No. 12-1632

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re Christopher Weber, *Debtor*

CHRISTOPHER WEBER,
Plaintiff-Appellee

— v. —

SEFCU,
Defendant-Appellant

ANDREA CELLI, Standing Chapter 13 Trustee
Necessary Party

On Appeal from the United States District Court for the
Northern District of New York – No. 11-cv-138

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS
CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

On Brief: Ray DiGuiseppe
September 5, 2012

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

SEFCU v. Weber – No. 12-1632

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant. **NOT APPLICABLE.**

__/s/ Tara Twomey_____
Tara Twomey

Dated: September 5, 2012

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CONSENT

This amicus brief is being filed with the consent of the parties.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,200 consumer bankruptcy attorneys nationwide.[1] Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *In re Rodriguez*, 375 B.R. 535 (B.A.P. 9th Cir. 2007).

[1] Pursuant to FRAP 29(c)(5) and Second Circuit Local Rule 29.1(b), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did a party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom file under Chapter 13 after their property has been lawfully repossessed. The nature and scope of a creditor's obligation to turn over such property after the filing is of great significance to all such debtors, because the resolution of that issue determines the extent to which the debtor may use the property for the benefit of the estate.

SUMMARY OF ARGUMENT

The moment the debtor files for bankruptcy protection, all of his or her legal and equitable interests become property of the bankruptcy of estate – including all lawfully repossessed property still in the hands of secured creditors at the time. This places the creditor under an affirmative obligation to turn over the property to the debtor or the trustee, and a creditor's failure to do so voluntarily upon learning of the bankruptcy is a willful violation of the automatic stay warranting sanctions. The debtor has no obligation to first pursue and obtain a turnover order or to demonstrate adequate protection to the subjective satisfaction of the creditor, who may seek relief from the bankruptcy court as necessary to protect its interests.

The vast majority of courts have so held, following the plain meaning of the Bankruptcy Code and the clear directives of the Supreme Court in this context. Indeed, this balance of the parties' respective rights and obligations is absolutely essential to effectuate the fundamental rehabilitative purposes of bankruptcy –

particularly where, as here, the property is an essential asset like a personal vehicle. Therefore, the District Court correctly concluded that the creditor in this case willfully violated the automatic stay by refusing to turn over the debtor's repossessed vehicle until the debtor obtained a court order requiring it to do so.

ARGUMENT

THE CREDITOR HAS AN AFFIRMATIVE OBLIGATION TO TURN OVER SUCH PROPERTY AND ITS FAILURE TO VOLUNTARILY DO SO UPON LEARNING OF THE BANKRUPTCY FILING IS A WILLFUL VIOLATION OF THE AUTOMATIC STAY WARRANTING SANCTIONS

A. Framework of the Issue

Filing a bankruptcy petition creates an estate comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. § 541(a). Thus, "an entity, other than a custodian, in possession, custody, or control" of estate property "shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." § 542(a). In addition, the petition operates as an automatic stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." § 362(a)(3); *In re Colortran* 210 B.R. 823, 826 (B.A.P. 9th Cir. 1997) (vacated on other grounds by *In re Colortran*, 165 F.3d 35 (9th Cir. 1998)). "An individual injured by any willful violation of a stay . . .

shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." § 363(k)(1).

Where, as here, a creditor with a security interest in property of the debtor obtains the property through a lawful repossession before the bankruptcy filing, the issue that arises is whether the creditor's continued retention of the property constitutes "exercis[ing] control over property of the estate" within the meaning of sections 362 and 541, and, if so, whether the creditor must voluntarily turn over the property pursuant to section 542 upon learning of the bankruptcy filing or face sanctions for a "willful" violation of the automatic stay under section 363.

There can be no question that withholding possession of property constitutes "exercis[ing] control" over it under section 362. "Withholding possession of property from a bankruptcy is the essence of 'exercising control' over possession." *In re Sharon*, 234 B.R. 676, 682 (B.A.P. 6th Cir. 1999); *accord Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 702-03 (7th Cir. 2009). This includes "the act of passively holding onto an asset." *Id.* at 702. A contrary interpretation of "exercising control" is simply "at odds with the plain meaning" of the phrase. *Id.* Indeed, SEFCU, the creditor here, does not deny that its postpetition retention of the debtor's truck was an exercise of control over the truck under section 362. Appellant's Brief at 14-30. Thus, the only real question is

whether a creditor has an affirmative obligation under the Code to turn over property lawfully repossessed postpetition. It is clear that it does.

