**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. EC-09-1281-DMkH |
| LUCINDA K. BAUER, | Bk. No. 09-21019 |
| Debtor. | |
| LUCINDA K. BAUER, | |
| Appellant, | |
| v. | **M E M O R A N D U M**[1] |
| NORTHEAST NEBRASKA FEDERAL CREDIT UNION, | |
| Appellee. | |

Argued and Submitted on March 17, 2010
at San Francisco, California

Filed - April 8, 2010

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Michael S. McManus, Bankruptcy Judge, Presiding.

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Before: DUNN, MARKELL and HOLLOWELL, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellant Lucinda K. Bauer ("Ms. Bauer") filed a motion for civil contempt ("Motion") against Appellee Northeast Nebraska Federal Credit Union (the "Credit Union") for alleged willful violations of the automatic stay and discharge injunction in Ms. Bauer's chapter 7 bankruptcy case.[2]

The bankruptcy court granted the Motion in part and struck Ms. Bauer's reply as untimely. Ms. Bauer appeals the bankruptcy court's award of sanctions against the Credit Union as inadequate and further appeals the bankruptcy court's order striking her reply. We AFFIRM.

## I. FACTS[3]

Ms. Bauer is an attorney licensed to practice law in California and Nebraska. She is a sole practitioner with approximately fourteen years of experience and has a home-based law practice.

Ms. Bauer filed her chapter 7 bankruptcy petition on January 22, 2009. On the same date, she filed her schedules. In her Schedule F, Ms. Bauer listed two unsecured loan debts owing to the Credit Union, and in her Schedule D, she listed the Credit Union as a secured creditor for an automobile loan, which was the

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[2] Unless otherwise indicated, all chapter, section and rule references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] This is the second appeal by Ms. Bauer that this Panel has heard. Relevant facts are included from the Panel's prior unpublished Memorandum disposition in BAP No. EC-09-1154-JuMkMo, filed on December 16, 2009.

subject of the prior appeal that we considered.[4] Notice of Ms. Bauer's bankruptcy filing, dated January 23, 2009, was served on the Credit Union by notice sent on January 25, 2009. Ms. Bauer received her discharge by order entered on April 29, 2009.

Following Ms. Bauer's bankruptcy filing and in spite of receiving notice of her bankruptcy, the Credit Union violated the automatic stay by sending postpetition notices and account statements to Ms. Bauer and by withdrawing funds from her account(s). On April 24, 2009, Ms. Bauer filed the Motion, supported by a Memorandum of Law, her Declaration and multiple exhibits. Notice of the Motion was served on the Credit Union, advising of a hearing ("Preliminary Hearing") on the Motion scheduled for May 26, 2009 at 9:00 a.m. However, contrary to the bankruptcy court's Local Rule 9014-1(d)(3), the hearing notice did not specify the filing deadline for written oppositions.

At the Preliminary Hearing, the bankruptcy court determined that it was not necessary to convert the Motion from a contested matter into an adversary proceeding but allowed the parties to conduct discovery pursuant to Rule 9014(c). The bankruptcy court further advised that it would set a briefing schedule for the

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[4] The record in this appeal is problematic for two reasons: First, Ms. Bauer did not index and submit her excerpts of record ("ER") chronologically. The nonsequential ordering of documents creates considerable difficulty in grasping exactly what was going on before the bankruptcy court. Second, Ms. Bauer does not include any of the Credit Union's submissions. The Credit Union did us no favors in not supplementing the record on its own. While these problems make the record more difficult to review, there is enough here, as supplemented by documents available on the bankruptcy court docket, to allow us an adequate review.

Credit Union's opposition to the Motion and Ms. Bauer's reply and adjourned proceedings for a further hearing ("Final Hearing") on August 17, 2009 at 9:00 a.m.

There is no record in the docket of Ms. Bauer's bankruptcy case that the bankruptcy court subsequently entered an order setting specific deadlines for filing the Credit Union's opposition to the Motion or any reply by Ms. Bauer. However, under the bankruptcy court's Local Rules 9014-1(f)(1)(ii) and (iii), the Credit Union's opposition to the Motion was required to be filed and served "at least" 14 days prior to the Final Hearing date, and Ms. Bauer's reply was required to be filed and served "at least" 7 days prior to the Final Hearing date. Accordingly, the Credit Union's opposition to the Motion was due no later than August 3, 2009, and Ms. Bauer's reply was due no later than August 10, 2009.

