UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

DENNIS L. RAE and
SANDRA J. RAE,

Debtors.

ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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DENNIS L. RAE and
SANDRA J. RAE,

Plaintiffs,

BKY 05-38108

v.

ADV 06-3037

SPRUCE FINANCIAL LLC, fka
RIVER CITY FINANCIAL, LLC,
AS SUCCESSOR IN INTEREST
TO PROVIDIAN,

Defendant and
Third-Party Plaintiff,

v.

HOGLUND, CHWIALKOWSKI,
GREEMAN & BERGMANIS P.L.L.C.,

Third-Party Defendant.

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At Minneapolis, Minnesota, this 18th day of January, 2008.

This adversary proceeding came on before the Court at a joint hearing on five different motions--three for substantive relief (a motion by the Plaintiffs styled as one for judgment on the pleadings; the Defendant's motion for partial summary judgment; and the Third-Party Defendant's motion to dismiss the third-party complaint against it), and two for imposition of sanctions on Messerli & Kramer, P.A., counsel for the Defendant, brought separately by the

Plaintiffs and the Third-Party Defendant. Appearances were as follows: Jeffrey J. Bursell, Esq., for the Plaintiffs ("the Debtors"); Cass S. Weil, Esq., for the Third-Party Defendant ("Hoglund, Chwialkowski"); and Derrick N. Weber, Esq., for the Defendant ("Spruce Financial") and for Messerli & Kramer, P.A. ("Messerli & Kramer"). The following order memorializes the disposition of the cross-motions for dispositive relief that the Debtors and Spruce Financial made. It is based on all of the written submissions made by those parties; the content of the Court's file in the underlying bankruptcy case, including the sequence of procedures and actions noted on the docket; and counsel's argument presented at hearing.[1]

INTRODUCTION

The Debtors filed a voluntary petition under Chapter 7 on October 7, 2005.[2] By all appearances, their bankruptcy case was uncomplicated within its four corners. Early on, the Trustee of their bankruptcy estate designated it as a "no asset" case. No party in interest objected to a grant of discharge, so the Debtors received that relief routinely and early. No creditor commenced an adversary proceeding to except a debt from discharge. The Court closed the case in a routine manner, barely five months after it was commenced.

However, a month before the case was closed, the Debtors filed the complaint in this adversary proceeding, invoking a derivative avoidance remedy that 11 U.S.C. §§ 522(g) - (i) make available to debtors in Chapter 7. In their original complaint, the Debtors sought to recover

[1]This ruling does not reach the several motions in the satellite litigation over sanctions. The decision on them will be made via separate order.

[2]The Debtors' petition was part of the "tidal wave" of a large number of bankruptcy filings by individual consumer-debtors that occurred during the six weeks preceding the October 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"). As such, the Debtors' case and this adversary proceeding are governed by the text of the Bankruptcy Code, Title 11 of the United States Code, that was on the books before BAPCPA's amendments took effect. Unless otherwise noted, all statutory citations are to the pre-BAPCPA text, including its section-numbering.

$830.82.[3] Funds in this amount had been attached for the benefit of Spruce Financial or transferred to it, under a post-judgment collection process that had taken place before the Debtors' bankruptcy filing. Via an amended complaint, the Debtors added a request to recover $240.00.[4] Funds in this sum had been attached in their bank account in the same manner, but after their bankruptcy filing.

From that simple prayer for relief, a large fracas erupted among three different law firms. The five pending motions billowed out of that.

I. The Debtors' Motion for Judgment on the Pleadings.

A. Nature of Motion.

The Debtors' motion for substantive relief was the first one filed. It was originally submitted in a somewhat anomalous form, styled as a motion for judgment on the pleadings in which the requested relief was "an Order dismissing [Spruce Financial's] Answer and Third Party Complaint with prejudice, [and] entering a judgment in favor of the Debtors . . ." The Debtors sought this relief as to both counts. Their counsel professed at the outset to be acting "[p]ursuant to Fed. R. Civ. P. 12(c) . . . [and] Fed. R. Bankr. P. 7012." But he immediately announced that "[w]hen considering a motion for judgment on the pleadings, the Court must treat the motion as one for summary judgment and disposed of as provided in Rule 56." He went on to cite a number of events and circumstances, allegedly uncontroverted by Spruce Financial, that he proposed as a factual basis for denying Spruce Financial's counterclaim and for granting judgment to his clients on their avoidance cause of action.[5]

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[3]For brevity, this request for relief will be identified as the one in "the first count."

[4]This request for relief will be identified as the one in "the second count."

[5]The face of Fed. R. Civ. P. 12(c) shows the gap in counsel's theorizing. The text of Rule 12(c) does not jump automatically into an analysis on the considerations of Rule 56, just because a motion is styled as one for "judgment on the pleadings." Under standard summary judgment analysis, the determination of uncontroverted *facts* is made on the consideration of *evidence* that is brought forward in writing to support the motion; the court's task is to see whether "all the evidence points one way and is susceptible to no reasonable inferences sustaining the position of the non-moving party." *E.g.*, *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). This inquiry and its subject matter go considerably

The threshold question, then, is whether the core material facts are expressly or tacitly admitted in Spruce Financial's answer, or otherwise are to be gleaned from the record, uncontroverted.

B. Uncontroverted Facts, Going to Debtors' Motion.

Many of the facts material to both counts are established by admissions in Spruce Financial's answer. Others were incontrovertible acts or events that took place in the administration of the Debtors' bankruptcy case. They are as follows:

1. On June 7, 2005, a judgment in the amount of $1,947.16 was entered against Debtor Sandra J. Rae, under her premarital name of Sandra J. Barrett, in the Minnesota State District Court for the Second Judicial District, Ramsey County, in case no. 62-C2-05-02559. The plaintiff and judgment creditor was named as "River City Financial, LLC as successor in Interest to Providian."[6] However, the true name of the plaintiff to the Ramsey County collection action was "Spruce Financial, LLC," effective as such when the judgment was entered. This business entity had been formed under the name of "River City Financial, LLC" several years previously; it had operated, so-named, until it agreed to cease the use of the name, in settlement of trademark infringement litigation brought by a previously-existing company that bore the same name. Several years prior to the entry of the Ramsey County judgment, the name was changed to "Spruce Financial, LLC." There is no indication as to why the Ramsey County collection action was sued

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beyond the *fact averments* that are made within the four corners of an attorney-drafted *pleading*, which is not required to be verified by a party and hence does not have an evidentiary character *per se*. The engagement in an evidence-based Rule 56 analysis is appropriate only where "matters outside the pleadings are presented to and not excluded by the court." Fed. R. Civ. P. 12(c). The Debtors' counsel never acknowledged that he was relying on such extrinsic material to establish his predicate facts; his briefing does not refer to specific sources as such. Nonetheless, the source he contemplates for the balance of the facts appears to be the simple sequence of events in the Debtors' bankruptcy case, as memorialized in the case docket and the filed documents associated with various docket entries. Given the way that counsel framed his argument, that--and only that--is to be consulted outside the pleadings to determine whether the Debtors have made out the prima facie basis in fact that is required of them to receive the relief they seek.

[6]This lawsuit will be identified as "the Ramsey County collection action" henceforth.

out under a business name no longer effective, and possibly prohibited under the terms of the trademark-infringement settlement.

2. During the months of June - October, 2005, the Debtors (or at least Debtor Sandra Rae) maintained a deposit account at Minnesota Teamsters Credit Union in Minneapolis.

3. Under cover of a letter dated June 23, 2005, Messerli & Kramer (acting on behalf of a client still identified as "River City Financial, LLC as Successor in Interest to Providian") served a notice of third-party levy, writ of execution, and associated disclosure forms, all captioned in the Ramsey County collection action, on Minnesota Teamsters Credit Union, pursuant to Minn. Stat. Ch. 551.