B. Any Repossessed Property Still in the Hands of the Creditor at the Time of the Bankruptcy Filing is Property of the Bankruptcy Estate

The automatic stay is "one of the most fundamental protections of bankruptcy." *Colortran*, 210 B.R. at 826. It is "crucial to effecting the fresh-start policy." *In re Johnson*, 501 F.3d 1163, 1170 (10th Cir. 2007). The purpose of the stay "is to alleviate the financial strains on the debtor." *In re Del Mission* 98 F.3d 1147, 1151 (9th Cir. 1996). "It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." *In re Holman*, 92 B.R. 764, 767 (Bankr. S.D. Ohio 1988). "The automatic stay is a basic protection afforded debtors . . . and its scope is intended to be broad." *Abrams v. Southwest Leasing & Rental Inc.*, 127 B.R. 239, 241 (B.A.P 9th Cir. 1991).

The Code's definition of "property of the estate" – "*all legal or equitable interests of the debtor in property* as of the commencement of the case" § 541(a)(1) (emphasis added) – is also broadly defined to effectuate the basic protections underlying the automatic stay. *United States v. Whiting Pools*, 462 U.S. 198, 204 (1983) ("Congress intended a broad range of property to be included in the estate."). "The primary goal of reorganization bankruptcy is to group *all* of

the debtor's property together in his estate such that he may rehabilitate his credit and pay off the debts[.]" *Thompson*, 566 F.3d at 702 (emphasis original). And "[t]he intent of § 541 is to 'move away from the complicated mélange of references to State law and to determine[] what is property of the estate by simple reference to what interests in property the debtor has at the time of the commencement of the case.'" *In re Warrington*, 424 B.R. 186, 189 (E.D. Penn. 2010) (quoting *Integrated Solutions, Inc. v. Service Support, Inc.*, 124 F.3d 487, 490-91 (3d Cir. 1997) (internal quotations omitted; alterations original). "Accordingly, with limited exceptions, the estate encompasses everything that the debtor owns upon filing a petition, as well as any derivative rights, such as property interests the estate acquires after the case commences." *Id.* at 189.

"While there are explicit limitations on the reach of § 542(a), none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings." *Whiting Pools*, 462 U.S. at 206. "[T]he reorganization estate includes any property in which the debtor could have had a possessory interest pursuant to any provision in the Bankruptcy Code, including property in which the debtor may not have had a possessory interest at the commencement of the bankruptcy proceeding." *Id.* at 205. That is, "as long as the debtor retains an interest in the repossessed property and the property is capable of being pulled into the estate by a provision under the Bankruptcy Code, that

property is included in the reorganization estate at the commencement of bankruptcy proceedings." *In re Velichko*, 473 B.R. 64, 67 (Bankr. S.D.N.Y. 2012). "Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision." *Whiting Pools* at 205. "Given the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate." *Id.* at 205-06; *accord Thompson*, 566 F.3d at 702. "Any other interpretation of § 542(a) would deprive the bankruptcy estate of the assets and property essential to its rehabilitation and thereby frustrate the congressional purpose behind the reorganization provisions." *Whiting Pools* at 208.[2]

Whether a debtor "retains an interest in the repossessed property" involves an interplay between federal and state law. The general rule is that the bankruptcy law – specifically section 542 – determines what property interests are included in the estate and state law defines the existence and nature of those rights. *Motors*

[2] While the opinion in *Whiting Pools* concerned a debtor in Chapter 11, and "expressed no view on the issue whether § 542(a) has the same broad effect in liquidation or adjustment of debt proceedings," *Whiting Pools* 462 U.S. at 208 n. 17, courts have made clear that the analysis applies equally to Chapter 13 cases. *See Thompson*, 566 F.3d at 706; *In re Yates*, 332 B.R. 1, 6-7 (B.A.P. 10th Cir. 2005); *In re Curry*, 347 B.R. 596, 602 (B.A.P. 6th Cir. 2006); *In re Robinson*, 285 B.R. 732, 735 (Bankr. W.D. Okla. 2002); *In re Mitchell*, 316 B.R. 891, 896 (Bankr. S.D. Tex. 2004); *see also Velichko*, 473 B.R. at 67. And, as a general matter, the provisions of Chapter Five apply to Chapter 13. § 103(a).

Acceptance Corp. v. Rozier, 290 B.R. 910, 912 (Bankr. M.D. Ga. 2003); *Robinson*, 285 B.R. at 735; *In re Estis*, 311 B.R. 592, 595 (Bankr. D. Kan. 2004). However, the state law cannot frustrate the rights granted to the debtor under the Code. Thus, "state law determines the debtor's property interest, but bankruptcy law determines the treatment of those interests." *In re Moffett*, 288 B.R. 731 (Bankr. E.D. Va. 2002) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). And "*Butner* requires that when an actual conflict exists between state laws and bankruptcy laws enacted by Congress, the state laws are suspended." *Curry*, 347 B.R. at 600.