The Credit Union's memorandum opposing the Motion and the supporting Declaration of Susie Korth ("Korth Declaration") were filed on July 27, 2009.[5] Ms. Bauer served her reply declaration ("Reply") by mail on counsel for the Credit Union on August 11, 2009. She drove to Sacramento on August 11, 2009, to file her Reply and supporting exhibits with the bankruptcy court, but due to an accident en route that diverted traffic, she was not able

[5] Neither Ms. Bauer nor the Credit Union included these documents in Excerpts of Record. We obtained and take judicial notice of these documents from the bankruptcy court's docket on-line. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

to get to the bankruptcy court until after it had closed. Consequently, she returned from Sacramento without having filed her Reply papers with the bankruptcy court and subsequently mailed them. Her Reply documents were not received by the bankruptcy court until after the Final Hearing on August 17, 2009, and were filed by the bankruptcy court on August 18, 2009.

At the Final Hearing, counsel for the Credit Union appeared, but Ms. Bauer did not. Ms. Bauer did not request to appear at the Final Hearing by telephone. In advance of the Final Hearing, the bankruptcy court had posted a tentative ruling ("Tentative Ruling"), granting the Motion in part: Based on its review of the evidence, the bankruptcy court tentatively determined that Ms. Bauer had suffered no actual damages, as the Credit Union had returned to Ms. Bauer the funds it had removed from her account(s). In addition, citing Elwood v. Drescher, 456 F.3d 943, 947-48 (9th Cir. 2006), the bankruptcy court determined that Ms. Bauer, as a pro se litigant, was not entitled to an award of attorney's fees. However, finding that the Credit Union had acted at least "recklessly and without regard to the debtor's bankruptcy rights" in continuing to send late notices and account statements to Ms. Bauer postpetition and making postpetition withdrawals from her account(s), the bankruptcy court tentatively awarded Ms. Bauer $500 punitive damages.

At the Final Hearing, counsel for the Credit Union accepted the bankruptcy court's Tentative Ruling, and Ms. Bauer did not appear, nor did she object. The bankruptcy court stated on the record that Ms. Bauer could lodge an order consistent with the Tentative Ruling.

Ms. Bauer did not submit an order following the Final Hearing. Instead, she filed a notice of appeal on August 27, 2009.

On September 1, 2009, the bankruptcy court issued an order ("Order") granting Ms. Bauer's Motion in part, consistent with its Tentative Ruling. In the Order, the bankruptcy court noted that Ms. Bauer did not appear at the Final Hearing and that her Reply was not filed until after the Final Hearing, in violation of the requirements of the bankruptcy court's Local Rule 9014-1(f)(1)(iii). Accordingly, the bankruptcy court did not consider Ms. Bauer's Reply papers when it decided the Motion at the Final Hearing. The Order included a provision striking Ms. Bauer's Reply and confirming that her Reply was not considered by the bankruptcy court. Ms. Bauer's notice of appeal is timely.[6]

## II. JURISDICTION

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

## III. ISSUES

1. Whether the bankruptcy court denied Ms. Bauer due process in striking her Reply.

2. Whether the bankruptcy court erred in determining that Ms. Bauer had no actual damages.

3. Whether the bankruptcy court erred in excluding emotional distress damages.

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[6] Though premature, Ms. Bauer's notice of appeal, filed August 27, 2009, is considered timely under Rule 8002(a).

4. Whether the bankruptcy court erred in denying Ms. Bauer an award of attorney's fees or in lieu thereof, an award of damages for her "diversion of energies."

5. Whether the bankruptcy court's award of punitive damages was sufficient or equitable.

## IV. STANDARDS OF REVIEW

We review a bankruptcy court's legal conclusions, including its interpretation of provisions of the Bankruptcy Code, de novo. Roberts v. Erhard (In re Roberts), 331 B.R. 876, 880 (9th Cir. BAP 2005), aff'd 241 F. App'x 420 (9th Cir. 2007). We review a bankruptcy court's findings of fact for clear error. United States v. Gould (In re Gould), 401 B.R. 415, 421 (9th Cir. BAP 2009). "A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been committed." Wall St. Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006). See also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 400-01 (1990). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Hansen v. Moore (In re Hansen), 368 B.R. 868, 875 (9th Cir. BAP 2007); Anderson v. City of Bessemer City, 470 U.S. 564, 573-75 (1985). Applying § 362(k) in this appeal presents a mixed question of law and fact. We review mixed questions of law and fact de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997).

We review a bankruptcy court's enforcement of its local rules for an abuse of discretion. O'Donnell v. Vencor Inc., 466 F.3d 1104, 1109 (9th Cir. 2006) (trial courts have broad

discretion in applying their local rules). "The amount of sanctions imposed for a willful violation of the stay is reviewed for an abuse of discretion." Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1213 (9th Cir. 2002).

