

1 PAUL B. SNYDER
2 United States Bankruptcy Judge
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5 **November 2, 2007**

6 MARK L. HATCHER
7 CLERK U.S. BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA
10 _____ DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 JEFFREY CONRAD,

15 Debtor.

16 JEFFREY CONRAD,

17 Plaintiff,

18 v.

19 NMTC INC., dba MATCO TOOLS,

20 Defendant.

Case No. 05-51412

Adversary No. 07-4095

MEMORANDUM DECISION

NOT FOR PUBLICATION

21 This matter came before the Court on October 2, 2007, on a Motion to Dismiss filed by
22 NMTC, Inc., dba Matco Tools (Matco). Pursuant to Fed. R. Civ. P. 12(b)(6), made applicable
23 by Fed. R. Bankr. P. 7012(b), Matco seeks to dismiss the Complaint for Violation of the
24 Automatic Stay and for Forgery (Complaint) filed by Jeffrey Conrad (Debtor). Based on the
25 evidence, pleadings and arguments presented, the Court's findings of fact and conclusions of
law are as follows:

MEMORANDUM DECISION - 1

1 **FINDINGS OF FACT**

2 On October 12, 2005, the Debtor filed a petition for relief under Chapter 7 of Title 11.
3 The Debtor listed Matco as a creditor on his Creditor Matrix. Docket entries in the Debtor's
4 bankruptcy case, No. 05-51412, indicate that although Matco was listed in the Creditor Matrix,
5 no address was provided, and Matco was not given notice of the Debtor's Chapter 7
6 bankruptcy filing. The Debtor subsequently included Matco's address in his Schedule F
7 included in his balance of schedules filed November 22, 2005, but there is no indication that
8 Matco was sent notice of the bankruptcy upon the filing of these schedules.
9

10 The Complaint alleges that Matco received actual notice of the Debtor's bankruptcy as
11 evidenced from the adversary complaint Matco filed against the Debtor. The Claims Register
12 indicates that on January 25, 2006, Matco filed a Proof of Claim, dated January 20, 2006.
13 Matco's Amended Proof of Claim, filed October 10, 2006, indicates Matco has an unsecured
14 claim of \$11,453.31. On January 31, 2006, Matco commenced Adversary Proceeding No. 06-
15 4032, seeking a determination that its debt was nondischargeable. The Debtor's answer to
16 Matco's complaint sets forth, by way of counterclaim, an action against Matco for violating the
17 automatic stay. On August 17, 2006, the Debtor converted his bankruptcy to a Chapter 13.
18 As a result of the conversion, Adversary Proceeding No. 06-4032 was dismissed by Matco
19 without prejudice on September 6, 2006.
20

21 According to the Complaint in the current adversary proceeding, on November 25,
22 2005, Matco caused a statement to be delivered to the Debtor entitled "Monthly Statement of
23 Account" (Statement). This Statement, contained in Exhibit A to the Complaint, sets forth the
24 account balance as of November 25, 2005, the minimum due that month, the amount past
25

1 due, and the total due by December 16, 2005. It contains the following language, set forth in
2 a box created by asterisks:

3 Please return the bottom portion of this statement, along with your check, money
4 order, or credit card information. Please make payments payable to MATCO
5 TOOLS. Be sure to include your account number on your check or money order.
We can be reached at 1-800-472-0012 from 8:00 a.m. – 9:00 p.m. EST.

6 The Statement also sets forth in all capital letters, "MATCO IS NOW REPORTING THE
7 STATUS OF ALL ACCOUNTS TO NATIONAL CREDIT BUREAUS."

8 On January 12, 2006, one of Matco's employees telephoned the Debtor and demanded
9 payment of the debt that had been listed in the Debtor's bankruptcy case. The Complaint
10 alleges that the employee threatened to send a representative from Matco to the Debtor's
11 home and his work to collect the debt or take back the tools.