It is clear that where, as here, the state law provides the debtor the right to redeem repossessed property and the related rights attendant to holding an ownership interest in the property -- such as the right to notice before the property is sold, to receive the surplus proceeds of any sale, and to recover damages for the creditor's failure to comply with the applicable procedures[3] -- the property is part of the bankruptcy estate. Repossession under such statutory schemes "merely divests the debtor of the present right to use the vehicle, but does not immediately extinguish the debtor's title." *Moffett*, 288 B.R. at 729. Accordingly, "[u]ntil the creditor disposes of the property, the debtor remains the legal and equitable owner, subject only to the creditor's debt collection remedies, which are suspended by 11

[3] A debtor in New York has these rights in addition to the right of redemption. *See* N.Y. U.C.C. §§ 9-611, 9-612, 9-613, 9-614, 9-615, 9-616, 9-623, 9-625.

U.S.C. § 362(a) when a bankruptcy petition is filed." *In re Sanders*, 291 B.R. 97, 101 (Bankr. E.D. Mich. 2003). Otherwise, the rights to notice, surplus proceeds, and damages for non-compliance would be meaningless. *Moffett* at 730; *see also Motors Acceptance Corp. v. Rozier*, 278 Ga. 52, 53-54 (2004); *Robinson*, 285 B.R. at 737; *Sanders*, 291 B.R. at 100-01; *Estis*, 311 B.R. at 597; *In re Will*, 303 B.R. 357, 363 (Bankr. N.D. Ill. 2003). "Indeed, 'the vast majority of courts have concurred that where repossession of a vehicle has occurred prepetition, but the vehicle has not yet been sold, a Chapter 13 debtor retains a sufficient interest in the vehicle so that turnover may be appropriate.'" *Sanders* at 102 (quoting *Spears v. Ford Motor Credit Co.*, 223 B.R. 159, 162 (Bankr. N.D. Ill. 1998). The Supreme Court has said so itself: "Until such a sale takes place, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a)." *Whiting Pools*, 462 U.S. at 211. And "[t]hese are the very rights possessed by the debtor in the *Whiting Pools* case . . . " *Robinson*, 285 B.R. at 737.

In fact, courts have reached this conclusion even where the applicable state law provides that repossession alone can suffice to divest the debtor of ownership, so long as the property has not been sold. *See Sanders*, 291 B.R. at 102 (quoting *In re Elliott*, 214 B.R. 148, 151 (B.A.P. 6th Cir. 1997) ("repossession title" is insufficient to cut off property interest); *In re Estis*, 311 B.R. at 596-97 (debtor maintained "an inescapable interest in a repossessed vehicle sufficient to bring it

within a debtor's bankruptcy estate" despite creditor's right to obtain repossession title); *Mitchell*, 316 B.R. at 898 (reaching a similar conclusion under Texas law); *Curry*, 347 B.R. at 605 ("ownership does not transfer upon repossession alone.").

Thus, a debtor's interest in repossessed property becomes "property of the estate" within the meaning of section 542 upon the filing of the bankruptcy petition. This would surely include the truck that SEFCU repossessed in this case, given the nature of the property interest that the debtor held under New York's version of the U.C.C. SEFCU does not even directly challenge the point that the truck was property of the estate. The main point SEFCU sets out to prove is that, even if such property falls within the scope of section 542, it nevertheless "remains outside the estate," and the creditor is not required to turn it over, unless *the debtor* commences a turnover action through which it (1) establishes the creditor will be adequately protected and (2) obtains a court order requiring that the property be returned. *See* Appellant's Brief at 15, 20. SEFCU's position is simply untenable.

C. A Creditor in Possession of Such Property Bears the Burden of Turning It Over and Then Moving the Court for Any Protections It May Need

Section 542 is mandatory in nature: it "*requires* that a creditor turn over possession of 'property that the trustee may use, sell, or lease under § 363.'" *Yates*, 332 B.R. at 5 (quoting § 542(a).) "The only exception to § 542(a)'s compulsory turnover provision is if 'such property is of inconsequential value or

benefit to the estate.'" *Yates*, 332 B.R. at 5. "This mandatory language squares with the language and impact of the automatic stay. By requiring a creditor to turn over property of the estate upon the filing of a bankruptcy petition, § 542(a) prevents the continued exercise of control over property of the estate – a violation of the automatic stay. Thus, § 542(a) works to avoid what § 362(a) forbids – the retention of property of the estate after filing." *Id.* at 4. "It has long been the determination of this panel that the turnover provisions of the Bankruptcy Code are to be self-effectuating, subjecting to sanctions a party that willfully fails to comply." *In re Mwangi*, 432 B.R. 812, 823 (B.A.P. 9th Cir. 2010).