To determine whether the bankruptcy court has abused its discretion, we conduct a two-step inquiry: (1) we review de novo whether the bankruptcy court "identified the correct legal rule to apply to the relief requested" and (2) if it did, whether the bankruptcy court's application of the legal standard was illogical, implausible or "without support in inferences that may be drawn from the facts in the record." United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). "If the bankruptcy court did not identify the correct legal rule, or its application of the correct legal standard to the facts was illogical, implausible, or without support in inferences that may be drawn from the facts in the record, then the bankruptcy court has abused its discretion." USAA Fed. Sav. Bank v. Thacker (In re Taylor), ___ F.3d ___, 2010 WL 1006927 (9th Cir. March 22, 2010), citing United States v. Hinkson, 585 F.3d at 1261-62.

We may affirm the bankruptcy court on any grounds supported by the record. Canino v. Bleau (In re Canino), 185 B.R. 584, 594 (9th Cir. BAP 1995).

## V. DISCUSSION

At the outset of our discussion in this appeal, it is important to remember that our role as an appellate tribunal is limited. We are not the trier of fact, and we do not "find" facts. We review the fact findings of the trial court for clear error, and we do not overturn a trial court's fact findings as

clearly erroneous unless we have a "definite and firm conviction" that the trial court erred. Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004). We further generally do not consider issues raised for the first time on appeal, where the trial court had no opportunity to consider them. See, e.g., United Student Aid Funds, Inc. v. Espinosa, ___ U.S. ___, 2010 WL 1027825, Slip Opinion at p. 8 n.9 (March 23, 2010) ("We need not settle that question, however, because the parties did not raise it in the courts below."); Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (court will not consider issue raised for the first time on appeal absent exceptional circumstances). In particular, we cannot consider facts that were not before the trial court. See Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 n.5 (9th Cir. 2001) ("[E]vidence that was not before the lower court will not generally be considered on appeal."); Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988) (papers not filed or admitted into evidence by the trial court prior to judgment on appeal were not part of the record on appeal and thus stricken). As stated by the Ninth Circuit in Kirschner, "'We are here concerned only with the record before the trial judge when his decision was made.'" Kirschner, 842 F.2d at 1077 (quoting United States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979)).

It is with these considerations in mind that we address the specific issues raised in this appeal.

A. The Bankruptcy Court Did Not Abuse Its Discretion In Striking Ms. Bauer's Reply

In her statement of Issues on Appeal in her opening brief,

Ms. Bauer states issue no. 4 as, "Whether the bankruptcy court denied Bauer due process in striking her response." Appellant's Opening Brief, at p. 3. However, Ms. Bauer did not present this argument to the bankruptcy court and does not argue denial of due process in her opening brief or in her reply brief. Accordingly, this issue is waived. Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002) (arguments not specifically and distinctly made in an appellant's opening brief are waived); Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd 205 F.3d 1350 (9th Cir. 1999).

What Ms. Bauer does argue is that her late Reply should not have been stricken based on her excusable neglect. She also questions the bankruptcy court's impartiality.

Federal Rule of Civil Procedure 60(b)(1), applicable in bankruptcy cases under Rule 9024, provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding...." (emphasis added). However, Ms. Bauer made no such motion to the bankruptcy court. It is axiomatic that appellate courts will not consider arguments "that are not 'properly raise[d]' in the trial courts." In re E.R. Fegert, Inc., 887 F.2d at 957. Because Ms. Bauer never filed a motion to vacate the portion of the order striking her Reply based on excusable neglect, we will not consider that argument on appeal.

As to any alleged prejudice against Ms. Bauer on the part of the bankruptcy court, our review of the record indicates that Ms. Bauer never filed a motion to recuse in the bankruptcy court. Her questions as to the impartiality of the bankruptcy court

spring from the following comment of the bankruptcy court at the Final Hearing: "And the--I will make sure, Counsel, that there are no findings and conclusions in the order, just the necessary order. All right?" See Appellant's Opening Brief, at p. 24. We can speculate that the bankruptcy court's comment reflects nothing more than its application of the "separate judgment rule" from Fed. R. Civ. P. 58(a), applicable at the time of the Final Hearing with respect to contested matters in bankruptcy under Rule 9021, to its prospective order granting the Motion in part.[7] However, as with Ms. Bauer's excusable neglect argument, there is nothing in the record before us reflecting that Ms. Bauer raised the issue of the bankruptcy court's alleged partiality before the bankruptcy court in the first instance.

> Although an impartiality issue can be raised at any time, the timing may affect the weight ascribed to the evidence said to be probative of bias or prejudice. One who waits to raise an impartiality issue until after adverse decisions are announced undermines the weight that will be ascribed to the evidence of bias or prejudice.