4. Pursuant to that levy, the Credit Union withheld and sequestered the sum of $830.82 from the Debtors' account, on July 1, 2005.

5. The Credit Union later remitted the $830.82 to Messerli & Kramer, by a payment received on July 21, 2005.

6. Under cover of a letter dated September 12, 2005, Messerli & Kramer (again purporting to act on behalf of "River City Financial, LLC") served a second notice of third-party levy on the Credit Union, with associated writ of execution and disclosure forms.

7. Pursuant to that levy, the Credit Union withheld and sequestered the sum of $240.00 from the Debtors' account, on September 19, 2005.

8. The Debtors filed a voluntary petition under Chapter 7 on October 7, 2005.

9. In the Schedules B and C filed with their petition, the Debtors did not include any entries for assets to correspond to the funds on which Spruce Financial had levied in July, 2005, or the funds that had been sequestered after service of the notice of levy in mid-September, 2005. In item 4.b. of their Statement of Financial Affairs, they did disclose the occurrence of a levy at the instance of Spruce Financial, on an "amount of $830." They recited its "Date of Seizure" as July 21, 2005.

10. As authority for the claims of exemption on their original Schedule C, the Debtors cited the "federal exemptions" of 11 U.S.C. § 522(d). The total of the stated values of assets that they claimed as exempt under 11 U.S.C. § 522(d)(5) was only $2,155.00.

11. By a payment received on October 12, 2005, the Credit Union remitted the $240.00 to Messerli & Kramer.

12. On December 5, 2005, the Trustee of the Debtors' bankruptcy estate filed a "Notice of No Asset Case." This document memorialized her conclusion that there were no assets of value greater than the Debtors' claimed exemptions, that could be administered and distributed to creditors.

13. On February 2, 2006, the Debtors, through Hoglund, Chwialkowski, filed Amended Schedules B and C. Under Item 20 of the Amended Schedule B, "Other contingent and unliquidated claims of every nature," they included a new entry for "Garnished funds by River City Financial, LLC," assigning a value of "1,071.00" to it. In the Amended Schedule C, they claimed an exemption for the full value of this asset pursuant to 11 U.S.C. § 522(d)(5). The filed proof of service for these amended schedules incorporates an address matrix that includes Messerli & Kramer at the address given on its two notices of levy.

14. On February 2, 2006, Hoglund, Chwialkowski, acting on behalf of the Debtors, filed the complaint that commenced this adversary proceeding. The complaint named "River City Financial, LLC as Successor in Interest to Providian" as defendant. The complaint had a single count, a request for avoidance of the transfer of the $830.82 that had been the subject of the levy in June and July, 2005.

15. Via an order entered on February 10, 2006, the Debtors received a discharge under Chapter 7.

16. On March 2, 2006, the Court entered an order closing the Debtors' case and discharging their Trustee.

17. No creditor or party in interest had filed an objection to the Debtors' amended claim of exemption by the date on which the case was closed. No creditor or party in interest has ever filed such an objection.

18. On February 7, 2006, the clerk of this Court had received a letter from one Wayne E. Gilbert, identifying himself as Vice President and General Counsel of "River City Financial, LLC." In it, Gilbert stated his belief that his company was not the proper defendant for the Debtors' adversary proceeding and that Spruce Financial, which he termed a subsidiary of Messerli & Kramer, was.

19. On March 31, 2006, Hoglund, Chwialkowski filed an amended complaint in this adversary proceeding. The amendments changed the name of the defendant to Spruce Financial, LLC, and added a second count in which the Debtors requested avoidance of the transfer of the $240.00 to Spruce Financial. A verification bearing the Debtors' signatures was attached. On April 12, 2006, Hoglund, Chwialkowski filed what appeared to be an identical copy of this document, with verification, but now including several documentary attachments.

20. The clerk issued summonses for all three versions of the Debtors' complaint. The Court file contains proof of service for all three. After service of the third version, Spruce Financial, through Messerli & Kramer as its counsel, filed an answer to the amended complaint.

C. Discussion.

1. Introduction; Order of Analysis.

A debtor in Chapter 7 may exercise certain avoidance powers of a trustee in bankruptcy, where:

1. the property transferred pre-petition would have been exempt in the bankruptcy case;

2. the property was not transferred voluntarily; and

3. the trustee has not brought an action to avoid the transfer.

11 U.S.C. §§ 522(g) - (h); *In re James*, 257 B.R. 673, 675 (B.A.P. 8th Cir. 2001); *In re Wade*, 219 B.R. 815, 819 (B.A.P. 8th Cir. 1998); *In re Merrifield*, 214 B.R. 362, 365 (B.A.P. 8th Cir. 1997); *In re Klingbeil*, 119 B.R. 178, 181 (Bankr. D. Minn. 1990) (all involving debtors' exercise of power to avoid preferential transfers under 11 U.S.C. § 547(b)).[7]

The application of § 522(h) is not the end of the analysis, however. Once the avoidance of the specific transfer is effected, the debtor then "may recover" from the creditor transferee, "in the manner prescribed by, and subject to the limitations of [11 U.S.C. §] 550." 11 U.S.C. § 522(i)(1). The debtor then "may exempt any property so recovered," under 11 U.S.C. § 522(h). *Id*. Thus, there are two applications of the substantive and procedural law of exemptions in this process. The first is treated in the hypothetical. The second is made in the actual, to the real fruits of avoidance and recovery.

As observed some years ago, the "multilayered cross-referencing" of the Code's provisions that govern debtors' derivative avoidance powers "confuses even those readers who are

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[7]The relevant text of 11 U.S.C. §§ 522(g) - (h) is:

. . . .

> (g) Notwithstanding [11 U.S.C. §§] 550 and 551 . . . , the debtor may exempt under [11 U.S.C. § 522](b) . . . property that the trustee recovers under [11 U.S.C. §§] . . . 550 [and] 551 . . . to the extent that the debtor could have exempted such property under [11 U.S.C. § 522](b) . . . if such property had not been transferred, if--
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> > (1)(A) such transfer was not a voluntary transfer of such property by the debtor; and
> >
> > (B) the debtor did not conceal such property . . .
>
> (h) The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under [11 U.S.C. § 522](g)(1) . . . if the trustee had avoided such transfer, if--
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> > (1) such transfer is avoidable by the trustee under [11 U.S.C. §§] . . . 547 . . . [or] 549 . . . ; and
> >
> > (2) the trustee does not attempt to avoid such transfer.

versed in bankruptcy theory; it certainly does not promote a simple and prompt application" of their substance. *In re Flitter*, 181 B.R. 938, 942 n. 10 (Bankr. D. Minn. 1995). To conform entirely to the complexity of the statute, then, the judicial treatment of a debtor's request for avoidance is even more involved than the parties have envisioned.

At its bedrock, the availability of relief to the Debtors depends on whether the transfers to Spruce Financial would be avoidable by a trustee. 11 U.S.C. § 522(h)(1). Thus, the substantive law governing the avoidance remedy itself must be applied first. If the transfers are avoidable, the Debtors' entitlement to do so for their own benefit, and the form of their recovery, is the next step. Interspersed throughout are the questions going to Spruce Financial's pleaded affirmative defenses.[8] So, despite a piddling amount in controversy, this dispute requires an extended sequential analysis.

2. Avoidability of the Transfers, Under the Law Governing Trustees' Powers.

a. The First Count: Application of 11 U.S.C. § 547(b) to the Pre-Petition Remittance of $830.82.

