

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
UNITED IMPORTS CORP., ) CASE NO. BK96-81674  
)  
DEBTOR ) CH. 11

MEMORANDUM

Hearing was held on April 29, 1997, on a Motion for Contempt and an Amended Motion for Contempt filed by debtor.<sup>1</sup> Appear-ances: James Cavanagh and Sandy Dougherty as attorneys for the debtor; Mike Washburn as attorney for the Creditors' Committee; Robert Bothe, Matt McGrory, Judy Archer and Donald Lefkowitz as attorneys for Time Warner Cable of New York City; and Robert Ginn as attorney for First USA Merchant Services. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (G).

**Background**

United Imports Corp., the debtor in this case, filed a motion for contempt against Time Warner Cable of New York City (Time Warner). The debtor alleges that Time Warner willfully violated the automatic stay imposed by 11 U.S.C. § 362 by continuing litigation against the debtor that Time Warner had instituted pre-petition.

The history of the prior litigation between the parties and the debtor's ensuing bankruptcy have been documented in two previous memoranda by this court. See, In re United Imports Corp., 203 B.R. 162 (Bankr. D. Neb. 1996); In re United Imports Corp., 200 B.R. 234 (Bankr. D. Neb. 1996). In addition, the Second Circuit Court of Appeals has also provided a history of the matter. See, Time Warner Cable of New York v. M.D. Electronics, Inc., 101 F.2d 278 (2d Cir.

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<sup>1</sup>Although captioned as a motion for contempt, the evidence presented and argument concerned a request for sanctions for a willful violation of the automatic stay under 11 U.S.C. §§ 105(a) and 362(a). This memorandum and order shall deal with the motions in that manner, and not as a contempt matter.

1996). A review of the relevant events is, however, necessary for a proper understanding of the motion.

Time Warner commenced an action against the debtor in the Eastern District of New York on July 10, 1996, alleging violations of §§ 553 and 605 of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 553 and 605, and seeking damages and seeking to enjoin the sale and distribution of certain electronic equipment sold by the debtor. The following day, Time Warner obtained a temporary restraining order enjoining the debtor from engaging in certain activities and freezing certain assets of the debtor.

A hearing on a preliminary injunction was held on July 25, 1996, and the federal district judge granted Time Warner a preliminary injunction. The injunction prevented the debtor from selling or transporting the electronic equipment in question, required the debtor to provide Time Warner with certain information regarding past sales and financial information about the corporation, and required the debtor to permit Time Warner to inspect its premises.

The debtor filed its petition for relief under Chapter 11 in the Bankruptcy Court for the District of Nebraska on August 1, 1996. By motion filed in this court on August 8, 1996, the debtor sought an order determining that certain aspects of the preliminary injunction were stayed by 11 U.S.C. § 362. A hearing on this motion was held on August 9, 1996, and both parties participated in the hearing. The issues were submitted and the court and the parties contemplated a relatively quick decision because of the continuing concerns of Time Warner about the debtor's activities.

Apparently not wanting to wait for a decision and not wanting to be outdone by the debtor in the gamesmanship of forum shopping,<sup>2</sup> Time Warner filed a motion in the Eastern

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<sup>2</sup> After Time Warner filed its complaint in the Eastern District of New York on July 10, 1996, the debtor filed a declaratory judgment action in this district on July 15, 1996, raising the same issues that were involved in the New York litigation. After a review of a Report and Recommendation by this bankruptcy judge, the action was eventually dismissed by Judge Shanahan of the District of Nebraska on February 14, 1997.

District of New York captioned "Order to Show Cause" on August 14, 1996, requesting a ruling on the same issues that had been litigated in this court on August 9, 1996. The proposed order provides in part as follows:

ORDERED that defendants show cause before this court . . . why an order should not be entered (i) determining that the automatic stay created by defendants M.D. Electronics, Inc., United Imports, Inc. and Everquest, Inc. filing a chapter 11 petition in the United States Bankruptcy Court for the District of Nebraska does not void or prevent enforcement of the Preliminary Injunction, and (ii) directing compliance with the Preliminary Injunction by defendants and all other parties to whom it is directed . . .

