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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. SC-13-1304-JuKiKu
	)	BAP No. SC-13-1464-JuKiKu
TREASURES, INC.,	)	(related)
	)	
Debtor.	)	Bk. No. 12-06689-MM7
	)	
APJL CONSULTING, LLC,	)	
	)	
Appellant,	)	
	)	
v.	)	M E M O R A N D U M *
	)	
TREASURES, INC.; LEONARD J.	)	
ACKERMAN, Chapter 7 Trustee,	)	
	)	
Appellees.	)	

Argued and Submitted on January 22, 2015  
at Pasadena, California

Filed - March 3, 2015

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

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

Appearances: Jeremy W. Faith of Margulies Faith, LLP argued  
for appellant APJL Consulting, LLC; Dean T.  
Kirby, Jr. of Kirby & McGuinn argued for appellee  
Leonard J. Ackerman, Chapter 7 Trustee.

Before: JURY, KIRSCHER, and KURTZ, Bankruptcy Judges.

\* This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8024-1.

1 In BAP No. SC-13-1304, APJL Consulting, LLC (APJL) appeals  
2 from the bankruptcy court's order denying its compensation  
3 request for auctioneer services provided to Chapter 11<sup>1</sup> debtor,  
4 Treasures Inc., under a court-approved employment order  
5 (Compensation Order). For the reasons discussed below, we  
6 AFFIRM.

7 In BAP No. SC-13-1464, APJL appeals from the bankruptcy  
8 court's order finding APJL in contempt for willful violation of  
9 the automatic stay and award of damages (Damages Order). For  
10 the reasons discussed below, we AFFIRM the bankruptcy court's  
11 decision in all respects except for the award of actual damages  
12 in the amount of \$68,598.49. We VACATE the award of actual  
13 damages and REMAND for further proceedings to determine the  
14 appropriate amount.

## 15 I. FACTS

### 16 A. The Parties

17 APJL is a Virginia based limited liability company. APJL  
18 and its related companies AP Consulting, LLC, and J&L Management  
19 Consultants, Inc., provide struggling furniture retailers with  
20 augmentation services by helping them acquire inventory when  
21 they have insufficient credit to do so. APJL would use its own  
22 credit lines to order furniture for its client/customers, assist  
23 with liquidation and going out of business sales, and provide  
24 personnel and consultation with the operation of such sales.

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 APJL provided these services for set percentages on the sale  
2 proceeds and extension of credit. Allen A. Parvizian  
3 (Parvizian) is APJL's president.

4 Treasures, Inc. was a home furniture retailer with stores  
5 in San Diego and Irvine, California. By early 2011, debtor had  
6 fallen behind on numerous obligations, was subject to lawsuits  
7 and judgments, and was at risk of closing down.

8 **B. The Prepetition Agreement Between APJL and Treasures, Inc.**

9 In July 2011, APJL and debtor entered into an agreement  
10 whereby APJL would assist debtor by providing augmentation  
11 services and consulting services, as well as conducting a  
12 "Closing of the Clearance Center" to raise funds, liquidate  
13 excess inventory, and improve debtor's financial condition. In  
14 the event this sale and "theme" did not achieve the objectives,  
15 APJL would conduct going out of business sales at debtor's San  
16 Diego store.

17 The agreement provided for APJL's augmentation services in  
18 several sections. Under ¶ 1(c), APJL agreed to, among other  
19 things, make available its contacts, credit lines and purchasing  
20 power to provide the going out of business sales with additional  
21 furniture and rugs (Additional Furniture) to be sold during the  
22 sale. APJL would order the Additional Furniture in debtor's  
23 name, but using its own credit lines. APJL charged a 3% fee  
24 (PMSI Fee) on all Additional Furniture based on invoice cost on  
25 any goods, material, or services that were placed on APJL's  
26 credit line.

27 Because debtor sold its own furniture inventory (Debtor's  
28 Furniture) in the sales along with the Additional Furniture, the

1 agreement contemplated that the sale proceeds generated from  
2 Debtor's Furniture would be segregated from the sale proceeds  
3 generated from the Additional Furniture. As part of the  
4 segregation process, APJL used its own credit card machines for  
5 sales of the Additional Furniture so that proceeds generated  
6 from those sales went into an account designated by the parties  
7 as the augmentation account (Augmentation Account).

8 Paragraph 4 of the agreement provided for the establishment  
9 of the Augmentation Account:

10 Consultant shall establish a bank account (Bank  
11 Account), which shall be controlled by Consultant.  
12 All proceeds from the Sale in relation to Additional  
13 Furniture shall be deposited into the Bank Account and  
14 distributed as provided under this Agreement. All  
15 other proceeds in relation to the Company Inventory  
16 shall be deposited into the Company's bank account.<sup>2</sup>

17 The parties further agreed that APJL would make weekly  
18 distributions to debtor from the Augmentation Account according  
19 to the priorities set forth in ¶ 7 of the agreement:

20 Provided that Consultant establishes the Bank Account,  
21 proceeds of the Sale shall be distributed on a weekly  
22 basis in the following order: (i) first, to pay the  
23 Consultant Fee, (ii) second, if Additional Furniture  
24 is provided by Consultant to the Sale on a consignment  
25 basis, to pay for such Additional Furniture as it is  
26 sold and delivered; and if Additional Furniture is  
27 provided by Consultant other than on a consignment  
28 basis, to pay the invoice cost plus billed freight of  
such Additional Furniture, (iii) third, to pay for the  
PMSI Fee due to the Consultant, (iv) fourth, to pay  
back all monies advanced by the Consultant to the  
Sale, and (v) fifth, a draw from the Augment Account  
to the Company of 30% of all deposits during an  
Accounting Week; [and (vi)] sixth, the remainder to  
the Company.

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<sup>2</sup> Debtor had its own separate bank account for the sale of  
its own furniture. This account was not involved in the  
accounting dispute between the parties which is described below.

1           Essentially then, the Augmentation Account was to contain  
2 proceeds from the sale of the Additional Furniture from which  
3 would be paid APJL's 5% commission, its 3% PMSI fee, and certain  
4 expenses. After payment of the expenses, APJL would advance  
5 funds to debtor on a weekly basis from the remaining Additional  
6 Furniture proceeds – referred to as draws – which provided  
7 debtor with regular cash flow.

8           Although the draw was an advance to debtor on the profit  
9 for the Additional Furniture sales, each week the parties  
10 conducted an accounting to make sure sufficient cash remained in  
11 the account to cover the payment of APJL's commission and other  
12 expenses. The draw was set at 30% of deposits but mutually  
13 agreed upon adjustments occurred each week that altered the  
14 amount actually distributed to debtor.

15           The reconciliation process involved debtor's accounting  
16 supervisor, Ms. Butryn, sending a spreadsheet of debtor's sales  
17 and expense information to Parvizian. In turn, Parvizian would  
18 send a spreadsheet to Ms. Butryn that detailed the cumulative  
19 accounting information for all the income and expenses  
20 associated with the Augmentation Account. APJL's reconciliation  
21 sheet contained running totals from the beginning of the sale,  
22 through the end of the given week (Reconciliation Sheet). It  
23 was designed to account for all receipts and disbursements from  
24 the Augmentation Account as well as the amounts "due to" and  
25 "due from" the parties so the amount of the draw could be  
26 determined.

27           The expenses which reduced the amount of the weekly draw to  
28 debtor, included, among others: (1) advertising; (2) minor

1 store expenses; (3) delivery fees; (4) expense reimbursements;  
2 and (5) credit card chargebacks. APJL's 5% commission was also  
3 included in the Reconciliation Sheet and was paid directly from  
4 the Augmentation Account on a weekly basis. The Reconciliation  
5 Sheet further settled between the parties collected delivery  
6 fees and sales taxes on invoices issued by debtor.

7 Finally, adjustments were made to account for sales of  
8 Debtor's Furniture that were accidentally charged on APJL's credit  
9 card machines and likewise to account for sales of Additional  
10 Furniture that were charged on debtor's credit card machines.  
11 Since debtor did not have an American Express account, APJL's  
12 American Express account was sometimes used to receive payments  
13 for Debtor's Furniture. Such amounts were applied and credited  
14 to the calculation of debtor's draw, less the fees charged by  
15 American Express. Once the parties agreed upon the figure, APJL  
16 would wire the draw amount to debtor's bank account.

17 During the course of the relationship, the cash flow from  
18 the sales was not sufficient to pay expenses and provide debtor  
19 with the necessary cash for payroll and advertising. As a  
20 result, Parvizian would occasionally defer deducting certain  
21 expenses.<sup>3</sup>

22 APJL opened the Augmentation Account at its bank in  
23 Virginia using its tax identification number, with a subtitle on  
24 the account of the store name, "Treasures Furniture San Diego."  
25 The address on the account was APJL's address in Virginia. APJL

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26  
27 <sup>3</sup> Due to APJL's decision to defer charging certain expenses,  
28 the weekly Reconciliation Sheet could not have reflected the  
actual contractual amounts owed between the parties.

1 took control over the account under the terms of the agreement.

2 Paragraph 6 of the agreement addressed the sales tax:

3 The Company shall solely be responsible for the  
4 payment of sales tax arising out of the Sale to  
5 applicable taxing authorities. If Consultant  
6 establishes the Bank Account, (a) Consultant shall  
7 forward to the Company the sales tax collected by  
8 Consultant, and the Company shall pay the sales tax to  
9 the applicable taxing authorities on a timely basis,  
10 and (b) from time to time, Consultant may, at the  
11 Company's request but at Consultant's sole and  
12 absolute discretion, provide the Company with an  
13 advance against moneys owed by Consultant to Company  
14 under the terms of this Agreement (the "Draw");  
15 provided, however, that such Draw will be deemed first  
16 as an advance against sales tax collected by  
17 Consultant and due to Company and then the remaining  
18 as an advance against funds owed by Consultant to  
19 Company under the terms of this Agreement.

20 Finally, in ¶ 19, entitled Security Interest, debtor  
21 granted APJL a senior first priority security interest and lien  
22 in the Additional Furniture and their proceeds and all rights of  
23 [debtor] under the agreement, including, without limitation,  
24 amounts due or to become due to [debtor] under the terms of the  
25 agreement, all funds in the "Bank Account," and all the proceeds  
26 (including any insurance proceeds and credit card receivables).

### 27 **C. Bankruptcy Events**

28 On May 8, 2012, debtor filed a voluntary chapter 11  
petition. In Schedule B, debtor listed an account receivable  
owing from APJL in an amount to be determined. In Schedule G,  
debtor listed the agreement with APJL as an executory contract.  
Debtor's Schedules did not list the Augmentation Account as its  
personal property nor was APJL listed as a secured creditor in  
Schedule D.