And this has long been the interpretation of the turnover provision throughout the federal courts, including the Supreme Court since its 1983 decision in *Whiting Pools*: "Although Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with 'adequate protection' for their interests." *Whiting Pools*, 462 U.S at 203-04 (citing § 363(e)). "The creditor with a secured interest in property included in the estate must look to this provision [section 363] for protection, rather than to the nonbankruptcy remedy of possession." *Id.* at 204. The vast majority of courts have followed the Supreme Court's direction and accordingly applied the clear intent of the Code to find the turnover provision

mandatory. *See In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989); *Del Mission*, 98 F.3d at 1151; *Thompson*, 566 F.3d at 704; *Abrams*, 127 B.R. at 242-43 (noting that a "substantial body of case law" so holds); *Yates*, 332 B.R. 1, 5; *In re Cepero*, 226 B.R. 595, 598 (Bankr. S.D. Ohio 1998); *Colortran*, 210 B.R. at 827; *In re Ryan*, 183 B.R. 288, 289-90 (M.D. Fla. 1995).

Thus, it is clear that a creditor has an affirmative duty to "restore the status quo" by immediately turning over the property upon learning of the bankruptcy, and the failure to do so subjects the creditor to sanctions for violating the stay. *See Abrams*, 127 B.R. at 242-43 (the "failure to return property of the estate with knowledge of the bankruptcy petition is a violation of both the automatic stay and of the turnover requirements of the Bankruptcy Code"); *accord Yates*, 332 B.R. at 4-5; *Knaus*, 889 F.2d at 775; *Cepero*, 226 B.R. at 598; *Ryan*, 183 B.R. at 289.

As an obvious logical and practical corollary to the creditor's mandatory turnover duty, the onus is entirely upon the creditor if it seeks to retain the property: the debtor is under no duty to commence or prevail upon a turnover action; nor must the debtor demonstrate adequate protection to the creditor's satisfaction. This "means that instead of waiting for the debtor to institute turnover proceedings, the creditor should come into court upon proper notification, and request a lifting of the automatic stay, at which time the creditor may obtain the protection to which it is entitled." *Ryan*, 183 B.R. at 289. "This procedure

protects the debtor from having to pursue the possessor of property of the estate and against the danger of having the creditor make its own determination of adequate protection." *Colortran*, 210 B.R. at 828. "In all cases . . . any prerequisite to turnover is determined by the bankruptcy court, not by the creditor." *Id.* at 828.

As the Supreme Court has explained, "[t]he Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and *these rights replace the protection afforded by possession*." *Whiting Pools*, 462 U.S at 207 (emphasis added). Thus, "the creditor must tender the goods or face sanctions for violation of the stay" and *then* seek protection through the court. *Colortran*, 210 B.R. at 827; *see Thompson*, 566 F.3d at 700 (joining the majority view of the circuits in so holding); *Holman*, 92 B.R. at 769 (the contrary view "flies in the face" of the authorities establishing the turnover duty); *Mwangi*, 432 B.R. at 824 (placing the burden on the debtor to seek a turnover "would turn on its head the balance between rights of parties legislatively created").

The reason for this is clear, as any rule placing the onus on the debtor would not only be completely inconsistent with the plain meaning of the Code, but would severely undermine the fundamental purposes and protections of bankruptcy. The language of the Code is clear about the proper burden allocation here. "[S]ection 362(d) puts the burden on the party seeking relief from the stay to show sufficient cause that the stay needs to be lifted to ensure it receives adequate protection and

section 542(a) puts the burden on the creditor to demonstrate that estate property within its possession falls within the exception for property of inconsequential value or benefit to the estate. *Yates*, 332 B.R. at 5. "Because the initial burden to demonstrate a lack of equity is on the creditor, the Bankruptcy Code must also contemplate that the creditor will have an incentive to meet this burden." *Id.* at 6. "If a creditor were permitted to retain possession of property of the estate after a debtor files bankruptcy, it would have no such incentive. It would be the debtor – not the creditor – who would seek the court's remedies." *Id.* "Until the creditor shifts the burden of proof by demonstrating a lack of equity, the debtor should not have to show the court why it is entitled to a right of possession; this right is incident to the automatic stay." *Id.*; *accord Thompson*, 566 F.3d at 704.

It is equally clear that saddling debtors with such pressures would significantly interfere with their ability to pursue the essential objectives for which they invoked bankruptcy protection. While SEFCU surmises that "it does not seem unreasonable for the burden to be on the debtor to demonstrate his need for the vehicle or the benefit to the bankruptcy estate," Appellant's Brief at 27, '"[t]he courts have been quick to realize that creditor inaction can often be as disruptive to the debtor as affirmative collection efforts.'" *Holman* 92 B.R. at 769 (quoting *In re Miller*, 10 B.R. 778 (Bankr. D. Md. 1981)). '"To place the onus on the debtor, as the [creditor] would have the Court do, to take affirmative legal steps to recover

property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory."' *Holman* at 769 (quoting *Miller* at 481); *accord Thompson*, 566 F.3d. at 707. '"[T]he case law and the legislative history of § 362 indicate that Congress did not intend to place the burden on the bankruptcy estate to absorb the burden of potentially multiple turnover actions, at least not without providing a means to recover damages sustained as an consequence thereof.'" *Del Mission*, 98 F.3d at 1151-52 (quoting *Abrams*, 127 B.R. at 243). "[T]he potential for multiple actions to obtain what is rightfully due to a bankruptcy estate is a very real concern." *Del Mission* at 1152.