American Express Travel Related Servs. Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 459 (9th Cir. BAP 1999), aff'd 242 F.3d 381 (9th Cir. 2000).

Rule 5004(a), "Disqualification of Judge," provides that, "A bankruptcy judge shall be governed by 28 U.S.C. § 455, and disqualified from presiding over the proceeding, or contested matter in which the disqualifying circumstance arises or, if appropriate, shall be disqualified from presiding over the case."

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[7] The "separate judgment" requirement was eliminated as to orders resolving contested matters by amendments to Rule 9021, effective December 1, 2009.

Section 455 of Title 28 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party,....

"Judicial impartiality is presumed." First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.... Almost invariably, they are proper grounds for appeal, not for recusal." Liteky v. United States, 510 U.S. 540, 555 (1994). In addition, questions of bias or prejudice are evaluated on an objective basis; "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Seidel v. Durkin (In re Goodwin), 194 B.R. 214, 222 (9th Cir. BAP 1996).

In this appeal, Ms. Bauer's arguments raising the issue of the bankruptcy court's alleged "partiality" arise from her dissatisfaction with the substance of the bankruptcy court's rulings and one statement from the transcript of the Final Hearing which Ms. Bauer did not attend. We find nothing in the record of this appeal that leads us to question the bankruptcy court's impartiality in its rulings with respect to the Motion.

As noted above, the bankruptcy court's decisions applying its local rules are reviewed for abuse of discretion. See O'Donnell v. Vencor, Inc., 466 F.3d at 1109. "Because general orders and local rules not only implement due process and other

statutory rights but also promote efficiency, we permit the [bankruptcy] court broad discretion in determining their requirements." United States v. DeLuca, 692 F.2d 1277, 1281 (9th Cir. 1982).

In this case the bankruptcy court struck Ms. Bauer's Reply as not timely filed pursuant to its Local Rule 9014-1(f)(1)(iii). In the Order, the bankruptcy court noted that the Reply was filed after the Final Hearing, and because the bankruptcy court was unaware of the Reply, it did not consider the Reply in deciding the Motion. The bankruptcy court further stated in the Order:

> A declaration of [Ms. Bauer] that accompanies the late-filed reply explains that she attempted to drive to Sacramento in order to file the reply on August 11 but a traffic mishap prevented her from reaching the court. This does not excuse the lateness of the reply. Even if [Ms. Bauer] had reached the court on August 11 and filed her reply that day, it would have been filed after its August 10 due date. Also, having failed to file a timely reply, it is odd [Ms. Bauer] failed to appear at the hearing to orally argue her reply. There is no explanation for the failure to appear, either in person or by telephone.

Order, at p. 2. Ms. Bauer does not argue that she was not aware of the deadline to file her Reply. In fact, in her opening brief, Ms. Bauer states that she "made every reasonable effort to meet the bankruptcy court's filing deadline." Appellant's Opening Brief, at p. 24.

In striking Ms. Bauer's Reply, the bankruptcy court applied the legal standard set forth in its own Local Rule 9014-1(f)(1)(iii). Its application of the local rule is neither illogical, implausible nor without support in the factual record before it. Based on the record before us, we conclude that the bankruptcy court did not abuse its discretion in striking Ms.

Bauer's Reply, and we do not consider her Reply documents in this appeal. See Kirschner, 842 F2d at 1077-78.

B. The Application Of § 362(k) Is Not In Question

Section 362(k)(1) provides:

> Except as provided in paragraph 2, 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.

Ms. Bauer questions the language used by the bankruptcy court in characterizing the Credit Union's postpetition conduct in its Tentative Ruling as "at the least, reckless and without regard to the debtor's bankruptcy rights" and faults the bankruptcy court for not making a finding that the Credit Union's stay violations were "willful." See Appellant's Opening Brief, at p. 18. However, the bankruptcy court's finding that the Credit Union's postpetition violations of the automatic stay were willful for § 362(k) purposes is implicit in the bankruptcy court's award of punitive damages to Ms. Bauer. Accordingly, the remaining issues in this appeal relate solely to the adequacy of the remedy ordered by the bankruptcy court.

C. The Bankruptcy Court Did Not Clearly Err In Finding That Ms. Bauer Had No Actual Damages

The bankruptcy court found that Ms. Bauer was not entitled to an award of actual damages because the Credit Union returned its postpetition withdrawals from Ms. Bauer's account(s). Ms. Bauer appeals that fact finding, arguing that the bankruptcy court disregarded evidence that the Credit Union charged, and Ms. Bauer paid, finance charges of $34.13 for the months of January through April 2009, as to her Credit Union business loan.