There is no indication in the record that a final  
accounting of the Augmentation Account for the prepetition

1 period was performed before the petition was filed. Nor is it  
2 clear what the Augmentation Account balance was on the petition  
3 date. The parties simply continued to operate under the  
4 agreement as if there had been no bankruptcy filing, with APJL  
5 providing consultation and augmentation services to debtor and  
6 receiving payment for those services under the contract terms.  
7 Proceeds from the postpetition sales of Additional Furniture  
8 continued to be deposited into the Augmentation Account. The  
9 parties never sought approval for the arrangement from the  
10 bankruptcy court, although at various times in the record APJL  
11 and the court referred to the agreement as being "approved."<sup>4</sup>

12 In late June 2012, the Chief Restructuring Officer (CRO),  
13 James Emmitt, and debtor conducted a cost-benefit analysis of  
14 operations at the San Diego store and determined that it was in  
15 the best interests of the estate to close the store by the end  
16 of July 2012. Debtor reached an agreement with its landlord to  
17 surrender the premises and decided to conduct an auction of its  
18 equipment and furniture inventory during the period July 19  
19 through July 25, 2012. Debtor requested APJL to act as  
20 auctioneer.

21 **1. The Court-Approved Auction And Employment Of APJL**

22 Although debtor did not think court approval of the auction  
23 was necessary because it thought the auction was ordinary

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24  
25 <sup>4</sup> In its September 10, 2013 Memorandum Decision, the  
26 bankruptcy court stated that its "earlier approval of the  
27 Agreement" did not relieve APJL from its obligation to turn over  
28 the funds when the dispute arose. We found no court approval of  
the agreement in the record. Rather, the bankruptcy court  
approved APJL's employment in connection with the postpetition  
auction based on different terms than those in the agreement.

1 course, debtor filed a motion to shorten time on its notice of  
2 intended action to auction property on July 18, 2012. The next  
3 day, debtor filed an ex parte application seeking bankruptcy  
4 court approval of the auction. In the application, debtor  
5 proposed using APJL as auctioneer under the terms set forth in  
6 an attached summary.

7 On July 20, 2012, the bankruptcy court granted debtor's  
8 motion to shorten time and scheduled a hearing on July 26, 2012.  
9 At the July 26, 2012 hearing, the bankruptcy court continued the  
10 matter to August 23, 2012, and required debtor to file a  
11 supplemental declaration explaining the circumstances as to how  
12 the emergency arose and provide information on the results of  
13 the auction.

14 On August 2, 2012, debtor filed a supplemental application  
15 seeking nunc pro tunc approval of the auction since the auction  
16 had concluded. Debtor explained that its portion of the net  
17 proceeds from the auction was approximately \$70,000 which  
18 amounted to 40% of the gross proceeds generated from the sale.

19 At the August 23, 2012 hearing, the bankruptcy court orally  
20 granted debtor's request for approval of the auction. On the  
21 same day, debtor filed an application to employ APJL as the  
22 auctioneer nunc pro tunc. Parvizian filed a perfunctory  
23 "Declaration of Disinterest" in support, stating that "to the  
24 best of his knowledge," APJL did not have any connection with  
25 debtor "other than its liquidation and augmentation services"  
26 and did not represent any interest that was adverse to the  
27 estate.

28 The United States Trustee (UST) objected to the employment

1 application, contending that additional disclosures were  
2 required: specifically, APJL's connections with debtor,  
3 creditors or any other party in interest; the nature of APJL's  
4 relationship with debtor since July 2011; whether APJL was a  
5 creditor of debtor; whether APJL received payments from debtor  
6 since the filing of the bankruptcy; and the amount of payments  
7 debtor made to APJL one year preceding the bankruptcy. The UST  
8 also requested further information regarding APJL's affiliate,  
9 HFR Rugs, and arrangements regarding APJL's consignment of  
10 furniture for the auction.

11 Debtor responded by explaining APJL's augmentation services  
12 and disclosing that APJL had received \$224,613.99 in commissions  
13 from the Augmentation Account since July 2011.

14 Parvizian filed a supplemental declaration on August 23,  
15 2012, stating that as of the petition date, APJL was not a  
16 creditor of debtor, and that, "to the best of his knowledge"  
17 APJL had no interest adverse to debtor, its estate or creditors.  
18 Parvizian explained that APJL continued to provide debtor with  
19 augmentation and liquidation services since the petition date  
20 under the terms of the agreement and had received postpetition  
21 payments totaling \$368,499.16 from all accounts. He also  
22 declared that prior to debtor's bankruptcy filing, APJL invoiced  
23 and received payment for all services it provided to debtor  
24 under the terms of the agreement (this statement would later  
25 come under scrutiny). Finally, Parvizian declared that the  
26 auction term sheet authorized APJL to supplement Debtor's  
27 Furniture with its own furniture, and with rugs provided by  
28 APJL's affiliate, HFR Rugs, and that APJL paid debtor a 10%

1 royalty on the gross sales for the consigned furniture and a 12%  
2 royalty on the gross sales for the HFR-consigned rugs.

3 The bankruptcy court entered the orders approving the  
4 auction and APJL's employment as the auctioneer nunc pro tunc on  
5 August 28, 2012.

6 About two weeks later, pursuant to the bankruptcy court's  
7 local rule 2002-2(a)(6), debtor filed a notice of intended  
8 action and opportunity for hearing seeking allowance of  
9 \$37,649.34 in compensation for APJL's auctioneer services.

## 10 **2. The Late September Reconciliation Dispute**

11 By late September, debtor had closed its retail stores and  
12 was out of business. APJL performed an internal audit and  
13 reconciliation to determine where the parties stood under their  
14 agreement. Critical to the audit was a determination of the  
15 amount of profit that was available to debtor during its final  
16 weeks of operation.<sup>5</sup> The record shows that APJL deviated from  
17 its previous protocol and did not exchange information with  
18 debtor regarding the late September reconciliations or conduct  
19 the settle up discussions.<sup>6</sup>

20 According to APJL, the audit revealed that it had excluded

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21  
22 <sup>5</sup> From a final accounting perspective, if APJL had  
23 intentionally or inadvertently not included expenses in the  
24 previous reconciliations, theoretically the draws on the front  
25 end of the agreement could have been overfunded. Therefore, at  
the end of the agreement, debtor's draws would have to be reduced  
to account for those omitted expenses.

26 <sup>6</sup> Emmitt declared that APJL gave no notice to debtor nor did  
27 it receive debtor's consent before reducing the late September  
28 disbursements. There is nothing in the agreement that required  
such notice or consent, but that is how the parties had been  
operating up until this time.

1 \$75,759 in credit card fees (CC Fees) and a \$28,000 manager's  
2 salary (Manager's Salary) from the weekly Reconciliation Sheet  
3 calculations. Thus, APJL included the unaccounted for portion  
4 of the Manager's Salary, along with the CC Fees, in the  
5 Reconciliation Sheet for September 21, 2012 (September 21  
6 Reconciliation). This resulted in an adjusted draw for debtor  
7 of \$11,942.50, when debtor anticipated a draw closer to \$110,000  
8 which was based on a 40% gross sales figure.<sup>7</sup> Debtor asserted  
9 that APJL owed it an additional \$99,000 for that week.

10 In the September 26, 2012 reconciliation (September 26  
11 Reconciliation), debtor calculated it was entitled to \$85,000  
12 from gross proceeds, without any deduction for expenses. APJL  
13 had assessed charges against that amount resulting in a  
14 \$36,601.04 net disbursement to debtor.

15 After receiving the September 21 Reconciliation, debtor  
16 requested a full reconciliation of the Augmentation Account and  
17 expressed concern over the sudden inclusion of the CC Fees and  
18 Manager's Salary. Debtor's counsel sent an email to APJL's  
19 corporate attorney, Jeffrey Wolf, on September 25, 2012, which  
20 states in relevant part:

21 Treasures has ceased operations and is closing its  
22 retail stores. Treasures and APJL are currently in  
23 the process of completing the final accounting and  
24 reconciliation of the Treasures-APJL furniture  
25 transactions. APJL has recently provided transaction  
26 documentation to Treasures, which the Treasures CRO

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25 <sup>7</sup> Under the agreement, debtor was entitled to draws of 30%  
26 of the net profit. However, Parvizian later orally agreed to  
27 deviate from the agreement and allow debtor draws of 40% of the  
28 net profit. This oral agreement, however, did not change the  
final sums which would be due debtor under the terms of the  
agreement.

1 team is in the process of reviewing.

2 As you may be aware, APJL manages a Treasure  
3 furniture-account bank account, which contains money  
4 that is property of the bankruptcy estate. It is in  
5 both parties' best interest to ensure the  
6 transparency, speed and accuracy of the final  
7 reconciliation process, as well as to protect property  
8 of the estate. Therefore, Treasures requests that all  
9 funds remain untouched in the bank account during the  
10 reconciliation process, and that APJL make no  
11 disbursements without Treasures' written consent until  
12 a final reconciliation is completed. Please confirm  
13 APJL's agreement to this arrangement, and thank you in  
14 advance for your cooperation.

9 On the same date, the CRO sent an email to Parvizian requesting  
10 Parvizian to seek written approval from him before making any  
11 disbursement from the account.

12 Having received no response from Mr. Wolf, debtor's counsel  
13 sent Mr. Wolf a follow-up letter on October 1, 2012 (October 1,  
14 2012 Letter), which stated in relevant part:

15 Treasures had determined that . . . APJL . . . has not  
16 provided the proper reconciliation documentation, and  
17 more significantly, appears to have made approximately  
18 \$99,000 of unauthorized and inappropriate debits from  
19 the Treasures-liquidation bank account.

18 Treasures demands that APJL provide no later than  
19 close of business tomorrow, October 2, 2012,  
20 (i) immediate delivery to Treasures of the requested  
21 QuickBooks reconciliation documentation flash drive,  
22 (ii) immediate freezing of the account with no  
23 disbursements made without written authorization from  
24 Treasures CRO, Mike Bergthold, which authorization  
25 will be granted for appropriate charges, and  
26 (iii) immediate payment to Treasures of \$184,000,  
27 consisting of a \$99,000 balance owed from the 9/20/12  
28 weekly settlement and \$85,000 owed from the 9/27/12  
weekly settlements.

24 Please be advised that . . . failure to meet these  
25 demands constitutes willful violation of the automatic  
26 stay and conversion of the property of the estate,  
27 which is punishable by sanctions.

27 **3. Debtor's Ex Parte Application For Order To Show Cause**

28 APJL did not comply with debtor's demands. Accordingly, on

1 November 2, 2012, debtor filed an ex parte application for order  
2 to show cause (OSC) why APJL should not be held in contempt for  
3 violating the automatic stay and ordered to disgorge funds.