Under bankruptcy law, creditors that receive a preferential transfer--i.e., something more than similarly-situated creditors did or would receive--may be compelled to surrender the value of the transfer, when their debtor later goes into bankruptcy. The basic remedy through which a trustee may avoid such a transfer is 11 U.S.C. § 547(b).[9]

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[8]In its submissions, Spruce Financial raised a flurry of issues, in challenge of the Debtors' prima facie case and by way of affirmative defense. These points are presented in varying degrees of detail, and with much bombast throughout. It is rare to see a *pleading* with the amount of rhetorical overemphasis, italicization, and underlining that Spruce Financial's counsel used in his client's answer--not to mention so much tiresome repetition of large blocks of near-verbatim text in successive paragraphs. Such practices do not evidence much heed of the directive for "a short and plain statement" of claims and defenses in our "General Rules of Pleading." *See* Fed. R. Civ. P. 8(a) - (b), *as incorporated by* Fed. R. Bankr. P. 7008.

[9]The relevant text of this statute is:

. . . .

(b) [T]he trustee may avoid any transfer of an interest of the debtor in

The Debtors maintain that Spruce Financial's pre-petition levy on $830.82 would be avoidable under § 547(b). Because several of the elements of § 547(b) can turn on the matter of timing, the initial task is to identify the transfer(s) that resulted in Spruce Financial's receipt of these funds, and when it (or they) took place.

First, and without dispute from Spruce Financial, *a* transfer took place when it served its notice of levy and associated documents on the Credit Union. Under longstanding Minnesota state legal precedent, this act attached a lien in favor of Spruce Financial, on all funds then on deposit in the Debtors' account at the Credit Union. *In re Howard*, 307 B.R. 659, 662-663 (Bankr. D. Minn. 2004) (citing *Murphy v. Casey*, 157 Minn. 1, 195 N.W. 627 (1923)).

As Spruce Financial's counsel notes, the date of that transfer was more than 90 days

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property--

> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
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> (3) made while the debtor was insolvent;
>
> (4) made--
>
> > (A) on or within 90 days before the date of the filing of the petition; [and]
> >
> > . . . .
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> > (A) the case were a case under chapter 7 of [the Bankruptcy Code];
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of [the Bankruptcy Code].

prior to the date on which the Debtors filed for bankruptcy.[10] The Debtors do not allege that Spruce Financial was an insider as to them; so, as to the attachment of the lien, the Debtors cannot satisfy the temporal-proximity requirement of § 547(b)(4)(A).

However, the attachment of a lien of levy did not effect a transfer to Spruce Financial of the full right to the funds. That was not accomplished before the Credit Union made remittance via tender of a check to Spruce Financial and, in truth, not until the check was honored. *Barnhill v. Johnson*, 503 U.S. 393, 399, 112 S.Ct. 1386, 1390 (1992); *In re Howard*, 307 B.R. at 663; *In re McGovern*, 295 B.R. 897, 904 (Bankr. D. Minn. 2003). *Cf., In re Klingbeil*, 119 B.R. at 183 (when inchoate lien under pre-judgment garnishment was perfected via entry of judgment, this effected a second transfer that was avoidable under § 547(b) if it occurred within 90 days prior to debtor's bankruptcy filing). Here, that second transfer did not take place until the Credit Union's check to Spruce Financial was honored--which was sometime after the remittance was physically effected by Spruce Financial's receipt of the Credit Union's check on July 21, 2005. The record does not establish the date of honoring, but that is of no moment; the act of remittance took place within the 90-day period of vulnerability to avoidance and the depositing and honoring of the check had to have taken place after that.[11]

This conclusion means that the Debtors satisfied four of the six requirements of § 547(b):

1. At the relevant times, Spruce Financial was a creditor of theirs, § 547(b(1);

2. that received a transfer of an interest of property of theirs, § 547(b) [prefatory provision];

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[10]The "90 days before the date of the filing of the petition" began on, and included, July 9, 2005; with that as day one, the 90th day was October 6, 2005. The wording of § 547(a)(4)(A) clearly excludes the day of the filing of the bankruptcy petition itself, since the initial word "on" clearly denotes that day. (It would be crystal-clear if the word "the" fell between "within" and "90," but the lack of a definite article does not bar this conclusion.)

[11]I.e., on or after July 21, 2005, which perforce fell after July 9.

3. on account of an antecedent debt (i.e., the one that had been reduced to judgment), § 547(b)(2); and

4. that was made within 90 days before the date of their bankruptcy filing, § 547(b)(4)(A).

Because the transfer took place within the 90-day "window," the Debtors have the benefit of a presumption of insolvency. 11 U.S.C. § 547(f). Spruce Financial produced absolutely no evidence to rebut this presumption, so § 547(b)(3)--the fifth element--is met. *Jones Truck Lines, Inc. v. Full Service Leasing Corp*., 83 F.3d 253, 256 (8th Cir. 1996).[12]

And, unquestionably, the receipt of the funds enabled Spruce Financial to receive more than it would have received had the transfer not been made and had the Debtors gone into Chapter 7 with the funds intact in their account at the Credit Union. *E.g., In re Zachman Homes, Inc.*, 40 B.R. 171, 173 (Bankr. D. Minn. 1984). In the first place, the Debtors had ample unapplied right of exemption under § 522(d)(5) to protect the funds, had they still possessed them in an unfettered status.[13] They would have been able to keep the funds, and Spruce Financial would have gotten no part of them as a creditor participating in liquidation. But even if the element is approached from the perspective of a trustee, without consideration of the Debtors' exemption rights, the Debtors prevail. As it was administered in reality, the Debtors' estate ended up empty; there was no distribution at all to unsecured creditors. Had the $830.82 remained in the estate to be administered by a trustee, Spruce Financial would have received only a fractional share of the

[12]So much for Spruce Financial's combative but hollow insistence on the Debtors "meeting their burden" on this issue. Fed. R. Evid. 301 identifies the consequence of § 547(f): ". . . a presumption imposes on the party *against whom it is directed* the burden of going forward with evidence to rebut or meet the presumption . . ." (Emphasis added).

[13]Under the text of § 522(d)(5) in effect in October, 2005, the Debtors had the right to exempt their "aggregate interest in any property, not to exceed in value $975 plus up to $9250 of any unused amount of the exemption" provided for homestead real estate under 11 U.S.C. § 522(d)(1). The Debtors scheduled no homestead. Because the stated exemption rights of § 522 "apply separately with respect to each debtor in a joint case," 11 U.S.C. § 522(m), they had unused exemption rights under § 522(d)(5) of over $9,000.00 for each of them.

residuum after payment of the trustee's compensation and any associated administrative expenses, pro rata with the holders of other allowed unsecured claims.[14] By receiving the whole, it got just the sort of jump that meets § 547(b)(5).

So, via the patchwork "record" for this motion, the Debtors have demonstrated that a trustee could have avoided the transfer of a full, unencumbered $830.82 to Spruce Financial that took place upon the Credit Union's first remittance.

b. The Second Count: Application of 11 U.S.C. § 549(a) to the Post-Petition Remittance of $240.00.

Bankruptcy law protects the property of the bankruptcy estate in several different ways. These include a power given to the trustee to avoid post-petition transfers of that property that are not "authorized under [the Bankruptcy Code] or by the court." 11 U.S.C. § 549(a)(1)(B). The four elements to be satisfied are right on the face of § 549(a). *In re Russell*, 927 F.2d 413, 417-418 (8th Cir. 1991); *In re Kingsley*, 208 B.R. 918, 920 (B.A.P. 8th Cir. 1997); *In re Dartco, Inc.*,197 B.R. 860, 865 (Bankr. D. Minn. 1996). By including § 549 in its provisions for the scope of the derivative avoidance powers given to debtors, 11 U.S.C. § 522(h)(1), § 522(h) empowers a Chapter 7 debtor to avoid post-petition transfers of assets, again as long as the debtor meets its other prerequisites.[15]

In their original complaint, the Debtors did not plead Spruce Financial's levy on the $240.00 as a transfer subject to avoidance at their instance. In the second count, first pleaded on March 31, 2006, the Debtors made a specific request for avoidance under § 549, as to the $240.00. They now seek judgment as to that.