In her Declaration supporting the Motion, Ms. Bauer states that the Credit Union mailed her a "Late Notice" on her business loan ("Business Loan") on February 24, 2009, assessing a $30.00 postpetition late charge. In addition, she asserts that the Credit Union applied dividend interest of $.01 to her Business Loan in February 2009. She further asserts that the Credit Union sent her a number of "Late Notices" and assessed a series of postpetition late charges on her Business Loan. She states that her March statement for her Business Loan reflects postpetition account withdrawals by the Credit Union of $4.11 and $30.00 respectively. Finally, she asserts that the Credit Union withdrew $.01 dividend interest from her account and applied it to her Business Loan on April 11, 2009. The exhibits to Ms. Bauer's Declaration in support of her Motion corroborate that a number of "Late Notices" with late charges assessed were sent to Ms. Bauer postpetition, but the account statements reflect a total of only $4.13 deducted postpetition from her account(s).[8]

In the Korth Declaration, Ms. Korth, as manager of the Credit Union, confirmed that a total of $4.13 was withdrawn from Ms. Bauer's business checking account postpetition. However, she further stated that the Credit Union had sent a check to Ms. Bauer in the amount of $4.13 on May 11, 2009, to refund the total withdrawals. In addition, she stated:

> [The Credit Union] did not assess a late fee of $30.00 on [Ms. Bauer's] account. As noted on the transaction history $30.00 was not withdrawn from [Ms. Bauer's]

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[8] To the extent Ms. Bauer argues from factual material included in her stricken Reply documents, as stated above, we have not considered any material from her Reply documents.

> account nor was it assessed on [Ms. Bauer's] account. The loan balance before the late fee note is $5,888.27 and after the late fee note the balance is the same $5,888.27. A true and accurate copy of the transaction history is attached hereto as Exhibit 1.

The attached Exhibit 1 transaction history does confirm that the $5,888.27 loan balance remained unchanged but is somewhat confusing with references to a finance charge of $34.11 and a finance charge paid of $34.12.

In her opening brief Ms. Bauer states that the Korth Declaration, though declared "under penalty of perjury under the laws of the State of California," is procedurally defective "[i]nasmuch as the declaration was executed at Norfolk, Nebraska" and "the declarant is not subject to California personal jurisdiction, nor 'penalty of perjury'." Appellant's Opening Brief, at p. 10. In her reply brief, Ms. Bauer expands that assertion to an argument that the Korth Declaration is "inadmissible." Appellant's Reply Brief, at pp. 4-5. Ms. Bauer did not raise this issue before the bankruptcy court, even in her stricken Reply. We will not consider it now. In re E.R. Fegert, Inc., 887 F.2d at 957 ("The rule in this circuit is that appellate courts will not consider arguments that are not 'properly raise[d]' in the trial courts.").

In the Tentative Ruling, the bankruptcy court found that the Credit Union had "admitted to violations of the automatic stay by sending post-petition notices and account statements, and withdrawing funds from [Ms. Bauer's] account post-petition." The bankruptcy court further found that the Credit Union had admitted to postpetition withdrawals from Ms. Bauer's account totaling $4.13, but had returned the withdrawn funds back to Ms. Bauer.

Based on its review of the evidence, the bankruptcy court noted that Ms. Bauer contended that the Credit Union had withdrawn a further $30 for late charges from one of her accounts but found that the Credit Union had refuted that claim. Based on those findings, the bankruptcy court determined that Ms. Bauer was not entitled to actual damages.

As noted above, we review the bankruptcy court's fact findings for clear error. United States Dist. Court v. Sandlin, 12 F.3d 861, 864 (9th Cir. 1993). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1947). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1984). Based on our review of the record, the bankruptcy court's fact findings were supported by evidence, in spite of some contradictory information included in the Credit Union's "Late Notices" and account statements. We do not have a "definite and firm conviction" that the bankruptcy court erred in concluding that Ms. Bauer suffered no actual damages from the Credit Union's postpetition activities with respect to her accounts.

D. The Bankruptcy Court Did Not Err In Not Awarding Emotional Distress Damages To Ms. Bauer

Ms. Bauer argues that the bankruptcy court erred in failing to consider her request for emotional distress damages resulting from the Credit Union's repeated violations of the automatic stay

and the discharge injunction. In its Order adopting the Tentative Ruling, the bankruptcy court did not award Ms. Bauer any emotional distress damages. However, we note that Ms. Bauer did not request an award of emotional distress damages in the Motion.