4 Debtor argued that the Augmentation Account contained property  
5 of the estate because the account was used for the deposit of  
6 gross proceeds from some sales held at debtor's Irvine and San  
7 Diego retail locations and was also used for the deposit of  
8 gross proceeds from the San Diego auction. Debtor further  
9 asserted that APJL owed it at least \$184,000 (\$99,000 + \$85,000)  
10 for the last two September reconciliations and that there were  
11 unexplained transactions related to prepetition services.

12 APJL has no right to unilaterally withdraw funds from  
13 the account without complying with the reconciliation  
14 process and resolving any disputed charges with the  
15 Debtor. Moreover, withdrawing funds from and cashing  
16 checks against the Augmentation Account for amounts  
17 allegedly owed to APJL on a pre-petition basis is also  
18 a willful violation of the automatic stay.

19 Debtor also alleged that APJL had wrongfully withheld  
20 certain funds for delivery fees in the amount of \$10,822 and  
21 sales taxes in the amount of \$56,098 which were collected and  
22 deposited into the Augmentation Account. Debtor argued that  
23 APJL was required to release these funds to it under ¶ 6 of the  
24 agreement.

25 In connection with APJL's compensation for auctioneer  
26 services, debtor asserted that APJL, as a prepetition creditor,  
27 was not disinterested when its employment as auctioneer was  
28 approved by the bankruptcy court and APJL also failed to  
disclose its relationship with a related entity furniture  
company called Cameron Michael. Debtor alleged that APJL  
diverted hundreds of thousands of dollars from the Augmentation

1 Account to Cameron Michael.

2 Finally, debtor argued that \$133,265 was in the  
3 Augmentation Account at the time it made the demand to freeze  
4 the account. Of that amount, \$56,098 was collected for sales  
5 taxes and \$10,822 was collected for delivery fees, which APJL  
6 refused to release to debtor, despite multiple demands to do so.  
7 Despite debtor's demand to freeze the account, APJL continued to  
8 cash checks and withdraw funds so that by the end of September  
9 2012, the account balance was \$88,840.20, and by the end of  
10 October 2012, the account balance was \$48,395.19.

11 **4. Debtor Objects To APJL's Compensation As Auctioneer**

12 On October 15, 2012, debtor objected to its own notice of  
13 intended action regarding APJL's compensation for auctioneer  
14 services. Debtor essentially articulated the same problems it  
15 described in its ex parte application for an OSC and requested  
16 the bankruptcy court to order APJL to disgorge \$37,649.34 in  
17 fees that APJL took as compensation for its auctioneer services.

18 APJL responded to the fee objection, asserting that  
19 debtor's contentions were false. APJL maintained that debtor  
20 did not own the Augmentation Account or APJL's Additional  
21 Furniture and was entitled to receive funds from the account  
22 only after the payment of all of APJL's expenses and overhead  
23 and the costs of goods and furniture. APJL also explained the  
24 reconciliation process for the September 21 Reconciliation and  
25 that it simply netted out the CC Fees and Manager's Salary that  
26 had been debited from the account since the beginning of the  
27 agreement. APJL stated that as to the September 26  
28 Reconciliation, there were chargebacks, expense reimbursements,

1 fees, advertising reimbursements and other reimbursements that  
2 were due to APJL that were netted out. APJL characterized the  
3 fees as "administrative" in nature as part of the parties' on  
4 going relations and because of the way the agreement was  
5 structured. APJL stated again that it was not a creditor of  
6 debtor.

7 On October 29, 2012, Parvizian filed a declaration in  
8 support of the opposition (October 29, 2012 Declaration), which  
9 stated in part:

10 Debtor ceased operations in September 2012, and APJL  
11 reviewed its accounts for the September settlements in  
12 order to account for fees and expenses that had not  
13 been credited to APJL. As such, when APJL reviewed  
14 the amount to be settled for September 21, 2012  
15 (incorrectly stated as 20th), it netted out the credit  
16 card fees that the Bank Account was debited from the  
17 beginning of the Agreement. The credit card fees  
18 totaled approximately \$75,759 and were never included  
19 in the Debtor's weekly settlement documentation or  
20 paid by Debtor. In addition, APJL paid for the office  
21 manager who worked the Sale and deducted it from the  
22 proceeds (\$28,000) as the Agreement provides that all  
23 expenses that APJL incurs are to be netted out of  
24 proceeds.

25 The bankruptcy court set the hearings on the OSC and  
26 debtor's objection to APJL's compensation for November 29, 2012.

#### 27 **5. The November 29, 2012 Hearing**

28 At the November hearing, the bankruptcy court decided that,  
based upon the language in the agreement and its understanding  
of the relationship between the parties, which the court  
characterized as a secured-creditor relationship, the monies in  
the Augmentation Account belonged to debtor.

The bankruptcy court also found that Parvizian willfully  
failed to disclose that APJL was a prepetition creditor in  
connection with APJL's employment application as auctioneer, and

1 that had the court known APJL would use postpetition proceeds to  
2 offset a prepetition obligation, it would never have approved  
3 APJL's employment. The court denied APJL's application for  
4 compensation based on its failure to disclose prepetition  
5 creditor status or relationships.

6 In addressing debtor's application for the OSC, the  
7 bankruptcy court found there was no factual dispute that the  
8 Augmentation Account contained property of the estate, which was  
9 subject to APJL's security interest.<sup>8</sup> Therefore, the court did  
10 not think an evidentiary hearing was warranted on the property  
11 of estate issue. The bankruptcy court found APJL's offset of  
12 prepetition expenses (i.e., the CC Fees and Manager's Salary)  
13 was an improper violation of the automatic stay. Finally, the  
14 court ordered APJL to turn over the \$75,759 and \$28,000 amounts  
15 related to its offset and if APJL did not comply the court would  
16 hold APJL in contempt.<sup>9</sup>

17 APJL's counsel requested the opportunity to submit a  
18 supplemental declaration prior to entry of an order on the OSC  
19 to clarify the CC Fees and Manager's Salary issue. The  
20 bankruptcy court granted the request and ordered debtor's  
21 counsel to lodge orders on the auctioneer fee application and

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22  
23 <sup>8</sup> As indicated below, APJL accepted the bankruptcy court's  
24 ruling that the funds in the Augmentation Account belonged to  
25 debtor and later adjusted Parvizian's description of the account  
as such.

26 <sup>9</sup> At the time the court ordered APJL to return the funds to  
27 the Augmentation Account, the court stated: "We need to restore  
28 the status quo so that the ownership of this account can be  
resolved." However, the bankruptcy court had already found that  
the funds in the account were property of the estate.

1 the OSC.

2 At the same hearing, the court considered debtor's motion  
3 to dismiss its chapter 11 case. Debtor's motion was mostly  
4 based on the fact that it had completed the orderly liquidation  
5 of its furniture inventory and ceased its retail operations at  
6 both the San Diego and Irvine retail stores. The bankruptcy  
7 court denied the motion and converted the case to one under  
8 chapter 7. On November 30, 2012, the case was converted and  
9 Leonard J. Ackerman was appointed the chapter 7 trustee  
10 (Trustee).

11 **6. Post-Hearing Pleadings**

12 Trustee's counsel did not lodge the orders on the  
13 auctioneer fee application and the OSC until February 15, 2013.  
14 Debtor's counsel, Christine Baur, later explained that there was  
15 some confusion as to whether she or Trustee's counsel was  
16 supposed to lodge the orders after the case was converted.

17 APJL filed an objection to Trustee's proposed form of order  
18 on the OSC along with Parvizian's declaration regarding the  
19 return of funds to the Augmentation Account. In his  
20 February 22, 2013 declaration (February 22, 2013 Declaration),  
21 Parvizian stated in relevant part:

22 As opposed to any reimbursement as alleged in the OSC,  
23 the CC Fees and Manager Salary were debited regularly  
24 throughout the Agreement from the Augmentation  
Account. . . .

25 The [Manager Salary] was paid directly from the  
Debtor's Augmentation Account. . . .

26 The CC Fees were also automatically debited from the  
27 Debtor's Augmentation Account by Global Pay on behalf  
of the credit card companies and by American Express  
28 on a monthly basis. . . . Again, these amounts were  
paid directly from the Debtor's Augmentation Account.

1 APJL never paid the CC Fees and was never reimbursed  
2 for such fees. . . .

3 Parvizian further declared that not all expenses were  
4 included in the weekly reconciliations and the draws did not  
5 account for all expenses paid through the Augmentation Account  
6 during the course of the relationship. Parvizian concluded that  
7 due to the netting out of mutual debts, APJL should not be  
8 required to return any amounts to debtor.

9 Attached to Parvizian's declaration were copies of the  
10 Augmentation Account bank statements from March 2012 to  
11 September 2012 which showed the amounts for the CC Fees and  
12 Manager's Salary debited from the account. Also attached was  
13 the itemization for the debits to the account for the Manager's  
14 Salary for the time period March 8 through September 23, 2012,  
15 and the itemization for the debits to the account for the CC  
16 Fees for the time period May through September 2012. These  
17 itemizations show that most of the debits occurred postpetition.

18 Thereafter, the bankruptcy court issued a scheduling order  
19 requiring APJL to explain the perceived "inconsistent positions"  
20 adopted by APJL and setting the matter for further hearing on  
21 March 28, 2013. The inconsistency arose because it was  
22 difficult to discern whether APJL paid the disputed charges and  
23 then reimbursed itself as indicated in Parvizian's October 29,  
24 2012 Declaration or whether the disputed charges had been  
25 automatically debited from the account as indicated in  
26 Parvizian's February 22, 2013 Declaration.

27 On March 4, 2013, Parvizian submitted a declaration in  
28 response to the bankruptcy court's scheduling order. Parvizian

1 declared that his statements in the October 29, 2012 Declaration  
2 referred to an accounting of the funds for the September 2012  
3 reconciliation of the Augmentation Account and not to any actual  
4 funds removed by APJL. At the time of that declaration,  
5 Parvizian testified that he believed the Augmentation Account  
6 belonged to APJL and, therefore, he referred to the payments as  
7 though they were made by APJL when they were made from the  
8 Augmentation Account. However, in the February 22, 2013  
9 Declaration, Parvizian explained that he meant to show that the  
10 funds for the CC Fees and Manager's Salary were automatically  
11 deducted from the Augmentation Account each month. Recognizing  
12 that debtor owned the Augmentation Account, he no longer stated  
13 that APJL paid the expenses. Parvizian further declared that  
14 all debtor's expenses for the Additional Furniture, including  
15 the CC Fees and Manager's Salary, were paid regularly from the  
16 Augmentation Account and never reimbursed to APJL. Therefore,  
17 Parvizian again maintained that APJL owed debtor nothing under  
18 the agreement.