These concerns take center stage where, as here, the property at issue is the debtor's mode of transportation. "If a debtor's car remains in the hands of a creditor, it could hamper the debtor from either attending or finding work, which is crucial for garnering the funds necessary to pay off his debts." *Thompson*, 566 F.3d. at 707. Obviously, "an asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot." *Id.* at 702. Indeed, a canvas of the case law in this context reveals a compelling fact about the timing of the petition in relation to the repossession: it was filed just hours or days later, highlighting the crucial role of the asset in the debtor's life. *In re Menasche*, 301 B.R. 757, 758 (Bankr. S.D. Fla. 2003) (four

hours later); *Moffett*, 288 B.R. at 723 (the same day); *In re Zajni*, 403 B.R. 891, 893 (Bankr. M.D. Fla. 2008) (the same day); *Mitchell*, 316 B.R. at 894 (the same day); *Bell-Tel Credit Union v. Kalter*, 292 F.3d 1350, 1351 (11th Cir. 2002) (the next day); *In re Alberto*, 271 B.R. 223, 225 (N.D. N.Y. 2001) (two days later); *In re Bonner*, 286 B.R. 917, 917-18 (Bankr. M.D. Ga. 2002) (three days); *Rozier*, 290 B.R. at 911-12 (four days); *Velichko*, 473 B.R. at 65 (four days); *Sanders*, 291 B.R. at 98 (in a consolidated action, one debtor filed two days later and the other filed four days later); *Ryan*, 183 B.R. at 289 (five days later); *Yates*, 332 B.R. at 3 (seven days); *Sharon*, 234 B.R. at 680 (10 days); *Estis*, 311 B.R.at 594 (12 days); *In re Cortez*, 2010 WL 3909496, *1 (Bankr. N.D. Cal. 2010) (12 days); *Thompson*, 566 F.3d at 701 (12 days); *In re Fitch*, 217 B.R. 286, 287 (Bankr. S.D. Cal. 1998) (13 days); *Robinson*, 285 B.R. at 733 (13 days); *see also Whiting Pools*, 462 U.S. at 200 ("the very next day" after repossession of debtor's equipment).

The reality of this situation sharply contrasts with SEFCU's unsupported claims that withholding possession of the vehicle until the debtor pursues and obtains a court order requiring turnover involves "no additional cost to the debtor." Appellant's Brief at 29. Not only would the debtor be deprived of the beneficial use of this essential asset while seeking its return, but pursuing a turnover action would also require the debtor to commence a formal adversary proceeding, as well

as a motion for injunctive relief, *see* Fed. R. Bankr. P. 7001 & 7065, which is a costly and ultimately unaffordable process for most individual debtors.

Moreover, consistent with the Code's clear intent to grant debtors the beneficial use of the assets essential to availing themselves of bankruptcy's rehabilitative purposes, the debtor is entitled to "modif[y] the procedural rights available to creditors to protect and satisfy their liens." (*Whiting Pools*, 462 U.S. at 207.) Debtors need not provide adequate protection in strict compliance with state law or in a manner that the creditor subjectively deems satisfactory. *See* Appellant's Brief at 17, 21. "[A]llowing debtors to cure a default even after repossession furthers the intent of Chapter 13, which is to facilitate the debtor's financial rehabilitation while protecting the rights of creditors. [Citations] This is entirely consistent with the Supreme Court's decision in *Butner*, which held that state law determines the debtor's property interest, but bankruptcy law determines the treatment of those interests." *Moffett* at 731 (citing *Butner*, 440 U.S. at 55).

Indeed, SEFCU defends its retention of the debtor's truck on the ground that the debtor failed to initially provide adequate protection in the form of a plan that would provide for repayment in full through the bankruptcy. Appellant's Brief at 3-4, 23-24. But again, the Code "*substitutes* 'adequate protection' for possession as one of the lien creditor's rights in the bankruptcy case," such that the creditor must address this issue to the court. *Sharon*, 234 B.R. at 683 (emphasis added);

accord Thompson, 566 F.3d at 704 (noting that the majority of appellate courts have so held). A finding otherwise "is not supported by the Bankruptcy Code, was rejected in large part by the Supreme Court in *Whiting Pools* and is contrary to the weight of authority . . ." *Sharon* at 683. Such a finding "would allow a creditor to unilaterally determine what is of inconsequential value to the estate, and gives far too much discretion to creditors." *Yates*, 332 B.R. at 6.