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[14]There were other creditors with standing to file claims of the same priority as Spruce Financial's; the Debtors listed a total of $31,848.00 in such, on their Schedule F, for unsecured nonpriority claims. And, they scheduled a total of $6,858.00 in priority claims for recently-incurred personal income tax liabilities--which, if allowed, would have consumed the full residuum of the $830.82, leaving nothing for general unsecured creditors like Spruce Financial.

[15]Because the statutory framework of § 522(h) incorporates both §§ 547(b) and 549, this conclusion follows by corollary from the authority cited *supra* at p. 8.

Again, the threshold question on the substantive aspect of this count is whether a trustee could satisfy § 549(a) as to the second levy, in the abstract. The answer is straightforward.

First, under the authority cited earlier, the Credit Union's post-petition remittance to Spruce Financial was a transfer of property to that creditor, no matter that the funds were previously subject to a lien of levy in its favor. Second, the funds then on deposit (even as subject to the lien) became property of the estate upon the Debtors' bankruptcy filing. *In re Pyatt*, 486 F.3d 423, 427 (8th Cir. 2007). Whether any portion of them was encompassed by the Debtors' claimed exemption of funds on deposit at the Credit Union, that claim of exemption had not been allowed as of the date of the second remittance. While it is a matter of legal abstraction, it is undeniable: until the allowance of a claim of exemption, the rights to the full balance on deposit, subject to the lien of levy or not, remained in the estate as property of the estate. *In re Kasden*, 209 B.R. 239, 244 (B.A.P. 8th Cir. 1997). And third, there is no provision in the Bankruptcy Code that allows a creditor to take such action in final effectuation of a pre-petition levy, without leave of the court. To the contrary, the automatic stay of 11 U.S.C. §§ 362(a)(2) unequivocally prohibited "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title." Spruce Financial never requested or received relief from the stay in the Debtors' case; so it never had authority from the court to receive and commingle the remittance.

Thus, the Debtors have demonstrated that a trustee could have avoided the post-petition transfer of the $240.00 to Spruce Financial, as it was made via the remittance. *In re Griffin*, 319 B.R. 609, 612-613 (B.A.P. 8th Cir. 2005).

3. Avoidability of the Transfers, at the Debtors' Instance.

Under the analysis just made, the Debtors have met § 522(h)(1), as to both transfers to Spruce Financial. For them to exercise the avoidance power otherwise in a trustee's hands, they must satisfy two other requirements.

a. Hypothetical Exemptability of the Funds:
11 U.S.C. §§ 522(g)(1) and 522(h) (Prefatory Provision).

As held earlier in Finding 10 and in n. 13, the Debtors had the legal right to exempt the full amount of the funds on which Spruce Financial levied, had the Trustee avoided the levies and gotten a recovery. The value of the other assets they had already exempted using § 522(d)(5) was far less than the aggregate protection available to them. And, the two levies and remittances certainly were "not . . . voluntary transfer[s] of such property by" the Debtors. This satisfies 11 U.S.C. § 522(g)(1)(A).

Third, the Debtors "did not conceal such property," § 522(g)(1)(B). In their original bankruptcy filing they disclosed the consummated pre-petition levy in the appropriate place in their Statement of Financial Affairs. When the inconclusive jousting between the lawyers prolonged the indeterminacy of its legal status, the Debtors formally disclosed the occurrence of the post-petition remittance by amending their asset and exemption schedules.[16] From the first, they had disclosed their maintenance of a deposit account at the Credit Union on their asset schedules; this enabled their trustee to inquire as to a more specific value for the balance on deposit as of the date they filed for bankruptcy, had she chosen to do so.[17] The amendment to give a more specific value for the petition-date balance was not untimely; the trustee had not yet been discharged, and thus the estate still could have made claim to the funds had the trustee chosen to do so.

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[16]For pretty obvious reasons, the form for the statement of financial affairs in a bankruptcy case has no query that goes to post-petition transfers of assets of the estate. After all, the document is to be filed no later than fifteen days after the filing of the initial petition. Fed. R. Bankr. P. 1007(c).

[17]When a debtor's checking account remains open and actively used over the several days spanning a bankruptcy filing, the actual balance presents a moving target. As a result, this sort of asset gives any trustee a real challenge, if the debtor cannot claim an exemption for funds on deposit. *See In re Pyatt*, 486 F.3d 423. That situation was obviated by the Debtors' choice of the "federal exemptions" of § 522(d), including the "wild card" of § 522(d)(5). Their trustee's apparent lack of interest in the account as an asset for liquidation is explained by the very large value of "exemption power" still available to the Debtors under the legal authority they claimed for their exemptions.

So, had their trustee avoided the two transfers and recovered from Spruce Financial, the Debtors could have claimed and been allowed an exemption for the amount recovered.

b. Trustee's Relinquishment to the Debtors: 11 U.S.C. § 522(h)(2).

At this late date the point is beyond obvious, but it must be noted: the trustee of the Debtors' bankruptcy estate did not ever "attempt to avoid such transfer," as to either levy. The reason is obvious, under the observations made earlier: had she done the avoidance herself, it likely would not have inured to the estate's benefit in the end; the Debtors could have plucked the fruits away via a late-coming claim of exemption under § 522(g)(1).

This satisfies § 522(h)(2), the last requirement for the Debtors' own exercise of the avoidance remedy.

4. Avoidance of the Liens of Levy: 11 U.S.C. § 522(f)(1).

So the Debtors have made their case for the avoidance of the two transfers that took place on the Credit Union's remittances to Spruce Financial, as an abstract substantive matter. This does not clear the funds of all claims in favor of Spruce Financial, though. Immediately before the events of remittance, the funds were still subject to the liens that had attached upon the service of Spruce Financial's writs of execution. Avoidance of the remittances, transfers analogous to foreclosure on those liens, did not vitiate the liens themselves.

At this point, the analysis of *In re Howard* kicks in. Under that, 11 U.S.C. § 522(f)(1)(A) divests Spruce Financial of those liens. *See* 307 B.R. at 662 - 663. And though the first lien of levy attached more than 90 days prior to the Debtors' bankruptcy filing, that is of no moment. Section 522(f)(1) does not contain any proximity-oriented requirement like § 547(a)(4). Nor does it have any requirement that the debtor be insolvent, and in particular none such that hinges on a proximity-dependent presumption like that created by § 547(f) for the purposes of § 547(b)(4) (A).

With the application of this separate avoidance remedy for the Debtors' benefit, the divestment of Spruce Financial's interest in the funds as levying creditor is complete.[18]

5. Recovery of Value of Subject Property: 11 U.S.C. §§ 522(i)(1) and 550(a).

Where a debtor avoids a lien under § 522(f) or a transfer under § 522(h), the debtor is entitled to a recovery from the creditor, and that recovery may be structured in the same way that a trustee's recovery would be under § 550. 11 U.S.C. § 522(i)(1). Under § 550(a), the recovery may consist of "the property transferred, or, if the court so orders, the value of such property . . ." This provision permits the structuring of relief that is most efficacious to the prevailing party; and if the asset originally subjected to the transfer now avoided is gone by the time of a potential recovery, due to intervening sale or commingling, the court may order a money judgment "for the value of such property." *In re Willaert*, 944 F.2d at 464.