19 **7. The March 28, 2013 Hearing**

20 At the March 28, 2013 hearing, after considering the  
21 evidence presented by APJL, the bankruptcy court concluded that  
22 the deductions for the CC Fees and Manager's Salary were a "red  
23 herring" since those expenses had already been paid out of the  
24 Augmentation Account. The bankruptcy court concluded from the  
25 evidence that APJL had "double charged" the CC Fees and  
26 Manager's Salary since those monies had already been deducted  
27 from the Augmentation Account. The court further noted that the  
28 funds in the account belonged to debtor and that APJL failed to

1 release the funds when debtor requested. The bankruptcy court  
2 also observed that although APJL's justification for holding  
3 back payment to debtor was the overfunding of debtor's draws  
4 prior to the September reconciliations, it found no evidence in  
5 the record to support that argument. In the end, the bankruptcy  
6 court ordered APJL to restore funds in the amount of \$100,000  
7 (roughly the amount of the CC Fees and Manager's Salary) to the  
8 Augmentation Account so that an accounting could be done and the  
9 funds properly allocated through an adversary proceeding.

10 **8. The April 12, 2013 OSC**

11 The bankruptcy court issued an OSC on April 2, 2013, which  
12 was amended on April 12, 2013, due to a typo. In the OSC, the  
13 court found that APJL was entrusted with control over property  
14 of the estate and APJL abused that trust by not accounting for  
15 the funds in the Augmentation Account and by giving incomplete  
16 and inconsistent explanations. The bankruptcy court ordered  
17 APJL to appear on May 2, 2013, to show cause why the court  
18 should not find APJL in contempt for its violation of the  
19 automatic stay and award damages to the estate.

20 The court also ordered APJL to (1) return the sum of  
21 \$104,425.68 to the Augmentation Account for the CC Fees and the  
22 Manager's Salary, plus the unpaid sales taxes and delivery fees  
23 of \$66,920.49 for a total of \$171,346.17; (2) provide an  
24 accounting for its disposition of the funds in the Augmentation  
25 Account to the debtor; and (3) make no further dispositions from  
26 the Augmentation Account pending resolution of the accounting  
27 adversary proceeding which must be brought by Trustee within  
28 thirty days of its order.

1 In response to the OSC, Parvizian filed a declaration on  
2 April 25, 2013, regarding the distribution of funds from the  
3 account. Parvizian declared that APJL was never paid more than  
4 the amounts set forth in the court-approved<sup>10</sup> agreement, which  
5 amounts were fixed contracted amounts of a 5% consulting fee on  
6 gross sales of the debtor (less sales tax and delivery fees), a  
7 3% fee for all services connected with the provision of the  
8 Additional Furniture, and reimbursement of certain expenses paid  
9 on an ongoing basis during the entire course of the  
10 relationship. Parvizian also declared that once he discovered  
11 that the CC Fees and Manager's Salary were not shown in the  
12 weekly reconciliations, he realized that there was not enough  
13 money in the Augmentation Account to pay debtor's draws in the  
14 amounts debtor thought were due. As a result of the  
15 inadvertence, debtor had been receiving too much in weekly draw  
16 payments by the exact amount of \$98,551.25 which would have  
17 otherwise been deducted from the draw payments on a weekly basis  
18 during the life of the agreement. This overpayment on the  
19 draws, according to Parvizian, explained the shortfall as of  
20 September 2012.

21 Parvizian also attached a copy of debtor's reconciliation  
22 for the week ended September 21, which showed \$69,477.82 due,  
23 and not the \$110,000 originally requested. Further, Parvizian  
24 pointed out that the amount debtor claimed due for the  
25 September 26 Reconciliation was \$22,122.65, an amount that was  
26

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27 <sup>10</sup> As we noted earlier, despite the bankruptcy court's  
28 statements to the contrary, the agreement was never approved.

1 \$14,478.50 less than the \$36,601.04 payment made by APJL to  
2 debtor for the period. Parvizian declared that one possible  
3 explanation for the difference was that debtor had asked him to  
4 increase its draws to 40% as the business was winding down.  
5 Parvizian agreed to increase the draws because he had estimated,  
6 incorrectly, that there would be sufficient funds in the  
7 Augmentation Account to cover such payments.

8 Finally, Parvizian pointed out that ¶ 6 of the agreement  
9 stated that draw payments will be deemed first as an advance  
10 against sales tax collected by APJL and due to debtor and then  
11 the remaining as an advance against funds owed by APJL to debtor  
12 under the terms of the agreement. Parvizian explained that  
13 since the final draw payment exhausted the funds in the  
14 Augmentation Account, debtor should have set aside monies  
15 sufficient to cover any applicable sales tax and delivery fees.<sup>11</sup>  
16 Parvizian attached back-up material and explanatory spreadsheets  
17 for the period of September 1, 2012 to April 2013.

18 On May 1, 2013, Trustee filed a reply to Parvizian's  
19 declaration. Trustee asserted that he was not satisfied with  
20 the explanations and documents proffered by APJL. Therefore,  
21 Trustee stated that he would file an adversary proceeding by the  
22 deadline set by the court.<sup>12</sup> Trustee also pointed out that APJL

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24 <sup>11</sup> The bankruptcy court later found that despite these  
25 provisions, the parties actually handled the sales taxes in a  
26 different manner. "APJL provided a weekly accounting of sales  
27 taxes collected and then Debtor provided an invoice to APJL for  
28 it to pay."

<sup>12</sup> Trustee filed the adversary proceeding on May 10, 2013,  
(continued...)

1 had failed to comply with the court's OSC, which required it to  
2 immediately turn over the sum of \$171,346. Next, Trustee  
3 asserted that payments in the amount of \$183,219 were made to  
4 Cameron Michael, one of APJL's largest vendors, in September and  
5 October 2012. According to Trustee, APJL never disclosed the  
6 relationship between Cameron Michael and APJL in its employment  
7 application for auctioneer. Finally, Trustee argued that the  
8 September and October 2012 payments in the amount of \$115,678 to  
9 HFR Rugs did not contain appropriate back-up, and therefore  
10 these amounts should be returned to the Augmentation Account  
11 until an accounting was provided.

12 **9. The May 2, 2013 Hearing On The OSC**

13 On April 30, 2013, the bankruptcy court issued a tentative  
14 ruling for the May 2, 2013 hearing on the OSC. The court noted  
15 that it required APJL to restore the disputed funds to the  
16 estate until the dispute was resolved and Trustee was obligated  
17 to commence an adversary proceeding by May 20, 2013, if he  
18 disputed APJL's accounting. The court also observed that there  
19 was no evidence before it regarding the damages sustained by the  
20 estate in dealing with the turnover order. The bankruptcy court  
21 continued the matter to May 30, 2013 to determine: (1) whether  
22 the chapter 7 trustee will file an adversary proceeding to  
23 account for the funds at issue in the OSC by May 10, 2013;  
24 (2) whether APJL had returned \$171,346.17 to the Augmentation

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25  
26 <sup>12</sup>(...continued)  
27 alleging claims for relief for turnover of and accounting for  
28 property of the estate under § 542; constructive trust;  
declaratory relief; avoidance and recovery of postpetition  
transfers and conversion.

1 Account as ordered by the court, and if not, why it has not  
2 complied with the court's order; (3) whether APJL had any excuse  
3 or justification for its inconsistent explanations for its  
4 actions taken in regard to the Augmentation Account; (4) whether  
5 APJL withdrew and failed to return the compensation for  
6 auctioneer services which the court declined to award; and  
7 (5) the amount of damages sustained by the estate for APJL's  
8 action in not turning over the funds to the estate since  
9 September 2012.

10 When the court issued its tentative ruling the order  
11 denying APJL's auctioneer compensation had not yet been entered.

12 On May 21, 2013, the bankruptcy court entered a Scheduling  
13 Order Re Order To Show Cause. The court ordered APJL to  
14 immediately turn over \$171,346.17 to Trustee or his counsel to  
15 be held in counsel's client trust account pending further order  
16 of the court. The court continued the hearing on the OSC to  
17 June 13, 2013.

18 On May 24, 2013, the bankruptcy court entered an Order  
19 Implementing Order Dated 4/12/13. The bankruptcy court noted  
20 that it had ordered APJL to return \$171,346 to the Augmentation  
21 Account on April 12, 2013. Trustee sought an order to allow  
22 those funds to be kept in a client trust account of his  
23 attorney. The court granted Trustee's request and ordered APJL  
24 to immediately turn over to Trustee or his counsel all funds in  
25 the Augmentation Account.

26 On May 28, 2013, APJL turned over to Trustee the amount of  
27 \$27,958.58 which remained in the Augmentation Account.

1           **10. The June 10, 2013 Entry Of The Compensation Order**

2           On June 10, 2013, the bankruptcy court entered the order  
3 denying APJL compensation for its auctioneer services. The  
4 court also ordered Parvizian to file a declaration regarding the  
5 disbursement of funds from the auction by June 14, 2013, and  
6 ordered the funds disgorged and turned over to Trustee by  
7 June 17, 2013.

8           In his declaration, Parvizian declared that \$37,649 in  
9 auctioneer fees were paid to APJL at the conclusion of the  
10 auction which took place at the end of August 2012 (the record  
11 shows the San Diego auction was complete by the end of July  
12 2012.) Parvizian explained that APJL was never instructed that  
13 such fees could not be paid, and debtor did not request that  
14 such fees be held with debtor.<sup>13</sup> APJL stated that it would make  
15 its best efforts to return the fees by June 17, 2013.

16           APJL complied with the bankruptcy court's order and filed a  
17 timely appeal.

18           **11. The June 13, 2013 Hearing On The OSC**

19           On June 6, 2013, APJL filed a brief re OSC. There, APJL  
20 continued to assert that all the accounting issues needed to be  
21 resolved in the context of the adversary proceeding and that the  
22 orders relative to the \$171,346 and associated attorney's fees  
23 should be stayed. APJL maintained that if it was compelled to  
24

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25           <sup>13</sup> This statement was contrary to the order employing APJL  
26 as auctioneer. The order provided that payment of APJL's  
27 compensation and reimbursement of expenses would be made only  
28 after it complied with local bankruptcy rule 6005 and notice to  
creditors. However, the employment order appears to have been  
entered after APJL had received payment for its services.

1 pay nearly \$250,000, it would become insolvent.

