IT IS SO ORDERED.

Dated: February 15, 2018

John E. Hoffman, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

In re:	:	
	:	Case No. 14-57104
JOHN JOSEPH LOUIS JOHNSON, III,	:	Chapter 11
	:	Judge Hoffman
Debtor.	:	

OPINION AND ORDER AWARDING THE DEBTOR ACTUAL AND PUNITIVE DAMAGES FOR RFF FAMILY PARTNERSHIP, LP'S VIOLATION OF THE AUTOMATIC STAY

I. Introduction

The Court previously held that RFF Family Partnership, LP ("RFF") willfully violated the automatic stay imposed by § 362(a)(3) of the Bankruptcy Code in the Chapter 11 case of John Joseph Louis Johnson, III (the "Debtor"). *In re Johnson*, 548 B.R. 770 (Bankr. S.D. Ohio 2016) ("*Johnson I*"), *appeal dismissed for lack of jurisdiction*, No. 16-8016 (B.A.P. 6th Cir. Jan. 17, 2017). In particular, RFF circumvented this Court in order to procure an arbitration award (the "Arbitration Award") containing findings to the effect that it had a perfected security interest in the Debtor's salary payments under his NHL player contract (the "Player Contract") and findings designed to

defeat his claims against RFF. Undeterred by the Debtor's demand that it cease and desist from this course of conduct, RFF then sought a state court order confirming the Arbitration Award and a judgment in its favor (collectively, the "State Court Judgment"). *Id.* at 775. Because RFF obtained the Arbitration Award and the State Court Judgment with full knowledge of the Debtor's bankruptcy case, its conduct was "willful" for purposes of § 362(k)(1) of the Bankruptcy Code. *Id.* at 797–98. And because § 362(k)(1) mandates the recovery of reasonable attorneys' fees and expenses incurred as the result of willful violations of the stay, after *Johnson I* was issued the Court held a damages hearing in part to determine the amount of fees and expenses the Debtor is entitled to recover. The evidence presented during the hearing established the reasonableness of attorneys' fees and expenses in the amount of $422,373.16. Although this is certainly a very large sum, the substantial amount of fees and expenses the Debtor incurred is the result not only of RFF's violation of the stay, but also of its unnecessarily contentious approach to this litigation and its unreasonable rejection of a compromise proposed by the Debtor—a settlement under which RFF would have paid nothing.

During the damages hearing, the Court also heard evidence on the issues of whether it would be appropriate for the Debtor to recover punitive damages and, if so, in what amount. Section 362(k)(1) provides for the recovery of punitive damages in "appropriate circumstances," including cases in which a creditor intentionally violated the automatic stay. The evidence leaves no doubt that RFF did indeed intentionally violate the stay and that an award of punitive damages is warranted in this case.

II. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this contested matter under 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core

proceeding. *See* 28 U.S.C. § 157(b)(2)(A) and (O); *see also Amedisys, Inc. v. Nat'l Century Fin. Enters., Inc. (In re Nat'l Century Fin. Enters., Inc.)*, 423 F.3d 567, 573 (6th Cir. 2005) (holding that a motion to enforce the automatic stay "constitutes a 'core proceeding' as defined in 28 U.S.C. § 157(b)(2)").

An order awarding damages under § 362(k)(1) is a final order. *See In re Webb*, No. 11-8016, 2012 WL 2329051, at *5 (B.A.P. 6th Cir. Apr. 9, 2012); *Wicheff v. Baumgart (In re Wicheff)*, 215 B.R. 839, 843 (B.A.P. 6th Cir. 1998). And because "[a] claim under § 362(k)(1) for an automatic stay violation . . . derives directly from the Bankruptcy Code" and "necessarily stems from the bankruptcy itself," the Court has the constitutional authority to enter a final order in this matter after *Stern v. Marshall*, 564 U.S. 462 (2011). *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943, 948 (10th Cir. 2017) (internal quotation marks omitted); *see also Tow v. Henley (In re Henley)*, 480 B.R. 708, 765 (Bankr. S.D. Tex. 2012).

III. Background

A. Events Occurring After the Hearing on RFF's Liability

Following an evidentiary hearing on liability (the "Liability Hearing"), the Court found that RFF willfully violated the automatic stay. *Johnson I*, 548 B.R. at 798–99. In addition to declaring the Arbitration Award and the State Court Judgment void, *Johnson I* also provided notice that the Court would hold another evidentiary hearing (the "Damages Hearing") to consider: (1) the reasonableness of the Debtor's requested attorneys' fees and expenses; and (2) whether the Debtor should be awarded punitive damages and, if so, the amount that should be imposed against RFF. *Id.* at 773–74.

1. The Damages Hearing

The Damages Hearing was held over the course of two days. The transcript of the first day (Doc. 952) will be referred to as "Transcript I" and the transcript of the second day (Doc. 954) as "Transcript II." During the Damages Hearing, the Debtor's Exhibits 39 through 46 and 49 through 52 ("Debtor Ex. __"), as well as RFF's Exhibits A through H-2 ("RFF Ex. __"), were admitted into evidence without objection.[1] Tr. I at 201; Tr. II at 13. Dayton Parcells (one of RFF's attorneys) made an opening statement, Tr. I at 12–37, and the parties agreed to deem the statement his direct testimony under oath to the extent it was based on his personal knowledge, Tr. II at 3–6, 121–22. The Court heard further testimony of Parcells on cross-examination, as well as the testimony of Jeffrey Levinson (another attorney for RFF),[2] Daniel DeMarco (one of the attorneys for the Debtor), and Robert F. Freedman (the president of RFF, Inc., which in turn is the general partner of RFF, Debtor Ex. 39 at 8–9; Tr. I at 13). The Debtor also introduced excerpts of the video deposition of Freedman.

2. Events Leading Up to the Damages Hearing

Although the Court entered a scheduling order under which the Damages Hearing would have taken place within a couple of months of the issuance of *Johnson I*, Doc. 557 at 4, the hearing was delayed for more than a year and a half due in large part to RFF's litigation tactics. Because RFF's conduct is relevant to the reasonableness of the fees and expenses that the Debtor seeks to recover from RFF, the history of the delay will be recounted in some detail.

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[1]The Debtor's Exhibits 1 through 38 were admitted into evidence during the Liability Hearing. RFF chose not to introduce any evidence during the Liability Hearing. *Johnson I*, 548 B.R. at 775.

[2]Levinson withdrew from his representation of RFF after the Damages Hearing. Doc. 941.