12 On January 27, 2006, Matco caused another statement (Second Statement) to be
13 delivered to the Debtor. The Second Statement, contained in Exhibit B to the Complaint, is
14 identical in language to the Statement, except for the amounts due.

15 The Debtor further alleges in the Complaint that on multiple occasions after the
16 bankruptcy case was filed, Jim Odoms, an agent of Matco, demanded payment from the
17 Debtor for his Matco obligation.

18 The Debtor filed the current adversary proceeding on July 19, 2007, alleging violation
19 of the automatic stay under 11 U.S.C. § 362(h)¹. The Debtor seeks damages in an
20 unspecified amount, including attorney fees and punitive damages if appropriate. On
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25 ¹ Former section 362(h) was amended and redesignated as section 362(k), by the Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005, effective in cases commenced on or
after October 17, 2005. Because the Debtor's bankruptcy case was filed October 12, 2005,
former section 362(h) applies.

1 September 10, 2007, Matco filed its Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6)
2 (Rule 12(b)(6)). After a hearing, the parties filed additional pleadings on the issues raised.

3 **CONCLUSIONS OF LAW AND DISCUSSION**

4 In order for a court to grant a motion to dismiss under Rule 12(b)(6), it must be
5 established that the plaintiff has failed “to state a claim upon which relief can be granted.”
6 While a complaint does not need detailed factual allegations, it requires “more than labels and
7 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell
8 Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). “[A]ll well-pleaded allegations of
9 material fact are taken as true and construed in a light most favorable to the non-moving
10 party.” Wyler Summit P’ship v. Turner Broad. Sys., Inc. 135 F.3d 658, 661 (9th Cir. 1998).
11 While factual allegations in the complaint are assumed to be true, they “must be enough to
12 raise a right to relief above the speculative level.” Twombly, 127 S. Ct. at 1965.

14 In ruling on a motion to dismiss, a court usually “may not consider any material beyond
15 the pleadings.” Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998) (quoting Branch v.
16 Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), overruled on other grounds by Galbraith v. County
17 of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)). If a court considers evidence outside the
18 pleadings, it normally must convert the Rule 12(b)(6) motion into a Fed. R. Civ. P. 56 motion
19 for summary judgment and allow the nonmoving party an opportunity to respond. United
20 States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003); Fed. R. Civ. P. 12(b). “A court may,
21 however, consider certain materials—documents attached to the complaint, documents
22 incorporated by reference in the complaint, or matters of judicial notice—without converting
23 the motion to dismiss into a motion for summary judgment.” Ritchie, 342 F.3d at 908.

1 “Even if a document is not attached to a complaint, it may be incorporated by reference
2 into a complaint if the plaintiff refers extensively to the document or the document forms the
3 basis of the plaintiff’s claim.” Ritchie, 342 F.3d at 908. Affidavits and declarations are not
4 allowed as pleading exhibits unless they form the basis of a party’s complaint. Ritchie, 342
5 F.3d at 908. In order for a court to take judicial notice of adjudicative facts, the facts must be
6 indisputable, which occurs only if they are either “generally known” under Fed. R. Evid.
7 201(b)(1) or “capable of accurate and ready determination by resort to sources whose
8 accuracy cannot be reasonably questioned” under Fed. R. Evid. 201(b)(2). Ritchie, 342 F.3d
9 at 908-09.
10

11 Matco has requested this Court consider material outside the Complaint, including the
12 following: docket report for Debtor’s bankruptcy case No. 05-51412; Debtor’s petition for relief
13 and bankruptcy schedules; Creditor Matrix; Notice of Chapter 7 Bankruptcy Case and
14 corresponding Certificate of Service; Time, Expense, and Compensation Listing Sheet
15 attached as Exhibit A to the Application for Compensation filed by Debtor’s attorney in the
16 bankruptcy case; the Order Confirming Chapter 13 Plan; Matco’s Amended Proof of Claim
17 and attachments; the docket report for Adversary Proceeding No. 06-4032; and the complaint
18 and answer filed in Adversary Proceeding No. 06-4032. The Debtor has not opposed the
19 Court’s consideration of any of the above documents. The Debtor also included in his
20 response to the Motion to Dismiss additional material outside the Complaint, including Matco’s
21 original Proof of Claim and attachments.²
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23
24 ² In his response, the Debtor also included a declaration of his bankruptcy attorney. This
25 declaration refers to facts in the Debtor’s response that are supported by a deposition taken of
the Debtor on July 14, 2006. To the extent these facts are not included in the Complaint, the
Court will not consider them on Matco’s Rule 12(b)(6) motion.

