptcy Docket, Docs. 425, 447 and 448 (Wells Fargo's Supplement [to its] Objection), *in* App. at 1100063, 1100061.

89 The bankruptcy court held a hearing on Cook's Amended Claim of Exemptions on February 26, 2007. *Id.*, Doc. 512, *in* App. at 110055. On April 5, 2007, the bankruptcy court issued an order decreeing the exemptions claimed in the Amended Schedule C were limited to the actual dollar amounts claimed there, and that with regard to Cook's claim of exemption in the IP, "if such property is property of the estate, such property is subject to the limitation of the exempt amount actually claimed." *Id.*, Doc. 533, *in* App. at 1100063. The bankruptcy court stated the order did not resolve the issue of whether such property is property of the estate.

90 *See Bucchino v. Wells Fargo Bank, N.A. (In re Bucchino*), 439 B.R. 761, 770 (Bankr. D.N.M. 2010) (property of the estate is not exempt unless and until the time to object to the claim of exemption expires or a timely objection is overruled).

91 Cook did not appeal the order appointing the Chapter 11 Trustee or the order converting his case, and it is too late now.

on March 20, 2008. From then on, the Chapter 7 trustee was entrusted with collecting and reducing to money the property of the estate.[92] Cook, as a Chapter 7 debtor, has no right to exercise control over the IP or claim an injury as a result of any alleged stay violations involving the IP.[93]

We conclude the bankruptcy court correctly held that a claim of exemption does not confer standing upon the debtor to pursue stay violations involving property claimed exempt.

3. Cook did not suffer injury in fact sufficient to confer standing under § 362(k).

Section 362(k) provides "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages."[94] Cook claims he has standing under § 362(k), previously § 362(h), to pursue these stay violations. Cook cites *Pettitt v. Baker*[95] for the proposition that § 362(h), now § 362(k), created both a private cause of action and a private remedy that belonged to a debtor.[96] Cook's reliance upon *Pettitt* is misplaced.[97]

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[92] 11 U.S.C. § 704(a)(1); *In re Perkins*, 902 F.2d 1254, (7th Cir. 1990) (authority to collect the debtor's assets is vested exclusively in the trustee).

[93] *Mark Bell Furniture Warehouse, Inc. v. D.M. Reid Assocs., Ltd. (In re Mark Bell Furniture Warehouse, Inc.)*, 992 F.2d 7, 9-10 (1st Cir. 1993) (The Chapter 7 trustee, not the Chapter 7 debtor, is responsible for collecting all property of the estate and reducing it to money.).

[94] In 2005, 11 U.S.C. § 362(h), the former sanctions provision, was renumbered as § 362(k)(1). Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441, 119 Stat. 23, 79, 114. We use the current codification and refer to § 362(k)(1) rather than § 362(h).

[95] 876 F.2d 456 (5th Cir. 1989).

[96] Amended Appellant's Opening Brief at 15.

[97] Cook also cites a number of other cases, see *In re Pointer*, 952 F.2d 82 (5th Cir. 1992); *In re Joubert*, 411 F.3d 452 (3d Cir. 2005); *Smith v. Keycorp Mortgage, Inc.*, 151 B.R. 870 (D. N.D. Ill. 1993); *In re Hutchins*, 211 B.R. 325

(continued...)

In *Pettitt*, the Fifth Circuit concluded that § 362(h) created a private remedy for one injured by a willful violation of an automatic stay. The Fifth Circuit, however, specifically stated that in reaching this conclusion, it expressed no opinion regarding whether the debtor had the requisite standing.

Article III of the Constitution requires that for a plaintiff to have standing, he must allege (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) that it is likely redressable by a favorable ruling.[98] Cook, as the party invoking standing, bears the burden of establishing these three elements.[99]

Cook claims he has been injured by the alleged stay violations committed by Wells Fargo and Garrett "in losing the value of his ownership of HCAN's causes . . . ."[100] Cook claims he acquired HCAN's causes of action six months after he filed bankruptcy, but they did not become property of the estate.[101] The flaw in Cook's argument is in the premise that the automatic stay protects HCAN's causes.