In accordance with the Court's initial order scheduling the Damages Hearing, the Debtor propounded requests for admissions, interrogatories and documents. Although the requests were reasonable, RFF responded by asserting 27 general objections. Among those objections, RFF opposed the discovery requests "to the extent they call[ed] for information or documents protected by the attorney-client privilege, the work product doctrine, and/or any other applicable privilege or protection." Debtor Ex. 39 at 2. RFF, however, did not provide a privilege log. Nor did RFF produce any documents in response to the Debtor's requests for production. Instead, RFF stated "See General Objections" in response to each of the requests. *Id.* at 14–16. RFF also asserted objections to the interrogatories by which the Debtor requested financial information about its gross revenue and net worth, as well as other litigation in which RFF was or had been involved. *Id.* at 11–13. RFF made these objections even though the information requested was relevant to the issue of the amount of any punitive damages that should be awarded. Underlying the objections was RFF's position that the Damages Hearing should be bifurcated so that the Court would first hold a hearing that concerned only the Debtor's *entitlement* to punitive damages, Doc. 595 at 1, not the *amount* of such damages—a position that had no merit.

The Sixth Circuit Bankruptcy Appellate Panel (the "BAP") held years ago that an order finding a creditor to be liable for misconduct such as a stay violation while reserving on the issue of damages is not final. *Wicheff*, 215 B.R. at 843 (holding that the bankruptcy court's contempt order was not final and appealable given that the court had not yet imposed sanctions). Nonetheless, RFF appealed from *Johnson I* and elected to have the appeal heard by the BAP. Doc. 560 at 1 n.1. A month later—and approximately a week before the date then scheduled for the Damages Hearing—RFF filed a motion to stay the Damages Hearing pending appeal (Doc. 595), relying in

part on the discovery dispute relating to the scope of the hearing. Doc. 595 at 1–2. RFF also argued that the Damages Hearing should be stayed pending appeal because "the issue of whether this Court erred in [*Johnson I*] is a threshold question that ought to be resolved before the discovery and other issues as to the Damages Hearing are considered." *Id.* at 2. The Debtor responded to the motion to stay by correctly noting that there was "no reasonable basis to conclude that the [BAP] will go against prior decisions in this Circuit and the almost entirely one-sided weight of authority on the question of whether RFF's appeal is premature." Doc. 597 at 5. According to the Debtor, "RFF is using this position as grounds to refuse to comply with discovery requests. RFF admits it is not producing complete discovery responses and documents because it claims that . . . this Court implicitly intended" to bifurcate the Damages Hearing. *Id.* at 2. The motion to stay was soon followed by RFF's motion for a protective order (Doc. 598) and the Debtor's motion to compel RFF to produce documents and answer interrogatories (Doc. 601).

In June 2016, the Court issued an oral ruling denying the motion to stay for the reasons stated in the Debtor's response. During the same proceeding, the Court concluded that RFF's sophistication level and its financial wherewithal were relevant to the issue of punitive damages. Tr. of June 20, 2016 Hr'g (Doc. 626) at 15 ("[O]ne of the factors the [c]ourts look to in whether punitive damages should be assessed and then if so in what amount, is the sophistication of the creditor that has violated the stay.") & 18 ("I think financial wherewithal is certainly a factor as well in terms of determining a sanction that would be an appropriate deterrent."). RFF also was directed to provide a privilege log if it intended to assert the attorney-client privilege or other purported privileges. *Id.* at 15–16. After the oral ruling, the Court entered an agreed order (1) governing RFF's submission of a privilege log and (2) establishing a briefing schedule on RFF's motion for

a protective order and the Debtor's motion to compel discovery. Because the Court had determined during the June 2016 proceeding that a continuance of the Damages Hearing would be required, the agreed order also continued the date of the hearing pending further order. Doc. 612 at 3.

The next month, RFF served its amended and restated objections and responses to the Debtor's discovery requests. This time, RFF responded with a privilege log in which it asserted the attorney-client privilege and work-product doctrine as to the invoices of its attorneys and a "tax return privilege" as to its federal, state and local tax returns. Debtor Ex. 40 at 000052–54. RFF again objected to the Debtor's requests for financial information (including the gross revenue and net worth of RFF) and for copies of its tax returns and financial statements. Most notably, and notwithstanding the Court's statement at the June 2016 hearing as to the legal relevance of RFF's "financial wherewithal," RFF twice stated that it would provide certain financial information and documents only if the Court "first determine[d] that ability to pay an award of punitive damages is an appropriate factor in the analysis." *Id.* at 000038, 000041.

That same month, the Debtor filed his response to RFF's motion for a protective order and a reply in support of his motion to compel discovery, stating that "[d]espite the guidance this Court provided at the June 20, 2016 hearing, RFF still refuses to produce even a single document in response to Debtor's Requests for Production or to answer relevant Interrogatories." Doc. 628 at 1. Citing RFF's statement that it would provide certain financial information and documents if the Court "first determines that ability to pay an award of punitive damages is an appropriate factor in the analysis," the Debtor rightly noted that RFF was failing to acknowledge that the Court had already made its views on this matter known in its June 2016 oral ruling. *Id.* at 1–2. The Debtor

also correctly pointed out that RFF's tax returns were not protected from discovery under Sixth Circuit law—by a purported "tax return privilege" or otherwise. Doc. 628 at 6–8.

The next several months were consumed with filings and proceedings relating to the Debtor's disclosure statement (Doc. 658) and his plan of reorganization (the "Plan") (Doc. 657). During this time, RFF actively opposed confirmation of the Plan. Among other things, RFF asserted that the debt the Debtor purportedly owed it should be declared nondischargeable and that the Plan was infeasible because RFF's claim would afford it the right, during the term of the Plan, to collect more from the Debtor than RFF was entitled to recover under the Plan. Doc. 744 (transcript of confirmation hearing) at 123–24; Doc. 829 (transcript of disclosure statement hearing) at 50, 100–01. In November 2016, the Court issued a bench decision overruling RFF's objections and holding that the Plan met the Bankruptcy Code's confirmation requirements. Doc. 737.[3]

A month later, the Court held a postconfirmation status conference at which it addressed a variety of issues still pending in the Debtor's case, including those relating to the Damages Hearing. The Court stated that it would, consistent with what it said in *Johnson I*, set a single hearing to determine whether appropriate circumstances exist to award the Debtor punitive damages and, if so, the amount of such damages. The Court also scheduled a telephonic status conference on the motion for a protective order and the motion to compel discovery for January 18, 2017, directing counsel for RFF and the Debtor to be prepared to address the issues raised by the motions.

On January 17, 2017, the BAP issued an order dismissing RFF's appeal of *Johnson I*, finding that the decision was not final and that it accordingly lacked jurisdiction to decide the appeal. *In re*

[3]The order confirming the Plan was entered on November 23, 2016. Doc. 757. RFF appealed the bench decision and confirmation order to the BAP. *See In re Johnson*, No. 16-8045 (B.A.P. 6th Cir.).

Johnson, No. 16-8016 (B.A.P. 6th Cir. Jan. 17, 2017). The next day, the Court heard extensive oral argument on the motion for a protective order and the motion to compel discovery. And two days later, the Court issued an oral ruling, which was followed by an order directing RFF to produce most of the information and documents the Debtor had requested, subject to certain confidentiality provisions requested by RFF. Doc. 825. On February 27, 2017—more than nine months after the Debtor first served his discovery requests—RFF finally complied with its discovery obligations. Debtor Ex. 41. An amended scheduling order prepared by the parties established August 28, 2017 as the new date for the Damages Hearing and set corresponding deadlines, including deadlines for depositions and the filing of final witness lists. Doc. 838.