1 For purposes of Matco's Rule 12(b)(6) motion, the Court will consider all of the material
2 outside the Complaint filed by both parties. This undisputed material primarily consists of
3 pleadings contained in either the Debtor's bankruptcy case or Matco's adversary proceeding,
4 of which this Court can take judicial notice.

5 Matco presents several arguments in support of its motion to dismiss.

6 **1. Standing**

7 Matco first argues that the Debtor has no standing to pursue the adversary proceeding
8 because the Order Confirming Chapter 13 Plan Dated 9/01/06 entered March 21, 2007,
9 provides that all of the Debtor's claims are retained by the estate and are to be pursued by the
10 Chapter 13 Trustee. This argument is not persuasive. Not only has Matco misread the
11 Confirmation Order, but upon confirmation, all property of the estate vests with the Debtor,
12 pursuant to 11 U.S.C. § 1327(b).

13 Matco also argues that the Debtor has no standing because in Matco's
14 nondischargeability adversary proceeding, the Court's Order Dismissing Adversary
15 Proceeding Without Prejudice permitted Matco to raise its debt as a matter of recoupment to
16 the Debtor's Complaint. Matco asserts that "it is likely" that no unsecured creditor will receive
17 any distribution from the Debtor's Chapter 13 case, and that the Debtor's damages will be
18 less than Matco's claim of \$11,453.31. According to Matco, because the only effect of the
19 continued pursuit of the Debtor's claims would be to reduce the amount of Matco's claim, the
20 Debtor has no standing. Matco assumes it will receive no distribution in the Debtor's
21 bankruptcy, but the confirmed plan provides for a 3% distribution to general unsecured
22 creditors. Furthermore, applying the Rule 12(b)(6) standard, there are no allegations in the
23 Complaint or facts in the judicially noticed documents that suggest the Debtor's alleged
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1 damages will be less than Matco's claims. Even assuming the facts as alleged by Matco are
2 correct, Matco has not established as a matter of law in its Rule 12(b)(6) motion that the
3 recoupment defense eliminates the Debtor's standing to make a claim under 11 U.S.C.
4 § 362(h). Recoupment outside of the standing issue will be addressed further below.

5 **2. Willful Stay Violation**

6 Former 11 U.S.C. § 362(h) provides that "[a]n individual injured by any willful violation
7 of a stay provided by this section shall recover actual damages, including costs and attorneys'
8 fees, and, in appropriate circumstances, may recover punitive damages." A willful violation
9 occurs if (1) a party knew of the stay, and (2) its actions in violation of the stay were
10 intentional. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002). Matco
11 does not appear to dispute that for at least those actions occurring after it filed its Proof of
12 Claim, its actions were willful and done with knowledge of the stay. Rather, Matco appears to
13 contend that for purposes of Rule 12(b)(6), its actions did not violate the stay.