The proposed order included numerous other provisions which the district judge did not adopt, but which the parties argued about at the hearing before the New York court. Accompanying the proposed order was an affirmation of Daniel J. Lefkowitz, an attorney representing Time Warner in its litigation with the debtor. The affirmation identifies various documents that were submitted with the proposed order, which included pleadings from the debtor's bankruptcy case, the New York litigation, and the declaratory judgment action filed by the debtor in the District of Nebraska and correspondence between counsel for the debtor and counsel for Time Warner.

On August 19, 1996, this court issued a memorandum opinion holding that the discovery obligations imposed on the debtor by the preliminary injunction were stayed pursuant to 11 U.S.C. § 362. 200 B.R. at 235. This decision was not appealed. Two days later, a hearing on Time Warner's New York show cause order was held, and on August 22, 1996, the federal district judge issued an order determining that a portion of the injunction ordering the debtor to perform an affirmative discovery obligation was not stayed by the automatic stay.

Time Warner's failure to appeal this court's decision and its intentional pursuit of the district court order thereafter resulted in the contradictory orders regarding the obligations of the debtor.

The debtor appealed the district court orders of July 25 and August 22 to the Second Circuit Court of Appeals. Pending appeal, the Second Circuit stayed the effect of the orders. The appeal was argued on November 1, 1996, and the Second Circuit extended the stay of the orders pending the outcome of the appeal. On November 27, 1996, the Second Circuit issued an opinion wherein it directed Time Warner to apply to this court for limited relief from the stay to seek the discovery it required, continued the stay on enforcement of the district judge's orders, and retained jurisdiction of the appeal. 101 F.3d at 282-83. The parties then cooperatively achieved limited discovery and inspection. The appeal was eventually dismissed as moot on May 5, 1997.

### **Decision**

Time Warner's action in filing its August 14, 1996 motion and its continued pursuit of an order in its favor after receiving this court's decision on the same issue resulted in a depletion of estate assets to the detriment of both the continuing legitimate business operations of debtor-in-possession and to the ultimate detriment of all of the creditors of this estate. Continuing to pursue the matter in New York, instead of appealing or moving for relief in the bankruptcy court, constitutes bad faith and a willful violation of the automatic stay. Under 11 U.S.C. § 105(a), this court has the authority to order compensation to the estate for the stay violation.

### **Discussion**

Section 362(a)(1) of the Bankruptcy Code provides in part:

A petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. § 362(a)(1). The debtor contends that Time Warner's action in filing its Order to Show Cause on August 14, 1996 in the Eastern District of New York was a continuation of its suit against the debtor and constitutes a willful violation of the automatic stay. In response, Time Warner argues that its actions were not in violation of the stay.

#### A. Violation of the Automatic Stay

While the filing of a bankruptcy petition operates as a stay of pending litigation involving the debtor, the court in which the litigation is pending retains jurisdiction to determine the applicability of the stay to the litigation in question and to its prior orders. Picco v. Global Marine Drilling Co., 900 F.2d 846 (5th Cir. 1990); N.L.R.B. v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986); Hunt v. Bankers Trust Co., 799 F.2d 1060 (5th Cir. 1986); In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969 (N.D. Ill. 1992); Mother African Union Methodist Church v. Conference of AUFCMP Church, 184 B.R. 207 (Bankr. D. Del. 1995).

Since a non-bankruptcy court has the right to consider whether the automatic stay order applies to matters before it, it logically follows that the parties before that court have the right, indeed perhaps the duty, to express to that court their views on whether the stay order applies to such matters. Absent bad faith conduct, the exercise of that right by the parties before the non-bankruptcy court cannot constitute a violation of the stay order.

Mother African Union Methodist Church, 184 B.R. at 216 (emphasis supplied). Cf. Etti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin v. United Corp. Litigation), 765 F.2d 343 (2d Cir. 1985) (Court criticized litigant who, upon learning that the debtor was in the process of having the bankruptcy court determine the effect of the automatic stay on ongoing litigation, filed its own motion with the nonbankruptcy forum); Brown v. Republic Oil Corp. (In re Republic Oil Corp.), 59 B.R. 884 (Bankr. W.D. Ky. 1986) (Removal of pre-petition litigation to a bankruptcy court other than the one in which the bankruptcy case was pending found to constitute a violation of the automatic stay).