As a technical matter, the funds that the Credit Union remitted to Spruce Financial were commingled with other funds once the Credit Union's checks were deposited to Spruce Financial's order. No doubt, they were dissipated weeks or months before the Debtors' counsel made initial demand on Spruce Financial. But, as § 550 permits whenever the avoidance remedies are invoked, entry of a money judgment is appropriate, to make whole the party exercising avoidance.

6. Actual Exemption of Funds so Recovered: 11 U.S.C. § 522(i)(1), Again.

After a recovery and avoidance, a debtor "may exempt any property so recovered under [11 U.S.C. § 522](b)." The claim of exemption that the Debtors made in their amended

[18]Since Spruce Financial received the remittances only because it had previously effected its levies and taken its liens, the remedies of avoidance and recovery may be applied sequentially in this fashion. In *In re Willaert*, 944 F.2d 463, 464 (8th Cir. 1991), the court held that the transfer to the defendant bank of the proceeds of the post-foreclosure sale of mortgaged property "was the culmination of the mortgage transaction" that had been avoidable as a preferential transfer; hence both the transfer of sale proceeds and the original attachment of mortgage could be undone at the trustee's instance, enabling a recovery of the subject value for the estate. To corollary effect here, the remittance of the funds avoidable as a preference was the fruit of the attachment of an avoidable judicial lien; so both transfers are properly undone in sequence, on application of the Code's remedies.

Schedule C was made under the authority of this provision. No creditor or party in interest timely objected to this claim of exemption, so it was duly allowed 30 days after the filing of the amended schedule and all property rights in the claimed asset revested in the Debtors. Fed. R. Bankr. P. 4003(b); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643 (1992); *Abramowitz v. Palmer*, 999 F.2d 1274, 1276 (8th Cir. 1993).

In paragraph 4 of its answer, Spruce Financial insists that "Debtors' failures to include [an] exemption [for the value corresponding to the pre-petition remittance] in their original sworn Schedules B and C, or to file an [sic] amended Schedule B and C immediately after, were in bad faith." It is not clear from the answer whether this accusation was intended to go to the Debtors' claim of exemption newly-asserted by the amendment, directly and on its merits, or if in some more indiscernible way it was directed toward the Debtors' satisfaction of § 522(i)(1) as a prerequisite to recovery in this adversary proceeding. But the argument does not wash, as to either application.

In the first place, by the time Spruce Financial filed its answer in this adversary proceeding, it was time-barred from objecting to the claim of exemption raised in the amended Schedule C, on its merits or even under an argument of bad faith. If, contrary to principles of *res judicata*, Spruce Financial had the right to make a collateral challenge to the exemptibility of the funds in the context of an application of § 522(i)(1), it is clear enough that that element may be satisfied by a previously-allowed claim of exemption to the Debtors' right to a prospective recovery, as occurred here.

Then there is Spruce Financial's vague, sweeping accusation of bad faith. Whether this would apply to the claim of exemption in its context as originally made, or would be cognizable under § 522(i)(1) in some derivative way, Spruce Financial has no case. The Eighth Circuit has held that a mere lapse of time between original and amended claims of exemption does not per se evidence a debtor's bad faith, even if it is lengthy. *In re Ladd*, 450 F.3d 751, 755 (8th Cir. 2006);

In re Kaelin, 308 F.3d 885, 889 (8th Cir. 2002). "When it is discovered that a debtor has attempted to hide an asset, it will generally support a finding of bad faith." *In re Kaelin*, 308 F.3d at 890. In the sense of a complete omission of the asset from an earlier version of statements and schedules, or an utter lack of prior disclosure of its existence, that simply did not happen here.

Further, Spruce Financial has identified no "resultant prejudice to creditors" from the allowance of the exemption, as would be recognized under the Eighth Circuit precedent. *See In re Ladd*, 450 F.3d at 755 (mere fact that trustee would be prevented from collecting asset that would be protected under claimed exemption otherwise proper under law, is not prejudice to creditors); *In re Kaelin*, 308 F.3d at 890 (prejudice to creditors can consist in "harm [to] the litigation posture" of the estate, but this is present only where trustee would have taken different actions or asserted different positions had debtor seasonably claimed exemption, and "the interests of the [estate] are detrimentally affected" as a result).

Spruce Financial made just this one, rather vaguely-framed objection to allowing the Debtors an exemption to the funds that they would recover from it.[19] The argument lacks all merit. The Debtors have the benefit of their right under § 522(i)(1) to exempt the funds.

7. Conclusion, as to Debtors' Motion.

This disposes of all of the issues raised by the Debtors' motion as it was originally made. On the basis of their unrebutted factual showing, as it went to their pleaded requests for relief, the Debtors met the substantive requirements under the governing statutes for their recovery of $830.82 on the first count, and of $240.00 on the second count.

The prior analysis also addresses all of Spruce Financial's responsive contentions but one: the pleaded affirmative defense to the second count. That issue was raised most directly and pointedly on Spruce Financial's own dispositive motion.

[19]Its counsel did not bother to cite any Eighth Circuit precedent on the issue.

II. Spruce Financial's Motion for Partial Summary Judgment.

A. Issue Presented: Time-Barring of Second Count.

Spruce Financial's motion for partial summary judgment goes only to the second count, which was added by the amendment made on March 31, 2006. Spruce Financial pleaded an affirmative defense, that this count was not timely pleaded under the Bankruptcy Code's applicable statute of limitations, and hence is time-barred.[20] That statute of limitations is specific to this avoidance remedy, and it is found in 11 U.S.C. § 549(d).[21]

B. Discussion.

1. Relation-Back of Second Count: Fed. R. Civ. P. 15(c).

In the Debtors' first pleading, the original complaint, they made no claim against Spruce Financial under §§ 549 or 362. All of the facts going to the post-petition remittance were

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[20]In Spruce Financial's written submissions, its attorney engages in some rhetorical carping: the Debtors' original complaint, albeit filed before the closing of their case and hence within the temporal confines of 11 U.S.C. § 546(a), nonetheless named and was "served [on] the wrong entity" as party-defendant, and "the Debtors' counsel waited nearly two months, until March 31, 2006, to serve the correct Defendant with the first Amended . . . Complaint." It is not clear whether this is an actual argument against a grant of judgment under the first count; counsel's prolixity and pugnaciousness make it difficult to isolate the defenses specifically pleaded. However, in the end it is obvious that Spruce Financial is not defending the Debtors' § 547-derived count on the ground of time-barring under § 546(a). It would be hard-pressed to do so; the Debtors' counsel was not out of line in initially naming the defendant from the styling of the state-court collection process under which the transfers had been effected. The Debtors' counsel's misnomer was only technical; and it stemmed directly from Spruce Financial's continued maintenance of collection activity and judgment enforcement under a trade name it had forsaken under pressure, years previously. As such, the later correction of the name via the amended complaint related right back to the original, timely-filed complaint under § 547(b), under the "traditional misnomer principle" of Fed. R. Civ. P. 15(c)(3). *Roberts v. Michaels*, 219 F.3d 775, 779 (8th Cir. 2000).

[21]This provision reads as follows:

> . . . .
>
> (d) An action or proceeding under [11 U.S.C. § 549] may not be commenced after the earlier of --
>
> > (1) two years after the date of the transfer sought to be avoided; or
> >
> > (2) the time the [bankruptcy] case is closed or dismissed.

first pleaded in the first version of their amended complaint. That, indeed, was filed after their bankruptcy case was closed. The maintenance of this request for relief is dependent in part on the Debtors' derivative standing to sue under § 549. The request was first put into suit after the event identified in § 549(d). Thus, the Debtors may maintain suit under § 549 only if the amended pleading relates back to the original, timely-filed pleading, the first version of the Debtors' complaint, by operation of Fed. R. Civ. P. 15(c).[22] *Mayle v. Felix*, 545 U.S. 644, 646 (2005) ("Rule 15(c)(2) relaxes, but does not obliterate, the statute of limitations . . .").