2 APJL also explained that it did not return the \$171,346 to  
3 the Augmentation Account since the CC Fees and Manager's Salary  
4 were paid directly to the creditors and thus any turnover of  
5 such funds should be made by the parties who received the  
6 monies. APJL again asserted that debtor received exactly what  
7 it was owed under the agreement and APJL did not double charge  
8 debtor for any fees, costs or taxes. APJL reiterated that under  
9 the agreement, debtor was to apply all draw payments to sales  
10 taxes first. APJL further maintained that the inconsistencies  
11 were previously explained in Parvizian's declaration filed on  
12 March 3, 2013. APJL stated that it had an "honest"  
13 misunderstanding of the nature of the Augmentation Account.  
14 Finally, APJL discussed its relationship with Cameron Michael  
15 and stated that Cameron Michael was not a creditor of debtor.

16 Parvizian submitted another declaration dated June 6, 2013.  
17 Parvizian mostly reiterated the explanation for the  
18 reconciliation process. He declared that APJL would  
19 occasionally defer deducting certain expenses because debtor did  
20 not have the necessary cash flow to support making payroll and  
21 paying for advertising. He explained that APJL had deferred  
22 deducting the Manager's Salary from debtor's draws to assist  
23 debtor with cash flow. Parvizian testified that other items  
24 also resulted in the overfunding of debtor's draws, including  
25 APJL's failure to include the CC Fees in its weekly settlement  
26 calculations. Finally, Parvizian declared that in no way did  
27 APJL wrongfully take funds from debtor.

28 Trustee filed a brief in support of the OSC on May 30,

1 2013. Trustee reported that he had filed an adversary  
2 proceeding against APJL and that APJL had not returned the  
3 \$171,346 to the Augmentation Account nor had it returned the  
4 compensation the court declined to award.

5 Trustee requested damages of \$29,000 in attorney's fees to  
6 remedy the violation of the stay and \$13,112.50 connected with  
7 his attempt to obtain an accounting from APJL, preparing for the  
8 June 2013 hearing, and responding to APJL's supplemental  
9 briefing. The CRO requested fees of \$15,662.50 and Christine  
10 Baur, attorney for debtor, requested \$33,400.36 for the estate's  
11 pre-conversion attorney fees. The bankruptcy court issued a  
12 tentative ruling prior to the hearing finding that (1) the  
13 Augmentation Account was property of the estate, (2) APJL was  
14 obligated to seek relief from stay before undertaking unilateral  
15 offset, (3) APJL willfully violated the automatic stay, and  
16 (4) APJL violated the court's turnover order. The court ordered  
17 APJL to return \$171,346 and for each day that it failed to do  
18 so, it would be assessed an additional fine of \$250 per day.

19 At the hearing, the bankruptcy court essentially adopted  
20 its tentative ruling, but allowed APJL to submit further  
21 briefing on the issue why it was impossible for APJL to comply  
22 with the court's turnover order. The court took the matter  
23 under submission.

#### 24 **12. Supplemental Briefing By APJL**

25 On July 17, 2013, APJL submitted a supplemental brief.  
26 There, APJL again provided an accounting, this time specifically  
27 with respect to the October 1, 2012 Letter in which debtor  
28 requested APJL to freeze the account. APJL identified numerous

1 third party checks that had been issued before October 1 in the  
2 amount of \$25,582.66. APJL explained that had it "frozen" the  
3 account on October 2, 2012, all those checks would have been  
4 returned for insufficient funds to a total of nine different  
5 third-party vendors and service providers. APJL argued that the  
6 writing of bad checks could have subjected it to both civil and  
7 criminal liability in California, where the debtor is located,  
8 and in Virginia, where APJL is located. APJL asserted that it  
9 would not have been reasonable or prudent for APJL to have  
10 stopped payment or frozen the account as it pertained to such  
11 outstanding checks. APJL further noted that debtor had not  
12 challenged the validity of any of the expenses associated with  
13 the payments made by APJL after the October 1, 2012 Letter.

14 Finally, APJL argued that it was impossible for it to  
15 comply with the court's turnover order since the CC Fees had  
16 been collected by the credit card companies and the funds were  
17 not in its possession. Likewise, the Manager's Salary had also  
18 been withdrawn and those funds were not in its possession.  
19 Finally, APJL argued that a turnover motion could not be used as  
20 a shortcut for a breach of contract dispute under the holding in  
21 Leonard v. Optimal Payments Ltd. (In re Nat'l Audit Def.  
22 Network), 332 B.R. 896, 914-916 (Bankr. D. Nev. 2005).

23 **13. The September 26, 2013 Entry Of The Damages Order**

24 On September 10, 2013, the bankruptcy court issued its  
25 memorandum decision and civil contempt order against APJL for  
26 failing to turn over property of the estate and to pay damages.  
27 The court found APJL in violation of the automatic stay and  
28 awarded attorney's fees in the amount of \$77,240 and actual

1 damages in the sum of \$68,598.49, for a total of \$145,838.49.

2 In calculating the actual damages, the bankruptcy court  
3 used the time period from September 25, 2012 (the date debtor  
4 requested APJL to freeze the Augmentation Account) to October 1,  
5 2012 (the date debtor informed APJL that it was in violation of  
6 the stay). According to the court, the balance in the  
7 Augmentation Account on October 1, 2012, was \$116,702.74.  
8 Deposits after that date were made in the amount of \$44,394.12.  
9 Therefore, the bankruptcy court found that the amount of  
10 \$161,096.86 (\$116,702.74 + \$44,394.12) would have been preserved  
11 had APJL frozen the account.

12 Due to the fact APJL had paid debtor \$36,601.04 on  
13 September 26, 2012, the bankruptcy court gave APJL credit for  
14 that amount. The court also gave APJL credit for the amount of  
15 \$27,958.75<sup>14</sup> which it had turned over to Trustee on May 28, 2013.  
16 Therefore, the total credit given was \$64,539.62,<sup>15</sup> to which the  
17 court added another credit of \$27,958.75<sup>16</sup> leaving \$68,598.49  
18 unaccounted for ( $\$161,096.86 - \$64,539.62 - \$27,958.75 =$   
19  $\$68,598.49$ ).

20 The order further provided that for each day that APJL  
21 refused to return \$68,598.49 to Trustee, APJL would be assessed  
22 an additional fine of \$100, plus additional attorney's fees

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23 <sup>14</sup> We could not find this exact amount in the record.  
24 Trustee's brief in support of the OSC filed May 30, 2013,  
25 indicates that APJL turned over \$27,948.58 to Trustee.

26 <sup>15</sup> Using the bankruptcy court's numbers, the amount of the  
27 credit actually was \$64,559.79.

28 <sup>16</sup> It appears that the court gave APJL double credit for the  
\$27,958.49 amount.

1 incurred in rectifying its continuing contumacious conduct.  
2 The bankruptcy court entered the Damages Order on September 26,  
3 2013. APJL timely appealed.

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(E) and (O). We have jurisdiction under  
7 28 U.S.C. § 158.

## 8 **III. ISSUES**

9 A. Whether the bankruptcy court erred by denying APJL  
10 compensation for its auctioneer services on the grounds that it  
11 was a prepetition creditor and therefore not "disinterested";

12 B. Whether the bankruptcy court erred in finding that the  
13 funds in the Augmentation Account were property of the estate;

14 C. Whether the bankruptcy court erred in finding that  
15 APJL had violated the automatic stay; and

16 D. Whether the bankruptcy court abused its discretion by  
17 awarding contempt damages for APJL's violation of the automatic  
18 stay without an evidentiary hearing.

## 19 **IV. STANDARDS OF REVIEW**

20 The abuse of discretion standard is applied to our review  
21 of the bankruptcy court's award of attorney's fees, the court's  
22 decision not to hold an evidentiary hearing, and its finding of  
23 civil contempt and imposition of sanctions. Feder v. Lazar  
24 (In re Lazar), 83 F.3d 306, 308 (9th Cir. 1996) (attorney's  
25 fees); Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133, 1139 (9th  
26 Cir. 2004) (evidentiary hearing); F.T.C. v. Affordable Media,  
27 LLC, 179 F.3d 1228, 1239 (9th Cir. 1999) (civil contempt and  
28 imposition of sanctions).

1 The bankruptcy court abuses its discretion when it fails to  
2 identify and apply "the correct legal rule to the relief  
3 requested," United States v. Hinkson, 585 F.3d 1247, 1263 (9th  
4 Cir. 2009) (en banc), or if its application of the correct legal  
5 standard was "(1) 'illogical,' (2) 'implausible,' or (3) without  
6 'support in inferences that may be drawn from the facts in the  
7 record.'" Id. at 1262.

8 We review for clear error the bankruptcy court's findings  
9 of fact in connection with the civil contempt order. Affordable  
10 Media, LLC, 179 F.3d at 1239.

11 Whether property is property of the estate is a question of  
12 law reviewed de novo. Collect Access LLC v. Hernandez  
13 (In re Hernandez), 483 B.R. 713, 719 (9th Cir. BAP 2012).  
14 Similarly, the applicability of the automatic stay and  
15 exceptions thereto are questions of law that we consider de  
16 novo. Lockyer v. Mirant Corp., 398 F.3d 1098, 1107 (9th Cir.  
17 2005). De novo means review is independent, with no deference  
18 given to the trial court's conclusion. Barclay v. Mackenzie  
19 (In re AFI Holding, Inc.), 525 F.3d 700, 702 (9th Cir. 2008).

## 20 V. DISCUSSION

### 21 A. The Compensation Order

22 The denial of APJL's compensation for its auctioneer  
23 services raises questions regarding APJL's disinterestedness,  
24 adverse interest to the estate, and adequacy of its disclosures.  
25 These issues are relevant to whether the bankruptcy court abused  
26 its discretion in denying APJL compensation for its auctioneer  
27 services.

28 Under § 327(a), a debtor in possession may employ a

1 professional with court approval only if (1) they are  
2 disinterested persons and (2) they do not hold or represent an  
3 interest adverse to the estate. See Tevis v. Wilke, Fleury,  
4 Hoffelt, Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 687  
5 (9th Cir. BAP 2006). The two tests overlap. Id.

6 A "disinterested person" is defined as one who "is not a  
7 creditor" and "does not have an interest materially adverse to  
8 the interest of the estate or of any class of creditors . . . by  
9 reason of any direct or indirect relationship to, connection  
10 with, or interest in, the debtor . . . or for any other reason."  
11 § 101(14) (A), (C). A creditor is defined as an "entity that has  
12 a claim against the debtor that arose at the time of or before  
13 the order for relief concerning the debtor." § 101(10) (A). A  
14 claim is defined as the "right to payment, whether or not such  
15 right is reduced to judgment, liquidated, unliquidated, fixed,  
16 contingent, matured, unmatured, disputed, undisputed, legal,  
17 equitable, secured, or unsecured." § 101(5) (A).