Both Ms. Bauer and the Credit Union cite Dawson v. Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139 (9th Cir. 2004), as the seminal authority in the Ninth Circuit on emotional distress damages in this context. Ms. Bauer correctly cites Dawson for the proposition that financial loss is not required in order to claim emotional distress damages. Id. at 1149. However, in Dawson, the Ninth Circuit goes on to make clear that not every willful violation of the automatic stay "merits compensation for emotional distress." Id. The Ninth Circuit placed the burden of proof on the claimant to establish "the individual suffered significant emotional harm" and the "nexus between the claimed damages and the violation of the stay." Id. at 1149-50. In other words, "[t]he individual must be 'injured by' the violation to be eligible to claim actual damages." Id. at 1150. See, e.g., Bishop v. U.S. Bank/Firstar Bank, N.A. (In re Bishop), 296 B.R. 890, 895-97 (Bankr. S.D. Ga. 2003) (the causal connection between the stay violator's acts and the claimant's emotional distress must be clearly established or readily apparent).

In Dawson, the Ninth Circuit further discussed in elaborate detail how a claimant could establish emotional distress damages, as follows:

Corroborating medical evidence may be offered.

> ...
> Non-experts, such as family members, friends, or coworkers, may testify to manifestations of mental anguish and clearly establish that significant emotional harm occurred.
> ...
> In some cases significant emotional distress may be readily apparent even without corroborative evidence. For example, the violator may have engaged in egregious conduct. See, e.g., Wagner v. Ivory (In re Wagner), 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987) (awarding emotional distress damages, based on the debtor's testimony, when a creditor entered the debtor's home at night, doused the lights, and pretended to hold a gun to the debtor's head). Or, even if the violation of the automatic stay was not egregious, the circumstances may make it obvious that a reasonable person would suffer significant emotional harm. See, e.g., United States v. Flynn (In re Flynn), 185 B.R. 89, 93 (S.D. Ga. 1995) (affirming $5,000 award of emotional distress damages, with no mention of corroborating testimony, because "it is clear that appellee suffered emotional harm" when she was forced to cancel her son's birthday party because her checking account had been frozen, even though the stay violation was brief and not egregious).

Id. at 1149-50.

We consider the evidentiary record in this appeal in light of the foregoing standards from Dawson. First, Ms. Bauer did not present any corroborating medical evidence in support of the Motion. Ms. Bauer did request that the bankruptcy court take judicial notice of an article that Ms. Bauer apparently retrieved from the internet, "About.com Arthritis--10 Things You Should Know About Fibromyalgia From Early Symptoms to Disease Management," but the subject article relates generally to fibromyalgia and does not have any specific connection either to Ms. Bauer's condition in particular or how the actions of the Credit Union challenged in the Motion may have affected Ms. Bauer's condition.

Second, Ms. Bauer did not submit any declarations of family

members, friends or coworkers to establish any significant emotional harm that may have resulted to Ms. Bauer from the Credit Union's acts in violating the automatic stay or the discharge injunction.

Third, in her declaration in support of the Motion, Ms. Bauer made the following statements:

> Because of [the Credit Union's] unauthorized withdrawals from my checking account, I no longer have an account wherefrom I can purchase postage online, resulting in an increased cost to me at the post office, nor wherefrom I can pay my PACER account such that I am now unduly hindered in my ability to track the docket herein as well as in my adversary proceedings in the Northern District, adversary numbers 97-4443 and 09-04022. My limited access is particularly distressing because I do not receive paper filings from any defendants located in the Northern District, and more often then not, do not receive copies of that court's orders.
>
> The additional stress of being constantly in fear that I am unwittingly missing deadlines is resulting in an even more emergent need to monitor dockets, and is being reflected in the quality of my work, as well as resulting in the need to research procedure over and over again in order to determine what corrective steps I need to take, beyond what is the ordinary level of activity a pro se litigant would be required to do in a typical Chapter 7 proceeding.
>
> ...
>
> It is unspeakably humiliating and extremely embarrassing to bring a motion involving such nominal sums to this Court's attention. I am especially fearful, having first hand knowledge of [the Credit Union's] organizational climate that the bringing of this motion will result in even broader broadcast and publication of otherwise personal and private facts, to wit, its infliction of even more shame, humiliation, and duress.
>
> ...
>
> Not only has [the Credit Union] exploited my financial vulnerability in violation of the stay, it has exploited my physical and emotional vulnerabilities, resulting in extreme emotional distress.
>
> ...
>
> Prior to my filing my petition for relief, I was able to work and still medically manage my condition. Now, however, in addition to debilitating extreme pain, I am experiencing increased short-term memory deficit accompanied by difficulty in concentrating which

> further impedes my ability to keep up with the press of litigation matters, thereby increasing my stress to the point that yesterday, I could not even remember my parents' address.