Thus, it is of no moment that the debtor's initial plan may have proposed to pay less than the total amount due on the vehicle loan. "There is no 'exception' to § 362(a)(3) that excuses [the creditor's] refusal to deliver possession of the Debtor's car based on [the creditor's] subjective opinion that adequate protection offered by the Debtor was not 'adequate.'" *Sharon*, 234 B.R. at 683. And courts have indeed permitted debtors to redeem property interests through reasonable payment plans they can afford, despite the variance from state law and despite creditors' complaint that the plan did not repay the entire obligation. *Moffett*, 288 B.R. at 731-32 (the Code permitted the debtor to modify the means by which one would normally have to cure a default under state law); *Robinson*, 285 B.R. at 738-39 (same); *Curry*, 347 B.R. at 600 (same); *Warrington*, 424 B.R. at 192 (same); *see also In re Taddeo*, 685 F.2d 24, 28 (2d Cir. 1982) (the Code empowers the bankruptcy court to "de-accelerate" an accelerated mortgage debt so as to facilitate a debtor's repayment of the debt over a period of time under Chapter 13).

Moreover, while SEFCU raises the specter of the risk a creditor faces when the vehicle is uninsured, Appellant's Brief at 20, the vehicle here was insured. *See* Appellee's Brief at 2, 20. Thus, the debtor complied with the Code's requirements regarding proof of insurance. See § 1326(a)(4). And that was adequate protection in itself. *See e.g., Mitchell*, 316 B.R. 900 ("Courts consider proof of insurance adequate protection for a creditor's interest in a debtor's automobile."); *Sharon*, 234 B.R. at 688 (proof of insurance served as sufficient adequate protection).

In sum, the clear policies and purposes of the Code, as expressed through the plain meaning of the text and the great weight of decisional authority, ineluctably lead to the following conclusions: a creditor holding lawfully repossessed property of the debtor as of the date of the petition has an affirmative obligation to turn it over to the trustee; the failure to do so immediately upon learning of the bankruptcy is a violation of the automatic stay warranting sanctions; and the creditor has the burden to move the bankruptcy court to obtain adequate protection of its interests in the property. That is precisely the problem in this case: based upon its subjective determination that the debtor had not provided adequate protection, SEFCU refused to return the debtor's truck until the court ordered it do so in response to the debtor's turnover action. Thus, the District Court correctly ruled that SECFU violated the automatic stay and was subject to sanctions.

D. The Outlying Contrary Authority Cannot Spare Creditors the Consequences of Failure to Comply with the Turnover Requirement

Attempting to justify its postpetition withholding of the debtor's truck, SEFCU seeks refuge in the handful of anomalies along the otherwise clear landscape of case authority defining the parties' respective rights and obligations. SEFCU relies upon *Alberto*, 271 B.R. 223, *Kalter*, 292 F.3d 1350, *Charles R. Hall Motors, Inc. v. Lewis*, 137 F.3d 1280, 1284 (11th Cir. 1998), and *Moffett*, 288 B.R. 731, to the extent they suggest the onus is on the debtor to obtain a court order requiring turnover and to prove the creditor will be adequately protected before the turnover duty arises. Appellant's Brief at 5-6, 17-22, 26-27. As illustrated above, the vast majority of courts have resoundingly rejected such a rationale given the clear language of the Code and the Supreme Court authority that places the burden squarely on the shoulders of the creditors. And courts have specifically criticized the rationale of these cases for this reason. *See Estis*, 311 B.R. at 598-99; *Curry*, 347 B.R. at 605; *Mitchell*, 316 B.R. at 898 (noting this line of cases was also criticized in *Robinson*, 228 B.R. 75, and *Sanders*, 291 B.R. 97); *Yates*, 332 B.R. at 4-5, n. 13, 6 (the Eleventh Circuit is the only circuit court to follow this view).

Plainly, "[e]ntitlement to adequate protection in the first instance with respect to all property of the estate other than cash collateral is triggered by a creditor's request to the bankruptcy court and 'if you don't ask for it, you won't get it.'" *Sharon*, 234 B.R. at 684 (quoting *In re Kain*, 86 B.R. 506, 512 (Bankr. W.D.