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[97] (...continued)
(Bankr. E.D. Ark. 1997); *Gullett v. Cont'l Cas. Co. (In re Gullett)*, 230 B.R. 321 (Bankr. S.D. Tex. 1999); and *Reyes v. FCC Nat'l Bank (In re Reyes)*, 238 B.R. 507 (Bankr. D. R. I. 1999). None of these cases are apposite. *Pointer* dealt with whether a creditor has standing to avoid postpetition ad valorem tax liens. *Joubert* and *Smith* discussed whether § 105(a) creates a private cause of action. *Hutchinson* and *Reyes* dealt with § 525(a) and § 524, respectively. Although *Gullett* made more than a passing reference to § 362, it focused on a workers' compensation carrier's exercise of its right of recoupment, and was reversed by *Cont'l Cas. Co. v. Gullett*, 253 B.R. 796 (D. S.D. Tex. 1999).

[98] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[99] *Id.* at 561.

[100] Amended Appellant's Opening Brief at 17. Cook's references to HCAN's causes are to its claim that it owns the IP.

[101] *Id.* at 3 n.2 ("...property acquired by Debtors post-Petition [sic], more than six months (e.g. HCAN's claims and a security interest in [CBM]), did not become estate properties as they were not acquired with estate funds. § 1115 became applicable Aug. of 2005 and this is a 2004 case.").

With respect to HCAN's claims, the bankruptcy court found:

> If the claims were not transferred [to the Debtor], the automatic stay does not protect non-debtors. If the claims were transferred [to the Debtor], they were claims by a debtor and not protected by the automatic stay. Whether HCAN's claims were incidentally diminished in value by the state court ruling is really none of this Court's concern.[102]

We agree. The automatic stay neither protects non-debtors nor suits by the debtor.[103] Even if the automatic stay applied to HCAN's causes, the bankruptcy court had annulled the stay.[104] Cook did not appeal that order and it is too late now to do so.

Cook suffered no injury to a legally protected interest fairly traceable to the Bank's or Garrett's actions. Consequently, Cook had no standing to assert claims against the Bank and Garrett under § 362(k). Because Cook lacks standing to bring these motions, we need not decide whether any stay violations occurred or whether collateral estoppel barred Cook from asserting these motions.

B. Merits of the Order Denying Reconsideration

Bankruptcy Rule 9023 makes Civil Rule 59 apply to bankruptcy proceedings, and a motion to reconsider is treated as a motion to alter or amend under Rule 59(e) so long as it is filed, as Cook's was, within the applicable time limit.[105] The standard for granting a motion to alter or amend is very strict, and

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[102] Reconsideration Order at 21-22, *in* App. at 1100119-1100120.

[103] *Marit. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (the clear language of section 362(a) indicates that it stays only proceedings against a "debtor" – the term used by the statute itself); *Martin–Trigona v. Champion Fed. Savs. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989) (the automatic stay is inapplicable to suits by the debtor).

[104] *See* Order Reiterating, Clarifying and Expanding as Needed April 21, 2008 Order Granting Stay Relief and Other Relief (Doc. 740), *in* App. at 1100545-549; Bankruptcy Docket, *in* App. at 110031-110032.

[105] *See, e.g.*, *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992).

typically Rule 59(e) motions are denied.[106] Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."[107] As stated by the Tenth Circuit, "[t]he purpose for such a motion is to correct manifest errors of law or to present newly discovered evidence."[108] New evidence in the context of Rule 59(e) refers to evidence that was "available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence."[109]

In his amended motion to reconsider, Cook alleged clear error and new evidence as grounds for his motion.[110] Cook's new evidence consisted of (1) an order issued by Judge Herrera on April 19, 2010, in *Cook v. Eastern Savings Bank, FSB*, Adv. No. 04-1246, (2) the bankruptcy court's recognition of Cook's entry of appearance in Adv. No. 04-1246; (3) the fact that the district court granted his request to withdraw the reference of Adv. No. 04-1246 from the bankruptcy court to the district court; and (4) the bankruptcy court's "okay" comment at the hearing on Cook's Motion to Compel Abandonment on October 2, 2008.[111] We do not consider these "events" newly discovered evidence relating to the abandonment issue.