The Debtor and RFF had filed initial witness lists back in June 2016. In addition to persons who were ultimately not called by either side (including the Debtor), the Debtor's witness list expressly identified only DeMarco and Parcells. Doc. 593. RFF, while stating that it may call "Any Rebuttal Witness(es)" and "Any Witness(es) on Debtor's Witness List," expressly identified only the Debtor. Doc. 594 at 1–2. But then, on the deadline established by the scheduling order, RFF filed an amended witness list identifying, for the first time, the following 13 additional potential witnesses: DeMarco; Marc Kessler (one of the other attorneys for the Debtor); Eliot Teitelbaum (a California attorney for the Debtor with the law firm Koorenny & Teitelbaum, LLP); a "Rule 30(b)(6) representative for Koorenny & Teitelbaum"; Kristina Johnson (the Debtor's mother); John Joseph Louis Johnson II (the Debtor's father); a "30(b)(6) rep for Team Johnson Investments, LLC"; Theresa Aslin (the case manager during the arbitration); the Honorable James A. Steele (the arbitrator); Levinson; Parcells; Freedman; and Marc Sidoti (the chief financial officer of RFF). Doc. 836 at 8–10.

Once RFF filed its amended witness list, a battle over depositions began. The Debtor filed a motion to compel depositions of Freedman, Parcells and Sidoti, asking for leave to take the depositions after the deadline established by the scheduling order had already passed and placing the blame for their not already having been taken on RFF. Doc. 844. RFF filed a response in which it pointed the finger at the Debtor for the delay and argued that no depositions should be taken. Doc. 847. After the Debtor filed a reply (Doc. 851), a telephonic hearing was convened on the Debtor's motion to compel depositions. During the hearing, DeMarco reiterated an alternative to taking depositions that the Debtor had offered in his motion: If RFF was going to call Parcells and Sidoti to testify in its case in chief during the Damages Hearing,[4] then those witnesses would be directed to be available for the duration of the hearing, and the Debtor would be permitted to call them in his case in chief.

In response, Levinson noted that those witnesses were outside the subpoena power of the Court,[5] but suggested that the Debtor could call them on cross-examination, which DeMarco rejected as an unworkable solution. Based on research it had conducted before the hearing,[6] the

[4]During the hearing, Levinson stated that RFF probably would not call Freedman, Tr. of July 31, 2017 Hr'g at 33 ("July 31 Tr.") (Doc. 950), but it ultimately did so.

[5]*See* Fed. R. Civ. P. 45(c) ("A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense.").

[6]*See Buchwald v. Renco Grp., Inc*., No. 13-cv-7948 (AJN), 2014 WL 4207113, at *1–2 (S.D.N.Y. Aug. 25, 2014) ("[C]onsistent with Rule 45(c)(1), this Court cannot *compel* the five witnesses in question to testify at trial, but the Court does have authority under Rule 611(a) to prevent those witnesses from testifying for Defendants if they are not made available to testify for the Trustee."); *Cisson v. C.R. Bard, Inc. (In re C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.),* No. 2:11-cv-00195, 2013 WL 3367715, at *2 (S.D. W. Va. July 5, 2013) ("The fact that Bard refuses to make Dr. Darois available for plaintiffs' case in chief when Mr. Darois will testify as a

Court decided to make a proposal to resolve the dispute in a manner consistent with the Federal Rules of Civil Procedure and the Federal Rules of Evidence without the need for the additional depositions to be taken. In making that proposal, the following colloquy occurred:

> THE COURT: [My proposal is that the Debtor would put on his] case in chief without Mr. Sidoti and Mr. Parcells. [RFF] then would put on [its] case in chief, and after [Levinson] was done calling those two witnesses, then [counsel for the Debtor] could examine [them], and the examination wouldn't be limited to the scope of the direct.
>
> My concern here is I'm not going to order them to be here for [the Debtor's] case in chief. I'll make them stay over after Mr. Levinson examines, if he chooses to call them, which he said he is going to do. If Mr. Levinson chooses not to call Mr. Sidoti at all, then I wouldn't require him to testify. That's the potential solution that I'm throwing out, and I wanted to first hear from you, Mr. DeMarco and/or Mr. Yeager, whether you [think] that [is] workable, then I'll hear from Mr. Levinson. . .
>
> MR. DeMARCO: . . . [T]he testimony that we might elicit from either Mr. Sidoti or Mr. Parcells would become part of the evidence in support of our case in chief regardless of when that witness was on the stand [?] . . .
>
> THE COURT: Right, that was—
>
> MR. DeMARCO: With that clarification, Your Honor, I think that would be workable from the Debtor's perspective.
>
> . . . .
>
> THE COURT: All right. Mr. Levinson?

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live witness for Bard would result in inequitable treatment. I [find] that the most practical and fair way to address this issue . . . is to permit plaintiffs to keep their case in chief open until Mr. Darois is called to testify during Bard's case in chief. At that time, plaintiffs may call Mr. Darois as their witness." (citation omitted)).

> MR. LEVINSON: Your Honor, I heard what you said, and that's okay with me, but then when Mr. DeMarco rephrased it—I know he's got a litigator there, so it makes me nervous.
>
> I think what the Court said and what we're agreeable to is that they would put on their case in chief, we would respond, and if we put on Messrs. Parcells, Sidoti and Freedman, they'd have a chance to examine them without being limited to it being on cross. They could ask questions beyond what would be appropriate for purposes of cross. So that is what I heard the Court say, and we're agreeable to that as a nice solution to this problem.

Tr. of July 31, 2017 Hr'g at 34–37.

The only way the Court's proposal would not have resolved the dispute was if Levinson—after expressing a willingness to permit the Debtor's lawyers to question RFF's witnesses as if on direct examination—intended to argue that the Debtor could use the testimony elicited only if it was given in response to questions that would have been permissible on cross-examination. Yet it did not occur to the Court that Levinson—or, for that matter, any attorney acting in good faith—would resort to such a disingenuous tactic. So the Court stated: "All right then. Mr. DeMarco, Mr. Yeager, I think Mr. Levinson laid it out exactly in terms of what I had in mind. With that agreement and stipulation, would you be willing to withdraw your motion to compel [depositions] and go forward on the [trial] dates as scheduled?" July 31 Tr. at 37. DeMarco demurred:

> Your Honor, I think the only part that was not mentioned by Mr. Levinson . . . I don't want it to become a bone of contention later, which is that regardless of when we would be questioning a particular RFF witness, be it Mr. Freedman, Mr. Sidoti or Mr. Parcells, that the evidence elicited would become part of our case in chief regardless of when that testimony was taken. With that clarification, we would be agreeable.

Id.