Frankly, it is difficult to know what to make of this evidence in context. On the one hand, Ms. Bauer declares that the actions of the Credit Union in violation of the automatic stay have subjected her to "extreme emotional distress," and she has experienced "debilitating extreme pain" from an unspecified medical condition(s) that may or may not have arisen as a result of the Credit Union's acts in violation of the automatic stay. On the other hand, she did not request an award of emotional distress damages in her prayer for relief in the Motion or in her supporting memorandum of law. In fact, she never quantified a request for emotional distress damages in any pleading she filed with the bankruptcy court. The bankruptcy court posted a Tentative Ruling in advance of the Final Hearing that did not include an award of emotional distress damages to Ms. Bauer, but Ms. Bauer never filed a response to the Tentative Ruling. Ultimately, she did not appear in person at the Final Hearing to present her case, and she did not avail herself of the opportunity to appear at the Final Hearing by telephone.[9]

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[9] Ms. Bauer asserts that she was precluded from appearing at the Final Hearing by telephone because the bankruptcy court's "Telephonic Court Appearance" rules required that telephone appearances be reserved 24 hours in advance. In light of her difficulties experienced driving to the bankruptcy court in her attempt to file her Reply and the multiple physical difficulties to which she was subject, as described to us in her opening brief (see Appellant's Opening Brief, at p. 8), it is difficult to (continued...)

Ms. Bauer has appeared pro se before the bankruptcy court in her bankruptcy case, and she stated in her declaration in support of the Motion that she did not consider herself to be proficient in bankruptcy law and did not "practice routinely in this area." On the other hand, she did not appear at the Final Hearing on her Motion. Further, she did not file any response to the bankruptcy court's Tentative Ruling. On the record presented to us in this appeal, we do not conclude that the bankruptcy court erred in not awarding emotional distress damages to Ms. Bauer.

E. The Bankruptcy Court Did Not Err In Not Awarding Attorney's Fees or Damages For "Diversion Of Energies" To Ms. Bauer

In the Tentative Ruling incorporated in its Order, the bankruptcy court did not grant Ms. Bauer an award of attorney's fees because she proceeded on the Motion pro se, citing Elwood v. Drescher, 456 F.3d 943, 947-48 (9th Cir. 2006), and Kay v. Ehrler, 499 U.S. 432 (1991). Ms. Bauer does not challenge that determination directly, but rather argues that she should have been awarded commensurate damages based on the diversion of her energies required to prepare, file and prosecute the Motion.

Her argument essentially is that small business or proprietorship owners, such as Ms. Bauer with her solo law practice, should be compensated for their efforts to combat violations of the automatic stay and the discharge injunction through treatment of the time diverted from their normal business endeavors as actual damages. The only case authority she cites

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[9](...continued)
understand why Ms. Bauer did not reserve at least the option of appearing at the Final Hearing by telephone 24 hours in advance.

in support of this argument is In re Hellen, 329 B.R. 678 (Bankr. N.D. Ill. 2005), which stands for the proposition that exemption statutes should be interpreted liberally in favor of debtors, but otherwise does not have any bearing on the appropriate measure of actual damages in cases involving willful violations of the automatic stay.

Ms. Bauer did not articulate her "diversion of energies" argument to the bankruptcy court either in her Motion or in her supporting Memorandum of Law. Her argument is based on a portion of a single paragraph in her Declaration in support of the Motion which states:

> 31. My usual hourly rate is $350.00 per hour in state court matters, $250.00 per hour in federal court. As a result of the aggravation of my medical status as set forth herein, I have spent an ordinarily-unjustifiable 47 hours in preparing this motion which is time diverted from income producing activity. I will incur costs to prepare and serve my reply pleadings....

The individual debtor bears the burden of proof to establish her entitlement to actual damages under § 362(k) for willful violations of the automatic stay. See, e.g., Dawson, 390 F.3d at 1149; Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227-28 (9th Cir. 1989). In the Tentative Ruling, the bankruptcy court did not limit its determinations to concluding that Ms. Bauer, as a pro se litigant, was not entitled to an award of attorney's fees. The bankruptcy court went on to find that:

> [E]ven if [Ms. Bauer] would have been entitled to attorney's fees, she would have been entitled only to reasonable fees. Spending 47 hours in the preparation of the instant motion is hardly reasonable. If [Ms. Bauer] had retained a bankruptcy attorney, that attorney would have likely spent one-tenth of the 47 hours claimed by [Ms. Bauer]. And, that attorney would have charged the same or a lesser hourly rate than the debtor typically charges. In her declaration, she

> states that her hourly rate in state court matters is $350 and in federal court is $250....
>
> The court also notes that it has no evidence of [Ms. Bauer's] time sheets. All the court has is a statement by [Ms. Bauer] that she "spent an ordinarily-unjustifiable 47 hours in preparing this motion."...Therefore, even if [Ms. Bauer] would have been entitled to attorney's fees and she had spent less than 47 hours in preparing the motion, the court still does not have sufficient evidence to determine the reasonableness of [Ms. Bauer's] attorney's fees.