Mich. 1988). As a further illustration of the controlling nature of this principle, in *Whiting Pools*, the Supreme Court held that the debtor had the right to force a turnover of the property "despite the Internal Revenue Code's requirement of full payment of all obligations owed to regain possession" because "the Bankruptcy Code replaces the protection afforded to secured creditors by possession with other rights such as adequate protection." *Curry*, 347 B.R. at 604 (citing *Whiting Pools*, 462 U.S. at 207). To hold otherwise would not only unduly burden the debtor but also work to the prejudice of the other creditors: "By negotiating a better security package for itself, the creditor can essentially remove the equitable powers of the bankruptcy court and place itself in a position above other secured creditors." *Thompson*, 566 F.3d at 707. Simply put, "[i]t makes far more sense for all creditors to move before the court in a consolidated proceeding than for the debtor to file a myriad of motions in an attempt to recover his dispersed assets." *Id.*

And it is *not* the case that this procedure leaves the creditor without any effective means to protect itself. *See* Appellant's Brief at 19-20. "Section 542(a) simply requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." *Whiting Pools*, 462 U.S. at 212. The expedited hearing procedure available to creditors seeking such relief "assures that irreparable harm may be prevented if the creditor's interests will be

damaged before there is an opportunity to give notice and a hearing on the creditor's motion." *Yates*, 332 B.R. at 8. It makes no sense to deprive the debtor of the beneficial use of the asset when the creditor can do nothing with it unless and until the creditor demonstrates sufficient cause to lift the stay for the purpose of selling the asset to a third party. In any event, this procedure is clearly what the Code requires, and the view of the majority of courts so holding would surely promote "more uniform application of §§ 362(a)(3) and 542(a)." *Id.* at 5.

SEFCU also continues to suggest that, even if the rationale of the outlying authorities is wrong, it cannot be found in violation of the stay because the *Alberto* opinion, which places the onus on the debtor in this context, was the "controlling precedent" at the time of SEFCU's refusal to turn over the truck. Appellant's Brief at 3, 7, 8, 9, 12, 14, 15-20.[4] At bottom, this argument is really nothing more than a claim that SEFCU did not "willfully" violate the automatic stay because it acted in good faith by reasonably relying upon what it believed to be the governing law at the time of the conduct at issue. SEFCU even suggests that an element of maliciousness or demonstrable bad faith is necessary to hold a creditor in violation of the stay. Appellant's Brief at 25 (attempting to distinguish the opinions in

[4] This was the sole contention on which SEFCU relied below. *See* SEFCU's Brief as Appellee in the District Court at 5-16. Its arguments before this Court represent SEFCU's first attempt to address the merits of the issue at hand.

Knaus, 889 F.2d 773, and *Del Mission*, 98 F.3d 1147, on the ground that the creditors there engaged in "obstinate behavior" and "other prohibited acts").

The standard for determining a "willful" violation of the automatic stay is well established. No specific intent to violate the stay is required. Rather, the violation is willful so long as the creditor is aware of the stay and commits the prohibited act with a general intent. *Knaus*, 889 F.2d at 775; *In re Sullivan*, 367 B.R. 54, 62 (Bankr. N.D. N.Y. 2007); *In re Watkins*, 240 B.R. 668, 679 (Bankr. E.D. N.Y. 1999); *Velichko*, 473 B.R. at 68; *Haile v. New York State Higher Educ. Services Corp.*, 90 B.R. 51, 55 (Bankr. W.D. N.Y. 1988); *Zanji*, 403 B.R. at 895; *Green Tree Servicing, LLC v. Taylor*, 369 B.R. 282, 286 (S.D. W.Va. 2007); *Holman*, 92 B.R. at 768-69; *In re Coons*, 123 B.R. 649, 650 (Bankr. N.D. Okla. 1991). In other words, "any deliberate act taken in violation of the stay justifies an award of actual damages, including attorney's fees, and, in appropriate circumstances, punitive damages." *Watkins* at 679.

"If section 362(h) were limited to violators who had specific intent to violate the stay, the deterrent effect of the damages remedy, and the relief it affords wronged debtors, would be compromised inappropriately." *Sharon*, 234 B.R. at 688. "The cases are legion which hold that a creditor who retains lawfully repossessed collateral after receiving notice or actual knowledge of the pendency of a bankruptcy case has engaged in conduct that is contemptuous" and thus

conduct warranting sanctions. *Holman*, 92 B.R. at 768; *In re Putnam*, 167 B.R. 737, 740-41 (Bankr. D. N.H. 1994); *Ryan*, 183 B.R. at 289-90; *Del Mission*, 98 F.3d at 1151; *Abrams*, 127 B.R. at 244; *Cepero*, 226 B.R. at 599-600.