Thinking that the answer to its next question would certainly be "yes," the Court asked: "Do you understand that, Mr. Levinson, and agree to that?" *Id.* But rather than responding in the affirmative, Levinson stated: "I understand what he's saying. I don't know its import. I understand what the Court said and I'm agreeable to that." *Id.* at 37–38. When the Court asked whether there was "any distinction in your mind between what I said and what [DeMarco] just said," Levinson responded:

> Yeah. It's the unknown. I mean, if the nature of the evidence coming in as part of their case in chief is somehow meaningful—as it apparently is, because they're insisting upon this—then I don't know whether that's appropriate. I mean, I think if they want to ask questions of my witnesses in my defense and do so other than as if on cross, I'll agree to that to resolve this. But I'm not going to allow them to use my witnesses ab initio, if you will, as part of their case in chief when they did not identify those witnesses,[7] when who knows how it is that they're going to characterize it.

Id. at 38. So Levinson had agreed that the Debtor's attorneys could *ask* RFF's witnesses questions as if on direct examination, but he had not agreed that they could *use the answers*. If Levinson intended to agree not only to allow the Debtor's counsel to question RFF's witnesses but also to use the answers, Levinson would have responded that the matter was resolved. But he did not do so. It was only after DeMarco asked for clarification that Levinson made clear that he was reserving the right to argue that the Debtor should be prohibited from using answers to questions that exceeded the scope of cross-examination. Once Levinson's true intentions became clear, the Debtor's counsel understandably balked, and the Court, stating that "this matter is not in a posture to be heard on the

[7]This was not entirely true. Parcells was on the Debtor's witness list. Doc. 593. In addition, the Debtor stated on his witness list that he reserved the right to call "any other witness . . . called by any other party to this contested matter," which obviously would include any witness called by RFF. *Id*. RFF used this same reservation of rights on its final witness list. Doc. 836 at 2.

merits," set a telephonic scheduling conference for August 28, 2017 for the purpose of determining a new date for the Damages Hearing and the dates for depositions of prospective witnesses. Doc. 857 at 2–3.

In the meantime, the Court had conducted a telephonic status conference on the objections of RFF, Cobalt Sports Capital LLC and Pro Player Funding LLC to the request by the law firm representing the Debtor (Hahn Loeser & Parks LLP) for a final award of compensation and reimbursement of expenses, and the parties agreed to participate in a mediation of that dispute. In July 2017, the Court entered an order appointing the Honorable Jeffery P. Hopkins, the Chief Judge of the United States Bankruptcy Court for the Southern District of Ohio, as mediator of the fee dispute. Doc. 850. On August 18, 2017, Judge Hopkins attempted to mediate a resolution of the objections to Hahn Loeser's attorneys' fees, as well as a global resolution of all of the issues between the Debtor and RFF.[8] "As the result of the progress made" during that mediation conference, Judge Hopkins—at the parties' urging—requested that the BAP "consider postponing or cancelling the appellate argument[]" in RFF's appeal of this Court's order confirming the Plan, which was scheduled for the following week. Doc. 870 at 1–2. Acceding to Judge Hopkins' request, the BAP issued an order cancelling the oral argument so that the mediation could continue unimpeded. *Id.* at 2. In addition, based on the recommendation of Judge Hopkins, this Court vacated the order setting its scheduling conference for August 28, 2017 so that a second mediation conference could be held on that date. Doc. 867.

[8]Cobalt and Pro Player had reached an agreement with the Debtor on all issues other than the fee dispute.

The second mediation conference apparently did not go as well as Judge Hopkins anticipated. On August 30, he entered an order noting "the lack of progress" made during the conference. Doc. 870 at 2. As a result of that lack of progress, and "in the interest of justice and to preserve judicial resources and to avoid unnecessary litigation costs," he ordered Levinson to provide RFF's "proposal related to Debtor's counsel's final allowance of compensation and reimbursement of expenses" to counsel for the Debtor, Cobalt and Pro Player no later than September 1. *Id.* Judge Hopkins also ordered the parties and their counsel to appear for a third mediation conference on September 12, 2017. *Id.* at 3.

Despite the extensive time and effort Judge Hopkins devoted to the mediation process,[9] the Debtor and RFF were unable to reach an agreement.[10] Thus, the day after the third mediation conference, the Court entered an order once again scheduling the Damages Hearing—this time for October 30 through 31, 2017—and setting a pretrial conference for the purpose of scheduling depositions. Doc. 872 (amended by Doc. 879). Guided by the Court during that conference, the parties agreed to the times and places for the depositions. Doc. 884. After the Court granted the joint motion of the Debtor and RFF to file certain documents under seal (Doc. 894), the Debtor filed the depositions of Freedman and Parcells (Docs. 900 & 901) under seal while designating parts of those depositions for use as evidence (Docs. 902 & 903).

RFF filed its pre-hearing brief on the docket ("RFF's Brief") (Doc. 897), while the Debtor filed his brief under seal (the "Debtor's Brief") (Doc. 898). Before the Damages Hearing, the

[9]Judge Hopkins prepared for and conducted three full-day mediation conferences over a time span of less than a month.

[10]DeMarco testified that RFF's representatives "walked out" of the third mediation conference, Tr. I at 166, an allegation RFF did not deny.

Debtor and RFF stipulated that "[t]he hourly rates charged by the attorneys and other professionals of [Hahn Loeser] are reasonable and comparable to those of professionals of like skill, experience and standing in the community." Doc. 888 at 3. After the Damages Hearing, the Debtor filed a supplemental statement of attorneys' fees and expenses (Doc. 921). In response, RFF filed an objection asserting that "the amount of fees sought by [Hahn Loeser] is excessive and unreasonable." Doc. 924 at 4. To the contrary, the manner in which RFF conducted itself during this litigation supports the amount of fees and expenses being awarded by the Court, as does RFF's resistance (described below) to the Debtor's reasonable efforts to resolve this matter.

B. Findings Relating to RFF's Intent to Violate the Stay

In *Johnson I*, the Court concluded that RFF willfully violated the automatic stay—that is, that it committed a deliberate act that violated the stay and that it did so with knowledge of the bankruptcy—entitling the Debtor to recover reasonable attorneys' fees and expenses. *Johnson I*, 548 B.R. at 797–99. In addition to requiring that attorneys' fees and other actual damages be awarded in all cases involving willful violations of the automatic stay, the Bankruptcy Code provides that punitive damages can be imposed in certain cases, including those in which a creditor recklessly or intentionally violated the stay. The Court finds that RFF intentionally violated the stay—making an award of punitive damages appropriate here—for four reasons:

- There was no reason for RFF to obtain certain findings in the Arbitration Award other than to use them to establish that its claim against the Debtor was secured by the salary payments under the Player Contract and to defeat the Debtor's claims against RFF.

- RFF procured the State Court Judgment confirming the Arbitration Award in all respects even after being warned multiple times—including by a cease and desist letter sent by the Debtor's counsel, by a follow-up email from counsel, and by the filing of the Debtor's motion to enforce the automatic stay (the "Enforcement Motion") (Doc. 382)—that its conduct violated the stay.