In all of the reported decisions cited, except In re Baldwin United Corp., the question of the applicability of the automatic stay to the pending litigation was placed before the non-bankruptcy court before the issue had been presented to the bankruptcy court. In this case, however, the debtor filed a motion with this court requesting such an interpretation, and a hearing on the motion was held in which Time Warner actively participated. It was not until a few days after the hearing was held, but before a decision was reached, that Time Warner sought its own order concerning the applicability of the stay to the pending litigation by filing its motion in the Eastern District of New York. Even after this court gave its answer to the questions, Time Warner, without appealing, insisted to the New York court that its discovery and inspection orders were not affected by the automatic stay.

Given that Time Warner not only knew of the debtor's motion in this court, but actively participated in the hearing on the debtor's motion, Time Warner's actions in filing and pursuing its competing motion in the Eastern District of New York constitute bad faith and thus a willful violation of the automatic stay. While both the bankruptcy court and a non-bankruptcy forum possess jurisdiction to determine the applicability of the automatic stay to pending litigation, the commencement of a parallel proceeding in one court while totally disregarding the result of litigation of the same nature in the other is exactly what 11 U.S.C. § 362(a)(1) was meant to prohibit.

#### B. The Remedy

In Sonse v. Reinert & Duree (In re Just Brakes Corporate Sys., Inc.), 108 F.3d 881 (8th Cir. 1997), the Eighth Circuit Court of Appeals stated that bankruptcy courts have broad equitable powers to remedy violations of the automatic stay that injure a corporate debtor's estate, and that "§ 362(a), buttressed by § 105(a), confers broad equitable power to remedy adverse effects of automatic stay violations." Id. at 885. Accordingly, this court may award compensatory damages to the debtor for Time Warner's willful violation of the automatic stay.

The actual damages incurred by the estate as a result of Time Warner's violation of the automatic stay include the attorney fees and expenses involved in preparing for and participating in the post-petition hearing in the New York

court; fees and expenses involved in obtaining relief from this court to appeal to the Second Circuit Court of Appeals; preparation of briefs, argument and application for stay of the district court orders pending appeal; final presentation of the issues to the Second Circuit. These costs of litigation caused solely by Time Warner's actions are the actual damages incurred by the estate. The amount of damages is \$108,243.00 in fees and \$9,625.00 in expenses which were awarded to New York counsel for the debtor. Although additional damages were incurred in the form of attorney fees awarded to Omaha counsel for the debtor, such fees are not sufficiently identified with this issue to enable an assessment to be made.

The estate has suffered \$117,868.00 damages as a result of the violation of the automatic stay.

Judgment shall be entered in favor of debtor and against Time Warner for such amount.

Separate journal entry to be filed.

DATED: May 23, 1997.

BY THE COURT:

/s/ Timothy J. Mahoney  
 Timothy J. Mahoney  
 Chief Judge

Copies faxed by the Court to:

ROBERT GINN	348-1111
JAMES CAVANAGH/SANDRA DOUGHERTY	344-4006
MICHAEL WASHBURN	390-7137
ROBERT BOTHE, MATT MCGRORY, JUDY ARCHER and DONALD LEFKOWITZ	341-0216

Copies mailed by the Court to:

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
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UNITED IMPORTS CORP., ) CASE NO. BK96-81674  
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DEBTOR(S) )  
)  
) CH. 11  
) Filing No.  
Plaintiff(s) )  
vs. ) JOURNAL ENTRY  
)  
)  
)  
\_\_\_\_\_  
Defendant(s) ) DATE: May 23, 1997  
HEARING DATE: April 29, 1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Contempt and Amended Motion for Contempt.

APPEARANCES

James Cavanagh and Sandy Dougherty, Attorneys for debtor  
Mike Washburn, Attorney for Creditors' Committee  
Robert Bothe, Matt McGrory, Judy Archer and Donald Lefkowitz,  
Attorneys for Time Warner Cable New York City  
Robert Ginn, Attorney for First USA Merchant Services

IT IS ORDERED:

Time Warner's actions violated the automatic stay causing damages to the estate. Judgment is entered in favor of the estate and against Time Warner Cable of New York City in the amount of \$117,868.00. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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