To allow the relation-back of a pleading's amendments to a timely-filed status, "the claim or defense asserted in the amended pleading [must have arisen] out of the conduct, transaction, or occurrence set forth . . . in the original pleading . . ." Fed. R. Civ. P. 15(c)(2). Thus, "relation-back depends on the existence of a common core of operative facts uniting the original and newly-asserted claims." *Mayle v. Felix*, 545 U.S. at 646. *See also Plubell v. Merck & Co*., 434 F.3d 1070, 1071-1072 (8th Cir. 2006). Where that common core of facts is shared by originally-pleaded claims and those pleaded by amendment, the "party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitation were intended to provide." *Mandacina v. United States*, 328 F.3d 995, 1000 (8th Cir. 2003). However, "when the new claims depend on events separate in both time and type from the originally-raised episodes," *Mayle v. Felix*, 545 U.S. at 646, i.e., "a new legal theory based on facts different from those underlying the timely claims," *United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002), the respondent to the amended pleading would not have received timely notice of the new claims, the amendment may not be related back, and the new claims must be considered as time-barred if the statute of limitations has run in the meantime. *Whalen v. Gordon*, 95 F. 305, 308-309 (8th Cir. 1899).

[22]Fed. R. Civ. P. 15 is made applicable to adversary proceedings in bankruptcy cases by Fed. R. Bankr. P. 7015.

Under this authority, the Debtors' statutory claim under § 549 is time-barred. That claim is based on facts completely distinct from those that were the basis of the timely-sued claim under § 547(b): a new, second levy, later in time and different in the amount attached, and a different remittance in enforcement of the levy. The mere fact that both were effected on the same judgment does not make them part of a single transaction; they certainly were separate events. A trustee could not have raised the claim under § 549 when and as the Debtors first did, via the amended complaint. Hence the Debtors may not. The Debtors must be denied the relief they request under this statute.

2. Timeliness of Request for Relief Under 11 U.S.C. §§ 362(a) and 362(h).

Though the Debtors' counsel titled the second count of the amended complaint "11 U.S.C. § 549 POST-PETITION TRANSFER," that statute was not the only one he cited in seeking redress from Spruce Financial's post-petition levy. At the end of that count, the amended complaint impugns the "garnishment [sic] of the Debtors' bank account after the filing of the Case" as a violation of various provisions of the automatic stay of 11 U.S.C. § 362(a). This pleads an alternate statutory theory to defeat the post-petition levy. Under it, Spruce Financial's alleged "continuing retention of" the amount paid to it under the post-petition remittance is cited as a willful violation of the automatic stay, actionable under 11 U.S.C. § 362(h) and also as a void act.[23]

This request for relief, ultimately stemming from the substantive governance of § 362(a), is not time-barred under § 546. That statute of limitations applies only to various

[23]The Debtors' counsel identifies "11 U.S.C. § 362(k)(1)" as the statutory authority for his clients' right to recover actual damages, punitive damages, and attorney fees consequent to the allegedly-willful violation. Based on the facial enumeration in this citation, Spruce Financial's answer took the Debtors' counsel sorely to task. But the point argued was as inept as the Debtors' counsel's job of statutory identification and cite-checking. Before the effective date of BAPCPA, 11 U.S.C. § 362(h)--first enacted in 1984--provided for this right of recovery. With the Debtors' case being governed by pre-BAPCPA law, that was the correct statutory enumeration. *See* n. 1, *supra*. Spruce Financial's gripe in its answer, that the Debtors had "improperly stated a claim for relief under 11 U.S.C. § 362(k)(1) which is not effective in bankruptcy cases filed before October 17, 2005," is not only redundantly hard-bitten, it is wholly off-base as to the fundamental availability of relief under statute.

avoidance remedies available to trustees in bankruptcy, identified by specific statutes in Chapter 5 of the Bankruptcy Code. Spruce Financial has not cited any other provision of the Bankruptcy Code that would make the availability of relief from an action in violation of the automatic stay dependent on the pendency of a bankruptcy case open under its original filing, or otherwise to be brought by a specific deadline. None appears in the Code, from a thorough search. Obviously, Congress did not choose to expressly time-bar relief under § 362(h), or any more general form of relief in redress of violations of § 362(a). Thus, the Debtors' assertion of a claim under this alternate theory, via their amended complaint, was not untimely.

3. Conclusion, as to Spruce Financial's Motion.

Thus, Spruce Financial's motion can be granted in part; it is entitled to a judgment to the effect that the Debtors' claim under § 549(a) is time-barred. The second count was still capable of suit under the alternate theory, however.

III. The Debtors' Motion for Judgment on the Pleadings, Redux.

A. Posture of Motion, as to Second Count; Suitability of Those Issues for Summary Adjudication.

The Debtors' motion for judgment on the pleadings does not raise, support, or develop their pleaded claim premised on an assertion of violation of the automatic stay. In its motion for summary judgment, however, Spruce Financial did put that claim before the Court; it asserted that the Debtors "cannot show the essential legal elements required by § 362." Though Spruce Financial urged "that [the Debtors'] Motion be **DENIED**"; but for some reason its counsel did not move for summary judgment in his client's own favor, to put this claim to an end.

The lack of a formal motion by a party does not prevent the according of summary judgment on this claim, however. It has long been recognized that where the evidentiary record placed before a federal court meets the requirements of Rule 56, and all parties have had full opportunity and notice to develop both facts and law, the court may act on its own motion to order

summary judgment as appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986); *Interco Inc. v. Nat'l Surety Corp.*, 900 F.2d 1264, 1268 (8th Cir. 1990); *In re Walsh*, 260 B.R. 142, 145 (Bankr. D. Minn. 2001).

And, ultimately, that is appropriate here, for a full resolution of the remaining issues under the second count.

Spruce Financial did produce evidentiary materials in support of its position, that the Debtors were not entitled to judgment because they could not establish all of the elements for the relief they sought. These consisted of the affidavits of two of its attorneys who had participated in the post-petition levy and the events after it, with exhibits to document associated written communications between the attorneys of Messerli & Kramer and attorneys and others employed by Hoglund, Chwialkowski. Once Spruce Financial as movant placed this material into the record, as evidence that went to the negation of the Debtors' prima facie case for a violation of the stay, the burden of production shifted over to the Debtors. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-252 (1986); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 643 (8th Cir. 2002). To the extent that the Debtors did not produce evidence to counter the findings that would be supported by Spruce Financial's evidence, they would be bound by all findings that could be made in Spruce Financial's favor. Then, to the extent that those findings defeated any possible showing for the Debtors on an essential element of their claim, judgment for Spruce Financial on the automatic-stay theory would be mandated. *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. at 325; *Luigino's, Inc. v. Peterson*, 317 F.3d 909, 914 (8th Cir. 2003); *TRI, Inc. v. Boise Cascade Office Prods., Inc.*, 315 F.3d 915, 918-919 (8th Cir. 2003); *In re Northgate Computer Systs., Inc.*, 240 B.R. 328, 339 (Bankr. D. Minn. 1999).