- To resolve the Enforcement Motion, the Debtor proposed an agreed order that would have prohibited RFF from using the Arbitration Award or the State Court Judgment against the Debtor or property of his bankruptcy estate. RFF, however, adamantly refused to resolve the matter on the terms set forth in the Debtor's proposed agreed order. In lieu of agreeing to the unqualified order proposed by the Debtor, RFF inserted provisos under which the Arbitration Award and the State Court Judgment could have been used against the Debtor and his estate under certain circumstances.

- RFF's contention that it never intended to use the State Court Judgment against the Debtor or his bankruptcy estate is simply not believable, because in the end it is based entirely on the representations of witnesses whose testimony the Court did not find to be credible.

Each of these findings is spelled out in more detail below.

1. The Lack of Any Legitimate Reason for Certain Findings in the Arbitration Award

As the Court explained in *Johnson I*, the Debtor signed the multimillion-dollar Player Contract in 2011. Then, in January 2014, along with his parents and an entity known as Team Johnson Investments, LLC ("TJI"), the Debtor issued a promissory note to RFF in an amount exceeding $1.8 million (the "Note"). The Debtor signed the Note and related security documents on his own behalf and for TJI as its manager, while the Debtor's parents signed the Note in their individual capacities. The Note and related documents stated that the Debtor was, among other things, granting RFF a lien on his salary payments under the Player Contract and that his parents were granting a lien on their 2008 Ferrari (the "Ferrari") and certain other property.[11] *Johnson I*, 548 B.R. at 776–77.

Alleging a default on the Note, RFF commenced an arbitration proceeding in September 2014 against the Debtor, his parents and TJI (the "Arbitration Action"). *Id.* at 777. In the

[11]While the Debtor had no interest in the Ferrari owned by his parents, he did own a separate 2011 Ferrari, which has now been sold.

Arbitration Action, RFF contended, among other things, that the Debtor, his parents and TJI had defrauded it and that it had a perfected security interest in the salary payments under the Player Contract. *Id.* In response, the Debtor denied that RFF held a perfected security interest in the salary payments and that it had been defrauded. He also asserted counterclaims alleging that RFF was a predatory lender, that it had violated California's usury laws, and that it defrauded him and his co-borrowers in order to induce them to sign the Note and related loan documents. *Id.* at 779.

The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on October 7, 2014 (the "Petition Date"). In December 2014, RFF requested, without notifying the Debtor, that the Arbitration Action proceed as to the Debtor's parents and TJI. *Id.* at 781. In April 2015, RFF filed an arbitration brief (the "Arbitration Brief") in which it asserted that it held a perfected security interest in the salary payments under the Player Contract and that it had been defrauded by the Debtor's parents and TJI. *Id.* at 781–82. The arbitrator issued the Arbitration Award the following month. Tracking the Arbitration Brief nearly verbatim, the Arbitration Award included findings to the effect that RFF had a perfected security interest in the salary payments. *Id.* at 782.[12] RFF contends that it intended to use the Arbitration Award only to obtain a judgment against the Debtor's parents and to gain possession of the Ferrari. Tr. I at 21–22. But "[t]here was no legitimate reason for RFF to cause . . . findings [relating to the Player Contract] to appear in an arbitration award that it ostensibly was seeking for the sole purpose of obtaining an award against [the Debtor's parents] and realizing a recovery from the[ir] Ferrari and other property." *Johnson*

[12]The evidentiary basis for the Arbitration Award was Freedman's testimony and the documents RFF introduced during an arbitration hearing. Freedman Dep. at 143–44.

I, 548 B.R. at 783. The Court therefore concludes that RFF intended to use the Arbitration Award in part to assert a security interest in the salary payments under the Player Contract.[13]

RFF also intended to use certain findings in the Arbitration Award to contest the Debtor's claims against RFF. As noted above, the Debtor had asserted counterclaims against RFF in the Arbitration Action, and he eventually reasserted those counterclaims in an adversary proceeding (Adv. No. 15-2117) that RFF commenced asking the Court to deny the Debtor's discharge and to declare its claim[14] against the Debtor to be nondischargeable based on his alleged fraud. The Debtor's claims against RFF constitute property of his bankruptcy estate, and the automatic stay thus prohibited RFF from obtaining findings in the Arbitration Award that were "completely at odds with the Debtor's allegations in his counterclaims," findings that "would—if given effect—render the Debtor's counterclaims valueless." *Id.* at 794. Yet RFF did just that. The Arbitration Award—again, tracking the Arbitration Brief—included findings stating that TJI and the Debtor's parents had defrauded RFF. If given effect, those findings would have defeated the Debtor's fraud-based counterclaims against RFF, because "[i]t is difficult to see how the Debtor could show that RFF was guilty of fraud if, as the Arbitration Award finds, it was RFF that had been defrauded by

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[13]This is not the only time that RFF has taken an aggressive position—which ultimately proved to be legally indefensible—in order to assert a security interest in the salary payments under the Player Contract. In an adversary proceeding that the Debtor commenced to obtain a ruling on RFF's secured status, RFF responded by claiming a security interest in the Debtor's salary payments under California law. RFF did so even though it was crystal clear that it did not have a valid security interest under state law, and even though it was equally clear that § 552(a) of the Bankruptcy Code would have terminated any prepetition security interest that RFF had in the salary payments. The Court so held in an opinion affirmed by the BAP and not appealed to the Sixth Circuit. *Johnson v. RFF Family P'ship, LP (In re Johnson)*, 554 B.R. 448, *aff'd*, No. 16-8035, 2017 WL 2399453 (B.A.P. 6th Cir. June 2, 2017).

[14]In December 2014, RFF filed a secured proof of claim in an amount exceeding $1.7 million as of the Petition Date.

the [Debtor's parents] and TJI." *Id.* This is true for two reasons: First, any representations that TJI made in the Note and related documents were made by the Debtor when he signed them on TJI's behalf—meaning that if TJI committed fraud, then so did the Debtor. Indeed, "there was no reason for RFF to [cause to be included in the Arbitration Award] a finding of fraud against TJI." *Id.* at 784. Rather, "RFF's obtaining a finding of fraud against TJI had much more to do with the Debtor—including his claims against RFF—than it did with TJI," the Debtor's parents or the Ferrari. *Id.* Second, before procuring the Arbitration Award, RFF certainly "recognized that the Debtor's fraud-based claims against [it] rely in part on his contention that RFF defrauded his parents, not the other way around." *Id.* at 795. And "[i]f it instead was the [parents] that defrauded RFF, the Debtor's fraud-based claims against RFF would be impaired, if not totally defeated." *Id.* The Court thus finds that RFF intended to use the Arbitration Award's findings to defeat the Debtor's claims against RFF.