18 APJL's primary argument on appeal is that the bankruptcy  
19 court erroneously determined that it was a prepetition creditor  
20 of the bankruptcy estate and thus not disinterested. According  
21 to APJL, the error occurred because the bankruptcy court assumed  
22 that APJL had withdrawn and paid itself almost \$100,000 in  
23 September 2012 to reimburse itself for the CC Fees and Manager's  
24 Salary. APJL asserts that the evidence shows those funds were  
25 debited directly from the Augmentation Account and thus APJL was  
26 not owed anything from debtor. APJL maintains it was not a  
27 prepetition creditor and therefore was a disinterested party.

28 We agree that APJL is not a prepetition creditor based upon

1 the automatic debits for the CC Fees and Manager's Salary from  
2 the Augmentation Account prepetition. APJL had no "right to  
3 payment" from debtor for these expenses when they were  
4 automatically debited from the account. However, APJL has  
5 asserted throughout this record that it overfunded draws to  
6 debtor because it did not take into account the CC Fees and  
7 Manager's Salary. The record shows that some of the CC Fees and  
8 Manager's Salary were debited from the Augmentation Account  
9 prepetition, but it is impossible to tell from this record  
10 whether APJL overfunded draws to debtor prepetition or whether  
11 the overfunding was limited to the postpetition period. If the  
12 draws were more than the expenses which were debited during the  
13 prepetition period, then it is possible APJL was owed money from  
14 debtor on the petition date. Most troubling is that APJL states  
15 that it was not a creditor even though it never conducted a  
16 final accounting as of the petition date that determined the  
17 rights and liabilities of the parties for the prepetition  
18 period.<sup>17</sup>

19 In any event, APJL overlooks that debtor granted APJL a  
20 security interest in the Additional Furniture and its proceeds  
21 under the terms of the agreement. Therefore, as of the petition  
22

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23 <sup>17</sup> Under the execution of the terms of the agreement  
24 described in Parvizian's declarations, a weekly reconciliation  
25 was done and checks issued to balance the account on Mondays for  
26 the period ending several days prior. Therefore, on any given  
27 Tuesday, APJL was owed money by debtor for transactions since the  
28 last reconciliation. The likelihood that APJL was owed money on  
the petition date – and therefore a creditor – was significant,  
even without taking into account that APJL was not factoring in  
all expenses when it gave draw checks to debtor.

1 date, APJL was a secured creditor and as the record shows, APJL  
2 continued to enforce its secured claims against debtor's funds  
3 in the Augmentation Account postpetition. APJL was thus not  
4 disinterested and failed to disclose its secured creditor status  
5 under the agreement in connection with its request for  
6 employment as auctioneer.

7 A professional may be disinterested if it does not have an  
8 "interest materially adverse to the interest of the estate . . .  
9 by reason of any direct or indirect relationship to, connection  
10 with, or interest in, the debtor . . . or for any other reason."  
11 § 101(14)(C). An "adverse interest" means "to possess or assert  
12 any economic interest that would tend to lessen the value of the  
13 bankrupt estate or that would create either an actual or  
14 potential dispute in which the estate is a rival claimant."  
15 In re Tevis, 347 B.R. at 687.

16 APJL had control of the Augmentation Account throughout the  
17 pre and postpetition relationship between the parties and offset  
18 pre and postpetition claims against debtor's postpetition draws.  
19 Moreover, during the postpetition period, APJL made payments  
20 from the account to entities that were insiders of APJL and  
21 those relationships were never disclosed in the context of its  
22 employment application. Further, since the parties continued to  
23 operate under the agreement postpetition, APJL was owed money on  
24 its commissions and reimbursement of other expenses on a  
25 recurring basis and therefore had postpetition creditor status.  
26 But this relationship was never disclosed.

27 The record shows that APJL clearly had an economic interest  
28 and connection to debtor under the terms of the agreement which

1 were adverse to debtor as borne out by the present dispute.  
2 These facts were relevant and material to the bankruptcy court's  
3 scrutiny of the relationship between APJL and debtor for  
4 purposes of accessing whether APJL held an adverse interest or  
5 conflict of interest. Yet, APJL never disclosed these facts to  
6 the bankruptcy court.

7 Rule 2014 provides that the employment application "shall  
8 be accompanied by a verified statement of the person to be  
9 employed setting forth the person's connections with the debtor,  
10 creditors, any other party in interest . . . ." The disclosure  
11 provisions of Rule 2014 are strictly applied with the burden on  
12 the applicant to come forward and make full, candid, and  
13 complete disclosure. Neben & Starrett, Inc. v. Chartwell Fin.  
14 Corp. (In re Park-Helena Corp.), 63 F.3d 877, 881 (9th Cir.  
15 1995).

16 Even a negligent or inadvertent failure to disclose  
17 fully relevant information may result in a denial of  
18 all requested fees. . . . The duty of professional is  
19 to disclose all connections with the debtor, debtor-  
20 in-possession, insiders, creditors, and parties in  
21 interest. . . . They cannot pick and choose which  
22 connections are irrelevant or trivial. . . . No  
23 matter how old the connection, no matter how trivial  
24 it appears, the professional seeking employment must  
25 disclose it. Id. at 882.

26 The record shows that APJL failed to meet the duty of full  
27 and complete disclosure. Whether its failure to disclose was  
28 willful or not is irrelevant to strict application of the  
disclosure rules.

A lack of disinterestedness does not mandate a denial of  
all compensation if the professional relies on the employment  
order. First Interstate Bank of Nev. v. CIC Inv. Corp.

1 (In re CIC Inv. Corp.), 192 B.R. 549, 553-54 (9th Cir. BAP  
2 1996). In In re CIC Inv. Corp., the Panel held that the  
3 bankruptcy court had discretion to award compensation for  
4 services performed in reliance on the order authorizing  
5 employment, before that order was reversed on appeal. Unlike  
6 here, the professional in that case had "fully disclosed" its  
7 relevant connections and "all potential conflicts" at the  
8 outset. Furthermore, we cannot see how APJL relied upon the  
9 employment order for its compensation when the order was entered  
10 after the auction was complete and entered nunc pro tunc. In  
11 any event, APJL does not tell us how it relied upon the order  
12 approving its employment, which was entered after the fact.

13 In the end, the bankruptcy court has broad discretion in  
14 designing appropriate remedies to deal with violations of  
15 Rule 2014. In re Park-Helena, 63 F.3d at 882; see also  
16 In re Film Ventures Int'l, Inc., 75 B.R. 250, 253 (9th Cir. BAP  
17 1987); § 328(c). Considering the record as a whole, we conclude  
18 the bankruptcy court did not abuse its discretion when denying  
19 APJL's compensation request; the court applied the proper legal  
20 standards and its application of those standards to the facts is  
21 supported by the record. We thus affirm the Compensation Order.

## 22 **B. The Damages Order**

23 The Damages Order involves the interplay between §§ 541,  
24 542, 362, and 105(a).

### 25 **1. Property of the Estate**

26 "Property of the estate" is defined in § 541(a) as all of a  
27 debtor's legal or equitable interests in property, wherever  
28 located, as of the commencement of the case. "Any interest in

1 property that the estate acquires after the commencement of the  
2 case" is property of the chapter 11 estate. § 541(a)(7). While  
3 § 541 sets forth what interests of the debtor must be  
4 transferred to the bankruptcy estate, it does not address "the  
5 threshold questions of the existence and scope of the debtor's  
6 interest in a given asset.'" Dumas v. Mantle (In re Mantle),  
7 153 F.3d 1082, 1084 (9th Cir. 1998). Rather, the bankruptcy  
8 court must look to state property law to determine whether, and  
9 to what extent, the debtor has any legal or equitable interests  
10 in property as of the commencement of the case. Id. The party  
11 seeking to include property in the estate bears the burden of  
12 showing that the item is property of the estate. Seaver v.  
13 Klein-Swanson (In re Klein-Swanson), 488 B.R. 628, 633 (8th Cir.  
14 BAP 2013). Whether the proceeds in the Augmentation Account  
15 were property of the estate would necessarily preface the  
16 determination of whether a stay violation occurred.

17 Trustee argues on appeal that APJL conceded that the funds  
18 were property of the estate and thus the doctrines of judicial  
19 admission or judicial estoppel should apply. Judicial admission  
20 does not apply since APJL did not admit facts, but only adopted  
21 the legal conclusion by the bankruptcy court that the funds were  
22 property of the estate. Judicial estoppel "is an equitable  
23 doctrine invoked by a court at its discretion" and "is invoked  
24 to prevent a party from changing its position over the course of  
25 judicial proceedings when such positional changes have an  
26 adverse impact on the judicial process." Russell v. Rolfs,  
27 893 F.2d 1033, 1037 (9th Cir. 1990). Since the bankruptcy  
28 court's decision that the funds in the Augmentation Account were

1 property of the estate is reviewed de novo, we fail to see how  
2 APJL's alleged inconsistent position on appeal would have an  
3 adverse impact on the judicial process.

4 APJL points to impermissible burden shifting as grounds for  
5 reversal. We do not discern any improper burden shifting and,  
6 as further discussed below, the agreement controlled the rights  
7 of the parties to the funds in the Augmentation Account. Once  
8 the bankruptcy court interpreted the agreement as a matter of  
9 law, the court still gave APJL an opportunity to refute the  
10 court's interpretation through other evidence, which it did not  
11 do.

12 The prepetition agreement between the parties controls the  
13 rights of the parties to the funds in the Augmentation Account  
14 that were generated from the postpetition sales of the  
15 Additional Furniture.<sup>18</sup> The interpretation of the agreement is  
16 governed by Virginia law. Under Virginia law, we review the  
17 bankruptcy court's interpretation of a contract de novo and  
18 "'have an equal opportunity to consider the words of the  
19 contract within the four corners of the instrument itself.'" Uniwest Constr., Inc. v. Amtech Elevator Servs., 699 S.E.2d 223,  
20 229 (Va. 2010). We construe the contract as a whole, giving  
21 terms their ordinary meaning unless some other meaning is  
22 apparent from the context. Id. The various provisions are  
23 harmonized, giving effect to each when reasonably possible, and  
24

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25  
26 <sup>18</sup> Since the proceeds due debtor from the court-approved  
27 auction were paid by APJL prior to this dispute, it does not  
28 appear that debtor is owed any money from the auction.  
Therefore, we attribute the funds in the account to the  
postpetition sales and not proceeds from the auction.

1 are construed considering the circumstances under which they  
2 were executed and the condition of the parties. Id.

3 "Contract language is ambiguous when it may be understood  
4 in more than one way or when it refers to two or more things at  
5 the same time. However, a contract is not ambiguous merely  
6 because the parties disagree as to the meaning of the terms  
7 used." Eure v. Norfolk Shipbuilding & Drydock Corp., 561 S.E.2d  
8 663, 668 (Va. 2002). When a contract is ambiguous, the court  
9 will look to parol evidence to determine the intent of the  
10 parties. Id. at 667-68.