The first step in this analysis is to identify the elements that the Debtors would have to prove to prevail, under §§ 362(a) or 362(h). *In re Nation-Wide Exch. Serv., Inc.*, 291 B.R. 131, 138-139 (Bankr. D. Minn. 2003). Then the status of the facts, as disputed or undisputed, must be ascertained. After that, the undisputed facts can be matched to the elements, to see whether the

Debtors have an established and unrebutted prima facie case or whether fact issues as to their satisfaction of the elements must be taken to trial. *In re Hauge*, 232 B.R. 141, 144-145 (Bankr. D. Minn. 1999).

B. Elements of Automatic-Stay Theory Under Second Count.

1. Under 11 U.S.C. § 362(h).

To establish a right to an award under § 362(h), an individual debtor alleging that a creditor interfered with property of the debtor or of the estate in violation of the stay must prove:

a. The bankruptcy estate or the debtor had an interest in the property in question. *In re Just Brakes Corp. Systs., Inc.*, 293 F.3d 1069 (8th Cir. 2002) ("*Just Brakes II*").

b. The debtor or the estate suffered an injury from the creditor's interference with the property. *Lovett v. Honeywell, Inc.*, 930 F.2d 625, 628 (8th Cir. 1991);

c. The creditor acted willfully, i.e. in knowledge of the automatic stay, and with an intent to invade the debtor's or the estate's right to the legal protections of the stay. *Cf. In re Porter*, 375 B.R. 822, 828 (B.A.P. 8th Cir. 2007) (construing willfulness requirement of 11 U.S.C. § 523(a)(6)).

2. Under 11 U.S.C. § 362(a).

In the alternative, the Eighth Circuit has held that "§ 362(a) buttressed by [11 U.S.C.] § 105(a), confers broad equitable power to remedy adverse effects of automatic stay violations." *In re Just Brakes Corp. Systs., Inc.*, 108 F.3d 881, 885 (8th Cir. 1997) ("*Just Brakes I*") (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 306-309 (1995). Strictly speaking, the remedies available under this theory do not include an award of damages at law. However, as *Just Brakes I* clearly countenances, the "compensatory equitable remedies" can include a dictate to the violating creditor to make the debtor or the estate whole for the value of property lost by a foreclosure of a judgment lien in violation of the stay. 108 F.3d at 885 - 886 and n. 5. Declaratory relief, in the form of an adjudication that the act in violation of the stay was void--i.e., of no legal effect, *ab initio*--is also available. *Cf. In re Vierkant*, 240 B.R. 317 (B.A.P. 8th Cir. 1999) (acts in violation of § 362(a) are

void and hence are not to be given collateral legal effect). The court has "substantial remedial discretion" to award costs and attorney fees as ancillary relief. *Just Brakes II*, 293 F.3d at 885.

C. Uncontroverted Facts, as to Balance of Second Count.

On the unrebutted affidavits and documents from Spruce Financial, the following findings relevant to the automatic-stay issue are uncontroverted:[24]

21. On October 19, 2005, Messerli & Kramer received a letter from an employee of Hoglund, Chwialkowski, advising the law firm, on behalf of Spruce Financial, that the Debtors had filed for bankruptcy.

22. On October 19, 2005, Derrick N. Weber, Esq., of Messerli & Kramer made a check request to the accounting department of Messerli & Kramer, for the issuance of a refund of $240.00 to the Debtors.

23. On October 20, 2005, an employee of Messerli & Kramer sent a letter to Robert Hoglund, Esq., of Hoglund, Chwialkowski, with a check in the amount of $240.00 enclosed to refund the money that the Debtors' Credit Union had remitted to Messerli & Kramer shortly after the Debtors' bankruptcy filing.

24. The check sent on October 20, 2005 was never negotiated.

25. Messerli & Kramer received no further communication from the Debtors or from Hoglund, Chwialkowski on the matter of the post-petition remittance until February 1, 2006.

26. On February 2, 2006, William C. Hicks, Esq., of Messerli & Kramer, had a conversation with Ken Moats, a paralegal employed by Hoglund, Chwialkowski, regarding the post-petition remittance. Hicks advised Moats that Messerli & Kramer had refunded the $240.00 under cover of the October 20, 2005 letter, and that the check had never been negotiated. Moats replied that he "would talk to Jeff" [Bursell, Esq., an attorney employed by Hoglund, Chwialkowski] and

[24]The numbering of these findings will take up in sequence from those made earlier in this decision.

"would get back to" Hicks on the matter.

27. The next day, Hoglund, Chwialkowski's attorneys filed the complaint that commenced this adversary proceeding. Under this first version of the complaint, the Debtors did not seek relief in relation to the post-petition remittance.

28. Neither Moats nor anyone else from Hoglund, Chwialkowski contacted Hicks as to the post-petition remittance, before Hoglund, Chwialkowski filed the first version of the amended complaint.

29. After Spruce Financial filed its third-party complaint against Hoglund, Chwialkowski, Hoglund, Chwialkowski retained Cass S. Weil, Esq., to represent it for the proceedings under that pleading.

30. In a conversation between Hicks and Weil on June 8, 2006, Weil confirmed that Hoglund, Chwialkowski had not received the check issued in October, 2005.

31. At that time, Hicks agreed to issue a check to the Debtors to replace the earlier one.

32. On June 9, 2006, Hicks sent that new check to Weil, with a letter containing his summary of their telephone conversation. He requested, "[p]lease have the Hoglund firm destroy the original check in the event it is located."

33. By the date of the hearing on these motions, the Debtors had negotiated the replacement check.[25]

D. Discussion.

1. Willfulness of Spruce Financial's Actions: 11 U.S.C. § 362(h).

The word "willful," when used in the Bankruptcy Code, is properly construed in light

[25]This finding is made from the Debtors' counsel's acknowledgment at the hearing, that the "section 549 claim" of the second count was now "moot," insofar as recovery of the basic sum of $240.00 was concerned. For some reason counsel omitted any mention of this crucial fact--presumably known to him--from his briefing for these motions.

of the general legal understanding under the RESTATEMENT (SECOND) OF TORTS. *In re Geiger*, 113 F.3d 848, 852-853 (8th Cir. 1997); *In re Shahrokhi*, 266 B.R. 702, 708 (B.A.P. 8th Cir. 2001) (both applying 11 U.S.C. § 523(a)(6)). Under the RESTATEMENT's definition, willfulness consists of an intent to inflict "injury" on the plaintiff, with "injury" defined as "the invasion of any legally-protected interest of another." *In re Stage*, 321 B.R. 486, 492-493 (B.A.P. 8th Cir. 2005); *In re Dziuk*, 218 B.R. 485, 487 nn. 3 and 4 (Bankr. D. Minn. 1998). Put another way, "if the [defendant] was aware of the plaintiff[ ]'s right under law to be free of the invasive conduct of others (conduct of the sort redressed by the [applicable substantive] law . . ." and nonetheless proceeded to act to effect the invasion with particular reference to the plaintiff, willfulness is established." *In re Langeslag*, 366 B.R. 51, 59 (Bankr. D. Minn. 2007). *See also In re Porter*, 375 B.R. 822, 828 (B.A.P. 8th Cir. 2007) (quoting *Langeslag* with approval).

From the undisputed sequence of events during Spruce Financial's and its attorneys' treatment of the post-petition levy in 2005-2006, it is easy to exonerate Spruce Financial of willfulness. No question, Spruce Financial and its attorneys knew generally about the effects of the automatic stay in bankruptcy and debtors' right to its protections. But they can be tagged with knowing that the protection was active, as to the Debtors in specific, only when they received counsel's advisory to them that the Debtors had filed for bankruptcy. Messerli & Kramer's receipt of that advisory came one week to the day after Spruce Financial's receipt of the $240.00 remittance. Almost immediately upon the advisory, Spruce Financial's counsel took action to reverse their client's technical violation of the stay, by seeing that the first check was issued to return the funds that had been transferred post-petition. This is anything but the act of a party that intended to violate the stay. It is the act of a party that intended to avoid any possible continuing violation of the stay.