2. Neither a Cease and Desist Letter nor the Enforcement Motion Deterred RFF.

Having acquired a copy of the Arbitration Award, counsel for the Debtor sent RFF a cease and desist letter in August 2015. That letter correctly noted that the Sixth Circuit's decision in *Amedisys*, 423 F.3d 567, supported the position that RFF had violated the automatic stay and that it would do so again if it obtained an order confirming the Arbitration Award. Neither the cease and desist letter nor a follow-up email from counsel for the Debtor deterred RFF from seeking the State Court Judgment. Thus, in September 2015, the Debtor filed the Enforcement Motion, again relying on *Amedisys* and also citing § 362(a)(3). *Johnson I*, 548 B.R. at 785. Because the Enforcement Motion cited *Amedisys* and § 362(a)(3)—authorities on which the Court ultimately relied in concluding that RFF willfully violated the automatic stay—it should have put a halt to RFF's pursuit

of the State Court Judgment. But rather than waiting for the Court to rule on the Enforcement Motion, RFF forged ahead and obtained the State Court Judgment, which confirmed the Arbitration Award "in all respects." *Id.* at 786.

RFF contends that the primary reason it prosecuted the Arbitration Action after receiving the cease and desist letter and the Enforcement Motion was to seek a judgment against the Debtor's parents for possession of the Ferrari. Tr. I at 20–22. It is possible that RFF was motivated, at least early on, in part by a desire to protect the Ferrari.[15] But even if it was, this is beside the point, because RFF also used the Arbitration Action to obtain findings that could have defeated the Debtor's claims against RFF, as well as findings to the effect that it had a perfected security interest in the salary payments under the Player Contract.

3. RFF Refused to Agree That It Would Not Use the Arbitration Award and the State Court Judgment Against the Debtor or Property of His Estate.

RFF contends that it never intended to use the Arbitration Award and the State Court Judgment against the Debtor or property of his bankruptcy estate. Tr. I at 21–22. But this contention is belied by RFF's consistent refusal to resolve the Enforcement Motion with an agreed order under which it would have paid nothing in exchange for an agreement not to use the Arbitration Award and the State Court Judgment against the Debtor or his estate. What's more, RFF requested exceptions to the agreed order proposed by the Debtor—exceptions that would have

[15]There are reasons to doubt that the Ferrari was a significant concern to RFF by the time the State Court Judgment was issued on October 16, 2015. Nearly two months earlier, on August 21, 2015, Levinson was present at a deposition during which the Debtor's father testified that the Ferrari's motor had been "fried" in November or December 2014. *In re Johnson*, 546 B.R. 83, 141 n.59 (Bankr. S.D. Ohio 2016); Doc. 432 at 16 n.17. RFF thus had reason to know well before the State Court Judgment was issued that the Ferrari's motor had already been severely damaged.

permitted it to seek to use the Arbitration Award and the State Court Judgment against the Debtor and his estate under certain circumstances.

a. RFF's Proposed "No Foul" Agreement

In an effort to reach a consensual resolution of the Enforcement Motion on behalf of the Debtor, Kessler sent Levinson an email dated November 11, 2015, which was after the State Court Judgment was issued and about a month before the Liability Hearing. The Debtor was proposing at that point to resolve the matter without RFF's paying any attorneys' fees or expenses. Instead, RFF needed only agree that the State Court Judgment would:

> 1. . . . not be used in any way:
>
> a. in the Debtor's Bankruptcy Case for any purpose,
> b. in the RFF Adversary Proceeding for any purpose,
> c. in any other litigation or legal proceeding related to the Debtor for any purpose,
> d. to obtain any property of Debtor's estate, or
> e. to have any adverse impact upon any property of Debtor's estate other than pursuant to para. 2 below.[16]

RFF Ex. A.

Levinson testified in response to a question from Parcells that this first paragraph of Kessler's email was "not objectionable." Tr. II at 21. But as was pointed out on cross-examination, *id.* at 46–47, it was through Levinson himself that RFF, in an email dated November 15, 2015, rejected the Debtor's proposal, stating: "[A]s confirmed in its response papers [RFF] is absolutely respectful of the automatic stay and will take no action which violates its provisions. *Accordingly*,

[16]Paragraph 2 provided that RFF may take collection action against the Debtor's parents based on the State Court Judgment subject to certain procedures designed to determine whether recoveries "realized from such actions" were property of the Debtor's estate and, if so, ensure that they were paid to the estate. RFF Ex. A.

point 1 below [Paragraph 1 of Kessler's email] is unnecessary." RFF Ex. B (emphasis added). In other words, contrary to Levinson's testimony, RFF insisted that the matter should be resolved without an agreement that RFF would refrain from using the State Court Judgment in a way that would have an adverse impact on property of the Debtor's estate.

Kessler responded by stating that he read Levinson's email to mean that the State Court Judgment "will not be used in any way to have an offensive or defensive preclusive effect (i.e. collateral estoppel or res judicata) on the Debtor or the Debtor's estate either in the bankruptcy proceeding, any related adversary proceeding, or in any other proceeding." RFF Ex. C. It is unclear why Kessler would have been so sanguine. Indeed, demonstrating how misplaced any such optimism was, Levinson tersely replied with an invitation to enter into an agreement providing merely that RFF had not violated the stay and would not do so in the future (the "No Foul Agreement"):

> Our position remains that we have not violated the stay in any respect, that we will not of course do so in the future and that we would have so stipulated since day one, without need of your motion. If you want to draft up something for my review stating exactly that I'll look at it but know we view this entire matter as frivolous and reserve our rights.

RFF Ex. D. In proposing the No Foul Agreement, RFF once again took the position that it should not have to agree to Paragraph 1 of Kessler's November 11, 2015 email.[17]

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[17]The Debtor asked RFF during the discovery leading up to the Liability Hearing to "[a]dmit that [it] will not stipulate that the judgment [it] seek[s] in the [State Court] will not be used by RFF or any related entity in any way to have a preclusive effect on the Debtor or [his bankruptcy estate]." Debtor Ex. 17 at 7. In response, RFF disclaimed knowledge of what the Debtor meant by preclusive effect and then repeated the No Foul Agreement:

> Debtor has not articulated and [RFF] would be speculating as to what Debtor means by "preclusive effect." [RFF] admits that it will

Several days later, the Debtor proposed an agreed order incorporating the terms set forth in Kessler's November 11 email. RFF Ex. F-2. On behalf of RFF, Levinson declined to enter into the agreed order, saying it included "the same terms . . . we have previously rejected twice." RFF Ex. G-1. Levinson then sent Kessler a competing agreed order. To resolve the matter on RFF's terms, the Debtor would have to agree—and the Court would be asked to order—that "[t]he actions of [RFF] through the date of this order in and with respect to the arbitration . . . and the confirmation of the [A]rbitration [A]ward . . . did not violate section 362." RFF Ex. G-2. It is noteworthy that, although RFF was asking the Debtor to agree that it had not violated the automatic stay, the Debtor was not requesting RFF to admit that it had done so; rather, the Debtor was asking RFF to agree only that it would not take certain specified actions in the future. By contrast, in exchange for the Debtor's agreement that it had not violated the stay, RFF was willing to agree only to "take no action that would constitute a willful violation of section 362 of the Bankruptcy Code" going forward. *Id.* This was merely a reiteration of the No Foul Agreement, which effectively would have left open the question of whether RFF would be violating the automatic stay if it attempted to use the State Court Judgment to establish that it had a security interest in the salary payments under the Player Contract or to contest the Debtor's claims against RFF.

b. RFF's Provisos

All of this occurred before the Liability Hearing was held on December 9, 2015. In a further attempt to resolve this matter shortly after the Liability Hearing, DeMarco resent Levinson the

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> stipulate and agree that [RFF] has not willfully violated section 362 of the Bankruptcy Code and that [RFF] will not willfully violate section 362 of the Bankruptcy Code.