It necessarily follows that a creditor's good faith, subjective belief that it is acting in compliance with the law in committing the conduct at issue is no defense; for the "reasonableness" of the conduct is irrelevant to question of willfulness. *In re Lansdale Family Restaurants, Inc.*, 977 F.2d 826, 829 (3d Cir. 1992); *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 268-69 (1st Cir. 1999); *In re Bloom*, 875 F.2d 224 (9th Cir. 1989); *Johnson*, 501 F.3d at 1173; *Abrams*, 127 B.R. at 243; *Mwangi*, 432 B.R. at 824. *Colortran*, 210 B.R. at 827. Thus, it makes no difference that the creditor may have believed, even reasonably, that the conduct was proper. *Kaneb* at 268-69 (a creditor is not "immune from sanctions because it made a mistake"); *Thompson*, 566 F.3d at 704 ("A subjectively perceived lack of adequate protection is not an exception to the stay provision and does not defeat this right."); *accord Mitchell*, 316 B.R. at 902; *In re Will*, 303 B.R. at 364.

This has long been the standard in the Second Circuit as well. "The Second Circuit has stated that [¶] 'any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." *Velichko*, 473 B.R. at 68 (quoting *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990). Indeed, as the bankruptcy court for the Northern District of New

York itself explained some three years before SEFCU repossessed the debtor's truck: "A willful violation of the stay does not require specific intent to violate the stay. A party can be subject to liability under [section] 362(h) if it engages in conduct which violates the automatic stay, with knowledge that a bankruptcy petition has been filed." *Sullivan*, 367 B.R. at 62 (internal quotations omitted). "'In the Second Circuit, if a party charged with violating the stay knows that the stay is in effect . . . its intention or lack thereof to violate the stay is irrelevant.'" *Sullivan* at 62-63 (quoting *In re Braught*, 307 B.R. 399, 403 (Bankr. S.D. N.Y. 2004) (alteration original in *Sullivan*). "Not even a good faith mistake of law or a legitimate dispute as to legal rights relieve a willful violator of the consequences of the act." *Sullivan* at 62. "'An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h).'" *Id.* at 66 (quoting *Crysen* at 1105).

"'[T]his standard encourages would-be violators to obtain declaratory judgments before seeking to vindicate their interests in violation of an automatic stay, and thereby protects debtors' estates from incurring potentially unnecessary legal expenses in prosecuting stay violations.'" *Putnam*, 167 B.R. at 740 (quoting *Crysen*, 902 F.2d at 1105). Thus, the governing law at the time of the bankruptcy filing in this case clearly established that SEFCU's continued retention of the truck with knowledge of the bankruptcy was in contravention of the automatic stay, even

if it believed the conduct was proper based upon the rationle of *Alberto* and the other the outlying authorities. *A fortiori*, its postpetiton withholding of the truck was a "willful" violation of the stay warranting imposition of sanctions.

CONCLUSION

For these reasons,[5] the District Court correctly ruled that the debtor's truck was property of the bankruptcy estate, which SEFCU had an affirmative duty to turn over to the debtor or the trustee, and that SEFCU's failure to voluntarily do so upon learning of the bankruptcy was a violation of the automatic stay subjecting the creditor to sanctions. Accordingly, the judgment should be affirmed.

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[5] SEFCU raises a series of untimely and specious procedural arguments, challenging the District Court's power to decide the issue at hand on the basis that the debtor failed to file a sufficiently "substantive" response to SEFCU's motion for summary judgment and that the District Court ruled upon the wrong issue, which is now "moot" anyway because SEFCU has returned the debtor's vehicle. Appellant's Brief at 5-14. Obviously, any claims regarding the procedural or substantive adequacy of the debtor's opposition to the summary judgment motion had to first be raised in the District Court. *See In re Johns-Manville Corp.*, 600 F.3d 135, 147 (2d Cir. 2010); *In re Woodman*, 379 F.3d 1, 2 (1st Cir. 2004). Moreover, the issue of "whether the car repossessed by the creditor, pre-petition, became estate property automatically, or if it was only drawn into the estate when the debtor moved to do so" -- which SEFCU claims was not before the District Court -- is obviously subsumed in the question of whether SEFCU "willfully violated the automatic stay when it followed *Alberto*," which SEFCU says was the actual issue before the court. Appellant's Brief at 9. And, contrary to SEFCU's suggestions, it is axiomatic that the District Court was to conduct a *de novo* review of this question. *See In re Ionosphere Clubs*, 922 F.2d 984, 988-89 (2d Cir. 1990). Finally, if a creditor could avoid liability by simply returning the vehicle at some point before the appellate process is over, as SEFCU claims in saying this issue is "moot," the sanctions under section 362 would merely be an empty threat.

Respectfully submitted,

_/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS
CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

Date: September 5, 2012

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 6,981 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

_/s/Tara Twomey_____

TARA TWOMEY, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2012, I electronically filed the foregoing document, along with ten paper copies, with the Clerk of the Court for the Second Circuit Court of Appeals by using the CM/ECF system and First-Class Mail.

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TARA TWOMEY, ESQ.