14
15 Matco relies on Morgan Guar. Trust Co. of New York v. Am. Savs. and Loan Ass'n, 804
16 F.2d 1487, 1491 (9th Cir. 1986), for its assertion that the Debtor must present evidence of
17 coercion or harassment to establish a violation of the stay. It is questionable whether Morgan
18 applies in this case. First, that case is factually distinguishable, as it dealt specifically with
19 presentment of a negotiable instrument, and the presentment in that case was to an entity
20 other than the debtor. Notably, in 1985, Congress amended 11 U.S.C. § 362 to provide that
21 presentment of a negotiable instrument is not a violation of the § 362(a), as now codified in 11
22 U.S.C. § 362(b)(11). Second, Morgan was decided based on law that existed prior to the
23 enactment of 11 U.S.C. § 362(h), the statute under which the Debtor currently seeks relief.
24
25

1 Even if Morgan were on point and applicable, however, the Rule 12(b)(6) standard
2 requires the Court to look at the alleged facts in a light most favorable to the Debtor. In the
3 Complaint, the Debtor alleged that after Matco filed its adversary petition in January, 2006,
4 Matco sent a Second Statement to the Debtor, and an agent of Matco demanded payment
5 from the Debtor on multiple occasions. One of the cases cited by the Ninth Circuit Court of
6 Appeals in Morgan as an example of threats and harassment was Gibson, where the
7 bankruptcy court held that the automatic stay was violated by “a creditor who made repeated
8 visits and telephone calls to the debtor.” Morgan, 804 F.2d at 1491 n.4 (citing In re Gibson,
9 16 B.R. 682, 683-84 (Bankr. S.D. Ohio 1981)). Assuming the Debtor’s alleged facts to be
10 true, the agent’s demand for payment on multiple occasions may meet the standard
11 articulated in Morgan. Furthermore, Matco’s Second Statement, which provides that Matco is
12 reporting the status of all accounts to national credit bureaus, can be construed as being more
13 than a mere “request for payment.” Accordingly, the Debtor has alleged sufficient facts upon
14 which to state a claim under 11 U.S.C. § 362(h).

16 **3. Recoupment**

17 Recoupment, an equitable defense, “is the setting up of a demand arising from the
18 *same transaction* as the plaintiff’s claim or cause of action, strictly for the purpose of
19 abatement or reduction of such claim.” Newbery Corp. v. Fireman’s Fund Ins. Co., 95
20 F.3d 1392, 1399 (9th Cir. 1996) (quoting 4 Collier on Bankruptcy ¶ 553.03, at 553-15 (15th ed.
21 1995)) (emphasis in original). Recoupment is “based on the premise that ‘the defendant
22 should be entitled to show that because of matters arising out of the transaction sued on, he
23 or she is not liable in full for the plaintiff’s claim.’” Newbery Corp., 95 F.3d at 1401 (quoting
24 Collier ¶ 553.03, at 553-17). “Recoupment is only a challenge to the validity and extent of the
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1 plaintiff's claim, and no affirmative recovery is permitted." In re Al-Jiboury, 344 B.R. 218, 227-
2 28 (Bankr. D. Mass. 2006) (quoting In re Jones, 289 B.R. 188, 192 (Bankr. M.D. Fla. 2002)).
3 The respective claims of the plaintiff and defendant may arise either before or after
4 commencement of the bankruptcy case, but both must arise out of the same transaction. In
5 re Madigan, 270 B.R. 749, 754 (9th Cir. BAP 2001).

6
7 In order to determine if the two claims arose from the same transaction, the Court must
8 apply the "logical relationship" test. Madigan, 270 B.R. at 754. A claim for recoupment is
9 analogous to a compulsory counterclaim; both require a determination of whether the claim
10 "arises out of the transaction or occurrence that is the subject matter of the opposing party's
11 claim." Madigan, 270 B.R. at 755 (quoting Fed. R. Civ. P. 13(a)). In the Ninth Circuit,

12 [a] logical relationship exists when the counterclaim arises from the same
13 aggregate set of operative facts as the initial claim, in that the same operative
14 facts serve as the basis of both claims or the aggregate core of facts upon which
the claim rests activates additional legal rights otherwise dormant in the
defendant.

15 Madigan, 270 B.R. at 755 (quoting Pinkstaff v. United States (In re Pinkstaff), 974 F.2d 113,
16 115 (9th Cir. 1992)). Courts applying this test have required, "only that the obligations be
17 sufficiently interconnected so that it would be unjust to insist that one party fulfill its obligation
18 without requiring the same of the other party." Madigan, 270 B.R. at 755 (quoting 5 Collier on
19 Bankruptcy ¶ 553.10[1] (15th ed. rev. 2001)). The word "transaction" is given both a liberal
20 and flexible construction. Madigan, 270 B.R. at 755.