Id. at 8.

proposed order that Kessler had emailed him before the hearing. Tr. II at 54. The agreed order that DeMarco and Kessler sent Levinson was designed to eliminate the threat that the Arbitration Award and the State Court Judgment posed to the Debtor and property of his bankruptcy estate, including the Debtor's salary payments under the Player Contract and his claims against RFF. *See* Tr. I at 159 (testimony by DeMarco that the agreed order would have "unequivocally removed the risk to the Debtor, the estate and the creditors"). In response, on December 21, 2015, Levinson returned the "proposed agreed order marked to show [RFF's] proposed changes." RFF Ex. H-1; *see also* Tr. II at 54. In its markup, RFF requested several exceptions to the unqualified language of the agreed order—exceptions that would have permitted RFF to seek to use the Arbitration Award and the State Court Judgment in order to assert a security interest in the salary payments under the Player Contract and to contest the Debtor's claims against RFF.

i. The Co-Makers Proviso

The first two paragraphs of the agreed order proposed by the Debtor, with RFF's additions underlined, read as follows:

> Therefore, it is hereby **ORDERED, ADJUDGED, AND DECREED** that any judgment or award obtained by RFF as a result of the arbitration which is the subject of the [Enforcement] Motion . . . shall not be binding upon Debtor or his estate for any purpose, whether in this bankruptcy proceeding, any related adversary proceeding, or in any concurrent or subsequent legal proceeding, excepting in all such cases with respect to the Debtor's parents, John Joseph Louis Johnson II and Kristina Johnson, and Team Johnson Investments, Inc. (collectively, the "Co-Makers"), and the rights of RFF with respect to the Co-Makers.
>
> It is further **ORDERED, ADJUDGED, AND DECREED** that the Judgments shall not be used by any party, including RFF, for purposes of collateral estoppel or res judicata against Debtor or his estate in any legal proceeding including this bankruptcy proceeding, any related adversary proceeding, or in any concurrent or subsequent

> legal proceeding, excepting in all cases with respect to the Co-Makers and the rights of RFF with respect to the Co-Makers.

Debtor Ex. 52; RFF Ex. H-2. The language underlined in the two paragraphs set forth above will be referred to as the "Co-Makers Proviso."

Questioned about the Co-Makers Proviso, Parcells conceded that in his experience, as counsel for the Debtor put it, "when you say, I agree to do X, and then you see the word after that, comma, except, that means that it's going to be something different or something more is going to be allowed than what comes before the word 'except.'" Tr. I at 129–30. And Parcells was unable to provide any explanation as to why RFF inserted the Co-Makers Proviso into the agreed order proposed by the Debtor, saying only that Levinson recommended it and that Parcells did not know why and did not ask.[18] *Id.* at 127–32.

Levinson provided this explanation for the Co-Makers Proviso:

> [W]e were looking to preserve what had been done in the arbitration with respect to the parents and the Ferrari. And our concern was that there was an effort still by the Debtor, through the use of this broad current or subsequent legal proceeding, to somehow contract that. So we left their language unchanged as proposed, but we did this carve-out with respect to our judgment against the co-makers, and the rights with respect to those co-makers. Again, we were concerned that they were trying through subterfuge to protect the parents.

Tr. II at 19; *see also id.* at 25 ("[W]e wanted to make sure that nothing contained in this order would affect the validity of our judgment as against the parents[.]"). But then, on cross-examination,

[18]Parcells says he did not inquire because Levinson was Ohio bankruptcy counsel, Tr. I at 123, 131–32, and because "[w]ith bankruptcy counsel, there are specific intricacies of this area of the law and things that take place in these bankruptcy courts that I don't know about, and specific terms, phrases and things have to be included," *id.* at 130. But the interpretation of the Co-Makers Proviso and the original language proposed by the Debtor is simply a matter of construing the words used. There is nothing special about bankruptcy law that would bear on the effect of the original provision proposed by the Debtor or the Co-Makers Proviso requested by RFF.

Levinson was unable to explain why the Co-Makers Proviso was needed to accomplish RFF's purported goal of preserving RFF's rights against the Debtor's parents:

> Q How does [the provision originally proposed by the Debtor] diminish in . . . any way RFF's rights against the parents?
>
> A I didn't know at that time, honestly.
>
> Q Do you know today? Can you tell me—can you give me any possible legal explanation of how there could be—of how that could impact the Debtor's parents?
>
> A No, I can't.

Id. at 64.

In short, Levinson testified that the purpose of the Co-Makers Proviso was "to preserve what had been done in the arbitration with respect to the parents and the Ferrari," but when he was asked to provide an explanation of how the language originally proposed by the Debtor would have affected RFF's rights against the Debtor's parents or as to the Ferrari, he could not do so. *Id.* at 19, 64. And Levinson responded in a manner similar to that of Parcells when counsel for the Debtor asked him: "In any normal situation of [the] English language, when you have a statement that something will not be used against the Debtor or his estate, except in such cases as X, it can be used against the Debtor or his estate in cases of X, right?" *Id.* at 60–61. The only response Levinson could muster was: "I understand what [you're] saying and I see how it could be read that way. I'm saying that that was not my intent and my hope was to continue the dialogue that existed at the time up until then." *Id.* at 61.

At bottom, all Levinson had to offer was his representation that he did not intend for the State Court Judgment to be given preclusive effect against the Debtor or his estate. Contrary to this

representation, RFF was asking the Debtor to enter into an order that, using the language of the Co-Makers Proviso, would in effect have provided that:

> (1) the State Court Judgment shall be binding upon the Debtor or his estate for any purpose, whether in this bankruptcy proceeding, any related adversary proceeding, or in any concurrent or subsequent legal proceeding, with respect to the Debtor's parents and TJI (collectively, the "Co-Makers"), and the rights of RFF with respect to the Co-Makers; and
>
> (2) the State Court Judgment may be used by any party, including RFF, for purposes of collateral estoppel or res judicata against the Debtor or his estate in any legal proceeding including this bankruptcy proceeding, any related adversary proceeding, or in any concurrent or subsequent legal proceeding, with respect to the Co-Makers and the rights of RFF with respect to the Co-Makers.