Tentative Ruling, at p. 2.

In other words, even if the bankruptcy court had not determined as a matter of law that as a pro se litigant, Ms. Bauer was not entitled to an award of attorney's fees, the bankruptcy court found as a matter of fact that Ms. Bauer did not meet her evidentiary burden of proof to establish her entitlement to an award of actual damages for the diversion of her time from her professional work as a solo attorney. Without an itemization in the record to evaluate the reasonableness of the time spent by Ms. Bauer in preparing and prosecuting her Motion, we do not have a clear and definite impression from the record in this appeal that the bankruptcy court erred in that fact finding. See also Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010).

F. The Bankruptcy Court Did Not Abuse Its Discretion In Awarding Ms. Bauer Punitive Damages Of $500

As noted above, the amounts of sanctions awarded for willful violations of the automatic stay are reviewed for abuse of discretion. Eskanos & Adler, P.C. v. Leetien, 309 F.3d at 1213. Factors to be considered in determining whether and in what amount to award punitive damages are: "(1) the nature of the defendants' acts; (2) the amount of compensatory damages awarded;

and (3) the wealth of the defendants." Prof'l Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d 1470, 1473 (9th Cir. 1984).

In this case, the Credit Union argued that the bankruptcy court should not award any punitive damages at all to Ms. Bauer because the funds withdrawn postpetition from Ms. Bauer's account(s) were nominal, and the Credit Union was a small financial entity with only approximately 2,700 members and handled an average of only three bankruptcies annually.

The bankruptcy court rejected those arguments, based upon the repeated late notices sent to Ms. Bauer postpetition and the evidence that the Credit Union continued violating the stay in spite of clear evidence that it had notice of Ms. Bauer's bankruptcy.

> [The Credit Union] sent approximately seven late notices to [Ms. Bauer] post-petition, as late as April 2009. It also sent account statements to [Ms. Bauer] for both January and February 2009. Moreover, the late notices were sent to [Ms. Bauer] even after [Ms. Bauer] filed a motion to avoid [the Credit Union's] lien on her vehicle and after [the Credit Union] responded to that motion....Also, the facts in the record suggest that [the Credit Union] did not investigate [Ms. Bauer's] allegations of stay violations until after she filed the instant motion. This motion was filed on April 24, but [the Credit Union] did not return the funds withdrawn from [Ms. Bauer's] account until May 11. [The Credit Union's] actions were, at the least, reckless and without regard to [Ms. Bauer's] bankruptcy rights.

Tentative Ruling, at p. 2.

As we concluded previously, the bankruptcy court effectively found that the Credit Union had violated the automatic stay willfully in Ms. Bauer's bankruptcy case and determined under those circumstances that an award of punitive damages was

appropriate to discourage such conduct in the future.

However, in deciding the amount of punitive damages, the bankruptcy court considered the nominal amount of postpetition withdrawals from Ms. Bauer's Credit Union account(s), the fact that the Credit Union had returned the withdrawn funds, and the fact that the Credit Union was a relatively small financial institution with only approximately 2,700 members in determining that a $500 award was appropriate. We conclude that the bankruptcy court applied the correct legal standards from Prof'l Seminar Consultants in awarding punitive damages in favor of Ms. Bauer in this case.

Ms. Bauer argues, however, that the bankruptcy court's $500 punitive damages award is too small to serve adequately the deterrent function of punitive damages. See, e.g., Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.").

However, as with her claim for emotional distress damages, Ms. Bauer did not quantify her request for punitive damages in her Motion or supporting papers. When the bankruptcy court posted its Tentative Ruling concluding that punitive damages of $500 were appropriate under the circumstances, Ms. Bauer did not respond. Finally, as noted previously, Ms. Bauer did not appear at the Final Hearing, either in person or by telephone, to contest the adequacy or appropriateness of the bankruptcy court's proposed punitive damages award.

Based on the record in this appeal, we do not conclude that

the bankruptcy court's determination of punitive damages was illogical, implausible or without support in the evidentiary record before it. Accordingly, we conclude that the bankruptcy court did not abuse its discretion in awarding punitive damages of $500 to Ms. Bauer in this case.

## CONCLUSION

Based on our review of the record in this appeal in light of the issues raised by Ms. Bauer, we AFFIRM.