In the pleading of the second count, the Debtors' counsel accused Spruce Financial and its attorneys of willfulness in Spruce Financial's "continuing retention of the Post-Petition

Payment . . ." To the extent that this was based on events before the February 2, 2006 conversation between Moats and Hicks, this was truly smoke-and-mirrors. Hoglund, Chwialkowski's employees took no action to follow up on their October, 2005 demand to Spruce Financial for over three months. Once Messerli & Kramer had issued the refund check on October 19, it was not out of bounds if it did not monitor the negotiation of the checks; it would be unfair to saddle any creditor in this position with such a duty, as a hedge against the diversionary accusation that the Debtors' counsel now makes.

True, once Moats alleged to Hicks that Hoglund, Chwialkowski had never received the check, this raised the specter of a violation of the stay were Spruce Financial to withhold the value of the post-petition remittance from the Debtors. But given Moats's advisory and promise to Hicks, neither Hicks nor his client can be tagged with willfulness for not dropping everything on the spot to cut a replacement check. Then, without the promised response and within a day, the Debtors and their counsel went to law against Spruce Financial. True, they did that through a complaint that did not expressly seek relief as to the post-petition remittance. But once that gauntlet was cast, the parties were put formally into adversarial postures; and (most critically) no clarification was forthcoming from Moats or Bursell as to the post-petition remittance. Given that, and then given the injection of this controversy into suit by the pleading of the second count seven weeks later, Spruce Financial and Messerli & Kramer cannot be tarred with an intent to deny the Debtors their rights under the automatic stay, as to the $240.00.

On the uncontroverted sequence of events and communications, there is no basis for an inference of willfulness in violating the automatic stay on the part of Spruce Financial or its attorneys. That evidence cuts entirely to the opposite inference. The Debtors have produced no direct evidence to establish a deliberate flouting of the automatic stay. Since they cannot prove this essential element of their case under § 362(h), they have no right to a judgment against Spruce Financial, and there is no reason why Spruce Financial should not receive a judgment to deny this

component claim.

2. Void Status of Post-Petition Remittance, 11 U.S.C. § 362(a), and Relief to be Accorded Thereon.

In the *Just Brakes* opinions, the Eighth Circuit recognized a broader equitable power in the bankruptcy court, to remedy violations of the automatic stay whether intentional or not. With the post-petition remittance to be deemed void under the *Vierkant* rationale, it would be appropriate to exercise that power as to the Debtors' loss in connection with it. However, any consideration of the basic relief--a restoration of the $240.00--was mooted by the Debtors' negotiation of the second check from Messerli & Kramer.

Under *Just Brakes II*, the court has discretion to make a debtor whole for the transactional costs of vindicating the automatic stay, i.e., by making an award of costs and attorney fees. The way things unfolded here, that discretion is *not* to be accorded to the Debtors on their demand. As a distinct component of the litigation, the whole bramble over the $240.00 could have been avoided entirely, had Hoglund, Chwialkowski timely monitored Spruce Financial's compliance with the demand in mid-October, 2005. (Clearly, the attorneys of Messerli & Kramer were primed and ready to avoid just the sort of accusations that they later came under.) The record strongly suggests that all contentions over the $240.00 could have been resolved on February 2, 2006, via a same-day reply from Moats to Hicks; there is every basis to predict that Hicks would have seen to the issuance of a replacement check right away.

Since Moats assumed the onus of pushing a resolution forward, and then did nothing, Spruce Financial has a credible claim to being blind-sided when the amended complaint put the post-petition levy into suit as well. After that, it seems, both sides got really bullheaded. Once Weil injected himself into this component dispute, the actual undoing of the levy and remittance came quickly, and the Debtors got their money back.

The delay in the Debtors' in-hand realization, however, was almost entirely the fault of their own attorneys. Neither they nor Hoglund, Chwialkowski have the slightest claim to any equitable consideration, or to be made whole for the costs of the litigation over the balance of the second count, i.e., that pleaded under § 362(a).

E. Conclusion, for Debtors' Motion as to Balance of Second Count.

In summary, the balance of the Debtors' substantive claims in suit against Spruce Financial are resolved as follows: the Debtors do not have the right to relief under 11 U.S.C. § 362(h), against Spruce Financial; Spruce Financial's post-petition receipt of the $240.00 in the Debtors' credit union account violated the automatic stay and hence is void, but the Debtors' request for actual damages for that is moot; and the Debtors' request for costs and attorney fees under § 362(a), as construed by the Eighth Circuit, is denied.

IV. Outcome of Parties' Substantive Motions on Both Counts.

The Debtors thus are entitled as a matter of law to a judgment against Spruce Financial to recover the $830.82 attached by the pre-petition levy, and to a declaration that the post-petition levy and remittance were void, as in violation of 11 U.S.C. § 362(a).

They are not entitled to the balance of the substantive relief they sought via their complaint. Their claim for avoidance under § 549(a) is time-barred; their claim for actual damages under § 362(a) is moot; and their request for attorney fees and costs is properly denied.

That judgment will not be entered at the present time, because this disposition involves "one or more but fewer than all of the claims" in suit and presented via these motions. And there is no extrinsic "just reason" not to delay entry of judgment until a decision is rendered on the other three pending motions. Fed. R. Civ. P. 54(b), *as incorporated by* Fed. R. Bankr. P. 7054. *See Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 807 (8th Cir. 1993) (suggesting courts should be reluctant to make "Rule 54(b) certification," to prevent piecemeal appeals over claims founded on common issues of fact or law). Those motions will be decided via

a separate order; a final (and appealable) judgment will be entered after that.[26]

ORDER

On the memorandum of decision just made,

IT IS HEREBY ORDERED:

1. The Plaintiffs' motion for judgment on the pleadings, treated as one for summary judgment, is granted in part and denied in part, per the following terms of this order.

2. The Defendant's motion for partial summary judgment is granted, per the following terms of this order.

3. In avoidance pursuant to 11 U.S.C. § 522(h) of the Defendant's levy on funds in the Plaintiffs' account at Minnesota Teamsters Credit Union, as made within the 90 days prior to the Plaintiffs' bankruptcy filing, and in recovery of that avoided transfer, the Plaintiffs shall recover from the Defendant the sum of $830.82, together with such costs as they may hereafter tax pursuant to applicable statute and rule.

4. The Plaintiffs' right under 11 U.S.C. § 549(a) to avoid the Defendant's receipt of the sum of $240.00 from the Plaintiffs' account at Minnesota Teamsters Credit Union in October, 2005 is barred by 11 U.S.C. § 549(d), and their request for such relief is denied.

5. The Defendant's receipt of the sum of $240.00 from the Plaintiffs' account at Minnesota Teamsters Credit Union on October 12, 2005, was a technical and non-willful violation of the automatic stay of 11 U.S.C. § 362(a), and was void.

6. The Plaintiffs' request for an order of actual damages from the Defendant on account of the action described in Term 5 is denied, as moot.

7. The Plaintiffs' request for an award of costs and attorney fees in consequence of the Defendant's acts in violation of the automatic stay is denied.

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[26]To make it absolutely clear: *this order is not appealable of right*. *See In re Hicks*, 369 B.R. 420, 422-423 (B.A.P. 8th Cir. 2007).

ENTRY OF JUDGMENT ON TERMS 3 - 7 IS DEFERRED pending further order of the Court.

BY THE COURT:

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GREGORY F. KISHEL
UNITED STATES BANKRUPTCY JUDGE