11 Relying on the language used by APJL and debtor in the  
12 agreement, the bankruptcy court found that the agreement was  
13 essentially a financing arrangement whereby APJL loaned money  
14 through its credit lines to debtor for the purpose of acquiring  
15 the Additional Furniture which was bought in debtor's name. The  
16 court did not find any provision that said anything about the  
17 account being "owned" by APJL, only that APJL had "control".  
18 Accordingly, the court concluded that the proceeds deposited  
19 into the Augmentation Account belonged to debtor, subject to  
20 APJL's security interest. Thus, it follows that the proceeds  
21 were property of the estate.

22 We agree with the bankruptcy court's assessment that the  
23 language in the agreement shows a financing arrangement and a  
24 creditor-debtor relationship. The agreement plainly states that  
25 debtor granted APJL a security interest in all the proceeds from  
26 the Additional Furniture and other rights it had under the  
27 agreement and that APJL would buy the Additional Furniture in  
28 debtor's name. Furthermore, although APJL's possession and

1 control of the account are indicia of ownership, its possession  
2 and control was necessary to perfect its security interest under  
3 Virginia law. See Va. Code § 8.9A-312(b) (1) (a security  
4 interest in a deposit account can only be perfected by control  
5 as defined in Va. Code § 8.9A-314); Va. Code § 8.9A-314  
6 (perfection by control occurs when the secured party actually  
7 obtains actual control of the deposit account).

8       The agreement is not ambiguous about APJL's security  
9 interest in the proceeds from the Additional Furniture. As the  
10 bankruptcy court noted, it would be illogical for APJL to have a  
11 security interest in its own property. Likewise, it would be  
12 illogical for APJL to be paying its own expenses (such as the  
13 commissions) out of its own property.

14       On appeal, APJL focuses on the priority of the  
15 distributions under the agreement, pointing out that debtor was  
16 allowed to share in the sale proceeds only after the payment of  
17 expenses (among them the CC Fees and Manager's Salary as well as  
18 costs of goods sold and other expenses). Whether or not the  
19 distribution scheme was adhered to is a separate question from  
20 what constitutes property of debtor's estate.

21       APJL also argues on appeal that the Augmentation Account  
22 operated more like an escrow account and thus the funds were not  
23 property of the estate under the holding of Dzikowski v. NASD  
24 Regulation, Inc. (In re Scanlon), 239 F.3d 1195, 1998 n.6 (11  
25 Cir. 2011) and Carlson v. Farmers Home Admin. (In re Newcomb),  
26 744 F.2d 621, 626-27 (8th Cir. 1984). Because APJL raises the  
27 escrow argument for the first time on appeal, we do not need to  
28 consider it. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,

1 Inc.), 887 F.2d 955, 957 (9th Cir.1989). However, even if we  
2 did, APJL's escrow analogy is contrary to the language of the  
3 agreement. Accordingly, we affirm the bankruptcy court's  
4 decision that the funds in the Augmentation Account were  
5 property of debtor's estate.

## 6 **2. Stay Violation**

7 To assemble the bankruptcy estate, § 542 requires that,  
8 during bankruptcy proceedings, an entity "in possession,  
9 custody, or control" of certain property in the estate "shall  
10 deliver" that property to the trustee (subject to certain  
11 conditions not relevant here). § 542(a). While bankruptcy  
12 proceedings are pending, the automatic stay provisions of § 362  
13 work with §§ 541 and 542 to shelter the debtor's estate from  
14 action by creditors, enabling the debtor to get the relief and  
15 fresh start that are among the goals of the bankruptcy regime.  
16 Thus, under § 362, filing a bankruptcy petition automatically  
17 effects a stay of "any act to obtain possession of property of  
18 the estate . . . or to exercise control over property of the  
19 estate." § 362(a)(3). Those who violate § 362 are liable for  
20 related damages and costs.

21 Since the funds in the Augmentation Account constituted  
22 estate property under § 541(a)(7), APJL was required to return  
23 the funds to debtor as soon as debtor notified it to return the  
24 property. Otherwise, it would be holding the funds in violation  
25 of the stay. See U.S. v. Whiting Pools, Inc., 462 U.S. 198,  
26 206-07 (1983). The record shows that debtor notified APJL to  
27 pay the amount of \$184,000 (which represented the \$99,000 and  
28 \$85,000 shortfalls for the late September reconciliations) in

1 the October 1, 2012 Letter and asserted that a stay violation  
2 would result if APJL failed to do so. The bankruptcy court  
3 found the October 1, 2012 Letter required APJL to "turn over the  
4 funds in the Augmentation Account under § 542 upon debtor's  
5 demand."

6 On appeal, APJL argues that the fundamental flaw in the  
7 bankruptcy court's finding is that the October 1, 2012 Letter  
8 never made a turnover request. Rather, according to APJL, the  
9 letter demanded that APJL "freeze" the account but that  
10 disbursements could be made with the CRO's written  
11 authorization. APJL further notes that in debtor's ex parte  
12 application for the OSC, debtor requested that APJL "disgorge"  
13 \$184,000 as opposed to turnover.

14 We are not persuaded that these nuances change the outcome  
15 when considering the context of the letter as a whole. Debtor  
16 made a number of demands in the October 1, 2012 Letter,  
17 including requests for reconciliation documentation, freezing  
18 the account, and the immediate payment of \$184,000. The letter  
19 also advised that failure to comply with these demands  
20 "constitutes willful violation of the stay and conversion of  
21 property of the estate which is punishable by sanctions."  
22 Importantly, by requesting the freezing of the account, limiting  
23 disbursements to those with written approval, and the return of  
24 \$184,000, debtor sought to maintain the status quo, which is the  
25 purpose behind the automatic stay. See Hillis Motors, Inc. v.  
26 Haw. Auto. Dealers' Ass'n, 997 F.2d 581, 585 (9th Cir. 1993)  
27 (the automatic stay is designed to effect an immediate freeze of  
28 the status quo). "The stay requires the creditor to maintain

1 the status quo ante and to remediate acts taken in ignorance of  
2 the stay.” Franchise Tax Bd. v. Roberts (In re Roberts),  
3 175 B.R. 339, 345 (9th Cir. BAP 1994).

4 Regardless of whether debtor used the terminology  
5 “disgorge” or “turnover” later in the OSC, we conclude that the  
6 October 1, 2012 Letter was sufficient to put APJL on notice that  
7 its failure to freeze the account or its wrongful retention of  
8 funds would result in a violation of the automatic stay. Of  
9 course, APJL did not freeze the account nor did it seek written  
10 authorization from the CRO for any disbursements. It also never  
11 turned over any money to debtor. Had APJL re-established the  
12 status quo, its violation of the stay would have ended.<sup>19</sup>

13 APJL argues that by the time debtor demanded turnover of  
14 the \$184,000, the expenses had already been disbursed to the  
15 credit card companies and the manager. The fact that APJL no  
16 longer had possession of the funds is irrelevant in a turnover  
17 analysis under § 542. Section 542(a) states in relevant part,  
18 “[A]n entity . . . in possession, custody, or control, **during**  
19 **the case**, of [property of the estate, or exempt property], shall  
20 deliver to the trustee, and account for, such property **or the**  
21 **value of such property**, unless such property is of  
22 inconsequential value or benefit to the estate.” (Emphasis  
23 added). The Ninth Circuit has recently rejected the argument

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24  
25 <sup>19</sup> One consequence of APJL not freezing the account was  
26 chargebacks by the credit card companies which occurred after  
27 October 1, 2012. These chargebacks themselves may have been  
28 violations of the automatic stay, especially if they were for  
prepetition debits which is unclear from the record. Whether pre  
or postpetition, a credit card company must get relief from stay  
to charge back a debtor’s merchant account.

1 APJL makes on appeal.

2 First, 'during the case' means that the trustee may  
3 bring a motion for turnover against an entity who has  
4 possession of the property of the estate, or had  
5 possession of that property at some point during the  
6 bankruptcy case. Second, the phrase "or the value of  
7 such property" indicates that the entity need not be  
8 in possession of the property itself when the trustee  
files the motion for turnover. Because § 542(a)  
permits a trustee to recover 'the value of [the]  
property,' instead of just the property itself,  
possession cannot be required in order to bring the  
motion for turnover.

9 Shapiro v. Henson, 739 F.3d 1198, 2001 (9th Cir. 2014); see also  
10 Newman v. Schwartz (In re Newman), 487 B.R. 193 (9th Cir. BAP  
11 2013).

12 In sum, "the failure to return property of the estate with  
13 knowledge of the bankruptcy is a violation of both the automatic  
14 stay and of the turnover requirements of the Bankruptcy Code."  
15 Abrams v. Sw. Leasing and Rental Inc. (In re Abrams), 127 B.R.  
16 239, 241-43 (9th Cir. BAP 1991) (creditor's continuing retention  
17 of repossessed vehicle after receiving notice of bankruptcy  
18 violated automatic stay). By its express terms, § 542(a) is  
19 self-executing and does not require the debtor to take any  
20 action or commence a proceeding or obtain a court order to  
21 compel the turnover. See Mwangi v. Wells Fargo Bank, N.A.  
22 (In re Mwangi), 432 B.R. 812, 823 (9th Cir. BAP 2010).

23 Accordingly, we conclude that the bankruptcy court properly  
24 found that APJL violated the automatic stay by retaining  
25 property which was property of the estate.

26 The bankruptcy court also found APJL's offsets of  
27 prepetition expenses against debtor's postpetition draws  
28 violated the automatic stay. APJL does not address this finding

1 with any specificity on appeal. To assert the right to setoff  
2 or pursue satisfaction of his or her claim, a creditor must seek  
3 relief from the automatic stay. § 362(d)(1). Further, “[t]he  
4 decision to award setoff rests squarely within the discretion of  
5 the Bankruptcy Court.” Hal Inc. v. United States (In re Hal,  
6 Inc.), 122 F.3d 851, 854 (9th Cir. 1997). Because no final  
7 accounting was completed in this record, we do not know if APJL  
8 did offset any prepetition expenses, but this has no effect on  
9 our decision to affirm.

### 10 **3. The Contempt Order**

11 Contempt damages under § 362(k) are available to  
12 individuals, but because neither debtor as a corporation nor  
13 Trustee may seek contempt damages under § 362(k), contempt  
14 damages are available under § 105. Havelock v. Taxel  
15 (In re Pace), 67 F.3d 187, 192 (9th Cir.1995).