The first four "events" took place in an unrelated proceeding against Eastern Savings Bank, FSB ("ESB"). The Cooks asserted causes of action for, *inter alia*, fraud and misrepresentation, malicious abuse of process, and violation

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106 11 Charles Alan Wright et al., *Federal Practice & Procedure Civil* § 2810.1 at 124-28 (2d ed. 2002).

107 *Id.* at 127-28 (footnotes omitted).

108 *Campbell*, 962 F.2d at 1523 (internal quotation marks omitted).

109 *Id.*

110 Amended Motion to Reconsider Dismissal of Sanctions Motions Against Wells Fargo Bank and Garrett et al. at 4, *in* App. at 1100281.

111 *Id.* at 1100281-282.

of the New Mexico Unfair Trade Practices Act against ESB for its prepetition foreclosure of the Cooks' former residence. Cook claims that the bankruptcy court "explicitly allowed Debtor's succession to the abandoned estate assets" when it recognized his entry of appearance in Adv. No. 04-1246, denied, without prejudice, his motion for change of venue of that case, and transmitted his motion for withdrawal of reference to the district court. None of these acts by the bankruptcy court constitute a court order declaring the abandonment of property. Recognizing an entry of appearance and transmitting a motion for withdrawal are ministerial tasks. The bankruptcy court's review of Cook's motion for change of venue was the execution of its duties under 28 U.S.C. § 157, to hear and determine matters concerning the administration of the estate.

Although Judge Herrera's order did state that the Trustee abandoned all remaining property of the estate on July 1, 2009, that conclusion was made in the factual and procedural background of the district court's order on Cook's motion to withdraw his "non-core" claims from the jurisdiction of the bankruptcy court. It would have been more accurate to state that "On July 1, 2009, the bankruptcy Trustee filed a notice of abandonment and requested dismissal as Trustee." In any event, because the issue before the district court was whether to withdraw the reference to Cook's non-core claims against ESB, and not whether a § 554 abandonment had occurred, the district court's order is not evidence supporting Cook's position on abandonment.

Cook either mischaracterized or misunderstood the bankruptcy court's "okay" comment at the October 2, 2008 hearing. As the bankruptcy court patiently explained, "okay" in both instances meant "I understand" and not "I approve and so order."

Cook's clear error arguments are essentially the same arguments he has pressed on appeal. Having concluded the bankruptcy court correctly held that Cook lacked standing to bring the stay violations motions, we conclude the

bankruptcy court did not abuse its discretion in denying Cook's motion to reconsider the dismissal of his stay violations motions.

IV. Conclusion

Cook does not have standing to pursue an alleged violation of the automatic stay under the facts of this case. When Cook's case was converted to a Chapter 7, his interests in the IP became property of the estate. Cook's claim of exemption did not confer standing because, when Wells Fargo filed its summary judgment motion in the State Court Action, Cook's claim of exemption faced a timely objection and had not yet been allowed. Because the Chapter 7 Trustee's Notice of Abandonment did not strictly comply with § 554's requirements and the case had yet to close, there was no effective abandonment to confer standing upon Cook to pursue stay violations involving the IP.

Because the bankruptcy court correctly concluded that Cook lacked standing to bring the stay violations motions and there was no new evidence the bankruptcy court failed to consider, the bankruptcy court did not abuse its discretion in entering the Reconsideration Order. Accordingly, we AFFIRM the denial of Cook's motion for reconsideration.

Any motion for reconsideration of this opinion is limited to no more than five pages.