21
22 The issue before the Court is whether the Debtor's 11 U.S.C. § 362(h) complaint arises
23 out of the same transaction as Matco's underlying claim of \$11,453.31 for tools sold to the
24 Debtor. Included in this issue is the question of whether the recoupment defense can be
25 applied to a § 362(h) action. Matco relies on Cox v. Billy Pounds Motors, Inc. (In re Cox), 214

1 B.R. 635 (Bankr. N.D. Ala. 1997), in which an Alabama bankruptcy court allowed a creditor to
2 assert recoupment against the debtor's claim for damages under § 362(h). In so doing, the
3 bankruptcy court held that the debtor's debt for purchase of a vehicle from the creditor, and
4 the creditor's post-petition repossession of the vehicle in violation of the automatic stay, arose
5 out of the same transaction. Cox, 214 B.R. at 647-48.

6 Assuming Matco is permitted to assert its recoupment defense against Debtor's claim
7 for damages under 11 U.S.C. § 362(h)--a legal issue which the Court need not determine at
8 this time--the only scenario under which the Creditor's defense would eviscerate the Debtor's
9 claim is if the Debtor's damages did not exceed Matco's \$11,453.31 claim. The Complaint
10 does not specify an amount of damages, but requests damages, including attorney's fees and
11 punitive damages as warranted. The Court previously viewed allegations of a stay violation in
12 the light most favorable to the Debtor, and concluded that there are sufficient factual
13 allegations upon which to adequately state a claim. The Court must now view the allegations
14 of damages in the light most favorable to the Debtor. In so doing, the Court notes that while
15 the Debtor has not specified a particular amount of damages, this is not an uncommon
16 practice in notice pleading. Furthermore, there are no allegations in the Complaint or facts in
17 the judicially noticed documents, which construed appropriately, support Matco's assertion
18 that damages will in fact be less than \$11,453.31. There is no factual basis to conclude that a
19 recoupment defense would eviscerate the Debtor's § 362(h) claim so as to warrant relief
20 under Rule 12(b)(6).
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23 **4. Damages**

24 Matco does not appear to dispute that attorney fees can be damages for purposes of
25 an action under 11 U.S.C. § 362(h). Rather, Matco argues that the attorney fees incurred by

1 the Debtor as a result of the alleged stay violations were covered by the flat fee paid to
2 Debtor's counsel, and thus no additional fees were incurred by Debtor. Matco, however,
3 concedes that fees would have been incurred by the Debtor in pursuit of the stay violation
4 action in the course of Matco's adversary proceeding. The Debtor confirmed that his attorney
5 fees in Matco's adversary proceeding included time for prosecuting the stay violation action.
6 Assuming the facts presented in the Complaint are true, the Debtor has presented sufficient
7 evidence of damages upon which to state a stay violation claim.
8

9 **5. Matco Agent**

10 In its post-hearing brief, Matco argued that Jim Odoms was an independent contractor,
11 and any intentional acts he may have performed were not in furtherance of Matco's business.
12 Matco points to the documents attached to its Proof of Claim in support of its position that
13 Odoms was owed a separate obligation by the Debtor, and thus was not an agent of Matco's.
14 The Complaint, however, alleges that Jim Odoms is an agent of Matco and that he demanded
15 payment from the Debtor for his Matco obligation. This Court is required to assume the facts
16 alleged in the Complaint are true. Moreover, the documents attached to the Proof of Claim
17 can be construed to support the Debtor's allegation.

18 Accordingly, Matco's motion to dismiss filed pursuant to Rule 12(b)(6) is denied.

19 DATED: November 2, 2007

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22 _____
23 Paul B. Snyder
24 U.S. Bankruptcy Judge
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