16 Under § 105, “[t]he standard for finding a party in civil  
17 contempt is well settled: The moving party has the burden of  
18 showing by clear and convincing evidence that the contemnors  
19 violated a specific and definite order of the court.” Knupfer  
20 v. Lindblade (In re Dyer), 322 F.3d 1178, 1190-91 (9th Cir.  
21 2003). The movant must prove that the creditor (1) knew the  
22 automatic stay was applicable and (2) intended the actions which  
23 violated the injunction. Id.; Zilog, Inc. v. Corning  
24 (In re Zilog, Inc.), 450 F.3d 996, 1007-08 (9th Cir. 2006).  
25 “Knowledge of the injunction, which is a prerequisite to its  
26 willful violation, cannot be imputed; it must be found.”  
27 In re Zilog, Inc., 450 F.3d at 1008; see also In re Dyer,  
28 322 F.3d at 1191-92 (contempt sanctions upheld where creditor

1 admitted having notice of the automatic bankruptcy stay, yet  
2 took no steps to remedy his violation of the stay).

3 APJL does not mention these standards in this appeal.  
4 Rather, it argues that it should not be held in contempt because  
5 debtor's demand to pay \$184,000 was not the proper subject of a  
6 "turnover" demand based on the holding in In re Nat'l Audit Def.  
7 Network, 332 B.R. at 911 (citing MCI Telecommunications Corp. v.  
8 Gurga (In re Gurga), 176 B.R. 196, 199 (9th Cir. BAP 1994)  
9 ("turnover proceedings involve return of **undisputed**  
10 funds. . . ."). There, the bankruptcy court noted that  
11 "settled and controlling law holds that the presence of an  
12 active dispute over the amount owed takes the action out of the  
13 turnover area; one cannot shortcut a breach of contract action  
14 with a turnover demand." Id.

15 Here, APJL argues that the parties were in a dispute over  
16 an accounting issue. However, APJL again confuses the  
17 accounting issue with the property of estate issue. The proper  
18 distribution of debtor's property is at issue in the pending  
19 adversary proceeding which includes a request for an accounting.  
20 We agree that there are material disputes with respect to the  
21 accounting, but that does not excuse APJL from turning over  
22 property of the estate for purposes of maintaining the status  
23 quo.

24 We are also not convinced that it was "impossible" for APJL  
25 to comply with debtor's demand for return of the \$184,000.  
26 First, APJL contends that the return of these funds cannot be  
27 the subject of a turnover order since they related to the  
28 CC Fees and Manager's Salary and other expenses which involve

1 breach of contract. This argument we already addressed.

2 APJL next argues that since the demand for the return of  
3 \$184,000 was not tied to the funds actually in the Augmentation  
4 Account, all the pleadings and hearings thereafter were focused  
5 on accounting issues. According to APJL, the bankruptcy court's  
6 attempt to combine the two issues led to the illogical result  
7 that improperly punishes APJL for claims that were never raised  
8 in the pleadings. Thus, according to APJL, the court improperly  
9 held that APJL had the ability to comply with a court order.

10 These arguments have nothing to do with the impossibility  
11 defense to a contempt order. To successfully assert this  
12 defense, APJL as the alleged contemnor must establish  
13 "categorically and in detail" its inability to comply with the  
14 court's order. Affordable Media, LLC, 179 F.3d at 1239. As  
15 noted by the bankruptcy court, APJL did not meet its burden.  
16 There is nothing in the record that shows APJL lacked resources  
17 to turn over the funds from other sources. More significantly,  
18 APJL could have frozen the account on October 1, 2012, or  
19 requested debtor to assert the automatic stay against the credit  
20 card companies. See Moratzka v. Visa USA (In re Calstar, Inc.),  
21 159 B.R. 247 (Bankr. D. Minn. 1993) (recovery of chargebacks  
22 from postpetition deposit is a violation of § 549 and the  
23 automatic stay). Instead, APJL conducted its late September  
24 reconciliations without notifying debtor and then ignored  
25 debtor's demand to freeze the account and return the funds  
26 associated with the previously undisclosed charges. Even  
27 setting aside whether APJL had the ability to return the  
28 disputed \$184,000, it clearly could have turned over the funds

1 in the account on October 1, 2012. As the bankruptcy court  
2 observed, APJL alone was "responsible for the inability to  
3 comply." In re Count Liberty, LLC, 370 B.R. 259, 275 (Bankr.  
4 C.D. Cal. 2007).

5 **4. Damages**

6 APJL complains that the damages award was improperly  
7 calculated and inequitable.

8 The basis for the equitable argument is that the bankruptcy  
9 court is to blame for the accrued attorney's fees and the other  
10 damages. APJL maintains that the "focus" of the hearings  
11 shifted after November 29, 2012, to the accounting issues raised  
12 in the OSC application which resulted in three hearings,  
13 multiple tentative rulings and interim orders, multiple  
14 pleadings, and thousands of pages of accounting records that the  
15 parties all reviewed. At the end of all these hearings, the  
16 bankruptcy court calculated the damages based on the amount of  
17 money that was actually in the Augmentation Account, which was  
18 never the focus of the inquiry all along. As a result, the  
19 parties spent tens of thousands of dollars arguing over  
20 accounting issues, which the court specifically ordered to be  
21 dealt with in the adversary proceeding. APJL contends that  
22 "[t]he entire cost of the Bankruptcy court's flawed process has  
23 been imposed upon APJL [because] the determination of what funds  
24 were in the Augmentation Account could have been decided at the  
25 November 29, 2012 hearing."

26 At the November 29, 2012 hearing, the following discussion  
27 took place:

28 MR. FAITH: Right. Well, your honor, I guess from my

1 standpoint, what I want to be able to communicate to  
2 the client is, look, if you put the money back in  
3 there, at least the relief from stay issue isn't still  
4 hanging over our head in terms of the OSC.

5 . . .

6 MR. FAITH: I don't know if you're saying that or not.

7 THE COURT: Well, I am . . . . Damages for pursuing  
8 stay violations . . . don't continue to actually  
9 recover the money once the stay violation has ended,  
10 but they end when the stay violation ends. So  
11 basically the client's damages for stay violation are  
12 going to go until it puts the money back. So that's  
13 its choice. I'm not saying it's going to give them a  
14 free pass for its conduct today. I'm just telling  
15 you, you want more time, you want more process, you  
16 can have it. If you take that time, you're going to  
17 be faced with a potential consequence.

18 It was APJL's counsel that requested the opportunity for  
19 further briefing and it was Parvizian's February 22, 2013  
20 declaration that was inconsistent with his previous declaration.  
21 That inconsistency raised further questions regarding the  
22 CC Fees and Manager's Salary which had been automatically  
23 deducted from the Augmentation Account. Further briefing ensued  
24 due to the new issues raised. Thus, the focus did shift from  
25 the initial inquiry as to whether APJL had reimbursed itself for  
26 the offset expenses. Nonetheless, the record shows that APJL  
27 never complied with any of debtor's demands set forth in the  
28 October 1, 2012 Letter. Had APJL frozen the account when debtor  
requested, it would have been unnecessary for the bankruptcy  
court to determine what the amount of the funds were in the  
Augmentation Account as of October 1, 2012. Moreover, APJL  
never complied with the bankruptcy court's ruling on  
November 29, 2012 when it ordered APJL to turn over the \$75,759  
and \$28,000 amounts related to its offset, nor did APJL comply

1 with the court's April 12, 2013 OSC which required APJL to  
2 return \$171,346.17 to the Augmentation Account. Had APJL  
3 complied with either of the bankruptcy court's orders, the  
4 damages for its stay violation would have stopped accruing. In  
5 short, we are not persuaded by APJL's equitable argument, which  
6 also was raised for the first time on appeal. See Conn. Gen.  
7 Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882  
8 (9th Cir. 2003) (arguments raised for the first time on appeal  
9 are waived).

10 Finally, APJL contends that the bankruptcy court's award of  
11 actual damages required an evidentiary hearing because the funds  
12 at issue were "unaccounted for." In its memorandum decision,  
13 the bankruptcy court found:

14 APJL's noncompliance with its automatic stay  
15 obligations and expenditure of the funds in the  
16 Augmentation Account for its own purposes has also  
17 caused actual damages to the estate in the amount of  
18 the deficiency between the funds on hand on October 1,  
19 2012 and what was left when the funds were finally  
20 turned over. In its Supplemental Briefing on July 17,  
21 2013 in response to the OSC, APJL admitted \$133,265.98  
22 was in the Augmentation Account when counsel initially  
23 requested it be frozen on September 25, 2012, and  
24 \$116,702.74 was in the Augmentation Account on  
25 October 1, 2012 when Debtor's counsel informed APJL  
26 that it was in violation of the automatic stay. After  
27 October 1, 2012, an additional \$44,394.12 was also  
28 deposited in the Augmentation Account. Had APJL  
frozen the account on October 1, 2012, \$161,096.86 of  
Debtor's funds would have been preserved. After  
October 2012, APJL paid Debtor \$64,539.62. By  
June 17, 2013, when APJL turned over the remaining  
funds in the Augmentation Account to the Chapter 7  
Trustee, the balance had dwindled to \$27,958.75. Of  
the original \$161,096.86 that was available and could  
have been turned over to Debtor as of October 1, 2012,  
\$68,598.49 is unaccounted for. These are the actual  
damages the Court awards to the estate.

27 The narrow question APJL raises on appeal is whether there  
28 is evidence to support the \$68,598.49 award. APJL argues that

1 since the accounting of the funds is at issue in the adversary,  
2 it should have had the opportunity to respond by way of an  
3 evidentiary hearing. APJL contends that the unaccounted for  
4 funds are disputed.

5 However, the bankruptcy court awarded the amount of  
6 \$68,598.49 because APJL failed to preserve those funds by  
7 freezing the account. While APJL tries to link the actual  
8 damages to an accounting dispute, APJL once again misses the  
9 point that the status quo is the policy behind the automatic  
10 stay. The fact that certain funds may be "unaccounted" for does  
11 not make debtor's actual damages any less. Under these  
12 circumstances, the lack of an evidentiary hearing was not an  
13 abuse of discretion.

14 Nonetheless, we conclude that the bankruptcy court's  
15 calculations regarding the actual damages are not supported by  
16 the record and thus clearly erroneous. The bankruptcy court  
17 apparently gave APJL double credit for the \$27,958.75 it turned  
18 over to Trustee on May 28, 2013. In addition, although the  
19 court fixed the account balance from which it credited the  
20 monies paid over to debtor as of October 1, 2012, \$36,000 of  
21 that credit was paid before October 1 and perhaps this credit  
22 was improperly given. Thus, the bankruptcy court's calculation  
23 of the damages award was clearly erroneous.

## 24 **VI. CONCLUSION**

25 For the reasons stated, we AFFIRM the Compensation Order  
26 and AFFIRM the Damages Order in all respects except for the  
27 award of actual damages. We VACATE the award of actual damages  
28 and REMAND for further proceedings to determine the appropriate

1 amount.

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