In other words, RFF was asking the Debtor to agree that the State Court Judgment could be given preclusive effect against him and his bankruptcy estate "with respect to" his parents and TJI. This is a proviso the Debtor could not agree to in light of his fraud-based claims against RFF and given that, as discussed above, "[i]t is difficult to see how the Debtor could show that RFF was guilty of fraud if, as the Arbitration Award finds, it was RFF that had been defrauded by the [Debtor's parents] and TJI." *Johnson I*, 548 B.R. at 794.

ii. The Reservation of Rights Proviso

RFF also requested an addition to another paragraph of the Debtor's proposed agreed order, as reflected in the text underlined below:

> It is further **ORDERED, ADJUDGED, and DECREED** that neither RFF nor any other party shall use the Judgments in any way which has an adverse impact upon any property of Debtor or of the Debtor's estate, other than in accordance with the rights of RFF as determined by the Bankruptcy Court or as established in this Case.

Debtor Ex. 52; RFF Ex. H-2. As the text that is *not* underlined shows, the Debtor proposed that RFF agree to a provision prohibiting it from using the State Court Judgment "in any way which has an adverse impact upon any property of Debtor or of the Debtor's estate." RFF's proposed exception to that prohibition—the language underlined above—will be referred to as the "Reservation of Rights Proviso." Levinson provided the following explanation for the Reservation of Rights Proviso, stating that RFF intended it:

> to preserve this Court's power, which it inherently has, but nonetheless make it express, that the Court could enter an order after this order determining that, for example, RFF had a secured claim with respect to the Ferrari and, therefore, it had its interest senior to the Debtor. I was not ignorant of the fact that there were claims of the Debtor against his parents on account of what happened.
>
> But we were a secured creditor with respect to that Ferrari. And in light of the procedure which the Debtor was proposing to try and adjudicate rights to proceeds, we wanted to make sure that our secured position was respected, so that was part of the overall thinking that went into this order. *We were going to be a competing creditor with the estate possibly as to that vehicle*.

Tr. II at 33 (emphasis added). That is, Levinson testified that RFF requested the Reservation of Rights Proviso to preserve the Court's authority to order that the Ferrari was its property, not an asset of the Debtor's bankruptcy estate. But the Debtor was not listed on the certificate of title for the Ferrari, as a copy of the title attached to a motion filed by RFF showed. Doc. 107 Ex D. The Debtor had even expressly disclaimed any interest in the Ferrari during the Liability Hearing when Kessler stated: "We have no problem with [RFF] taking the Ferrari. I mean let me be very clear. We have no problem with it. We have no claim to it. It's [RFF's]." Doc. 479 at 81. Indeed, RFF conceded that the Debtor—and therefore the Debtor's bankruptcy estate—"has specifically and expressly disavowed any interest whatsoever" in the Ferrari. RFF's Br. at 14. For these reasons,

Levinson must have known that there was no reason why RFF needed this Court to rule that it had an interest in the Ferrari. Thus, the purported desire to preserve this Court's authority to do so provided no basis to add the Reservation of Rights Proviso to the agreed order, meaning that the reason given by Levinson for inserting this proviso into the agreed order was pretextual.

Counsel for the Debtor (Steven Goldfarb) provided the only other explanation anyone has offered for RFF's requesting the Reservation of Rights Proviso. He did so when he suggested during Parcells' deposition that the proviso could be used to give the Arbitration Award and the State Court Judgment preclusive effect:

> [I]f the bankruptcy court, based upon either the court's own decision or determination by a court of appeals or an appellate court, found that there was some preclusive effect as to the [A]rbitration [A]ward that was reduced to judgment, this proviso would allow it to be used to have an adverse impact upon the Debtor or Debtor's estate[.]

Parcells Dep. at 85–86. After Parcells took the position that "[t]here's no conceivable way an award rendered against the parents and Team Johnson [Investments] could ever have a preclusive effect on the Debtor Jack Johnson, III," counsel for the Debtor asked him "what else could the . . . added language mean?" *Id.* at 86. Parcells responded: "I don't know. I don't know." *Id.* Finding RFF's explanation for the Reservation of Rights Proviso to be pretextual, the Court concludes that the only conceivable reason for including it was to preserve what RFF saw as its right to assert a security interest in the salary payments under the Player Contract and to contest the Debtor's claims against RFF through the use of the State Court Judgment if this Court or an appellate court concluded that the judgment could be given preclusive effect.

4. The Testimony RFF Offered in Support of Its Conduct Is Not Credible.

In the end, RFF is left only with the bare assertions of its witnesses that it never intended to use the State Court Judgment against the Debtor or his bankruptcy estate. But there are a number of reasons not to credit the testimony of RFF's witnesses.

First of all, during the Damages Hearing, Levinson lied under oath while Goldfarb was cross-examining him. Goldfarb had approached Levinson to provide him a copy of an exhibit and, after returning to the podium, asked Levinson: "[W]hen I brought that exhibit over, there was one document that was folded up there. Can you identify what that exhibit is?" Levinson answered: "52, H-2." Tr. II at 42–43. But when Goldfarb, with the Court's permission, viewed the document to which he had referred, Goldfarb discovered that it was not Debtor Exhibit 52 or RFF Exhibit H-2, as Levinson had said—or, for that matter, any exhibit at all. Instead it was notes that Levinson had brought to the witness stand without informing opposing counsel or the Court. The following exchange ensued:

> MR. GOLDFARB: If you don't mind my asking, there seems to be notes. I'd like to review the notes that are apparently up here. I didn't realize the witness was looking at notes during his testimony. So if I could—
>
> THE COURT: You may. Nor did I.
>
> BY MR. GOLDFARB:
>
> Q Mr. Levinson, am I to understand that in response to Mr. Parcells' questions, that you had notes that you read from as your answers? They were pre-prepared before you took the stand?
>
> A No. Those notes relate to questions that were going to be about explaining why my advice to RFF was—what my advice to them was with respect to that initial demand letter that we cease and desist. They were legal points that were made that I wanted to make sure that I remembered to report to the Court.

> Q Did you think it was appropriate to bring notes up to the witness stand and have them in front of you?
>
> A I didn't know that it was inappropriate.

Id. at 43–44.

According to Levinson, he was planning to use the notes he brought to the witness stand so that he would not forget to make certain points during his testimony. To the extent this would ever be proper, the Court cannot decide whether it might have been so here: It has not seen the notes and, according to Levinson, the notes related to testimony about his purported advice with respect to the cease and desist letter—testimony that he ultimately did not provide.[19] But it is clear that Levinson lied when he testified that the document that was "folded up" was Debtor Exhibit 52 or RFF Exhibit H-2 when in fact it was actually notes he had brought to the witness stand. For if Levinson did not at least suspect that it might be inappropriate to bring the notes to the stand without informing opposing counsel, why did he falsely testify that the notes were an exhibit?

Levinson's misrepresentation relating to his notes provides one of several reasons to question his credibility and thus to discredit his testimony regarding RFF's intent. In addition, there is Levinson's attempt during the July 31, 2017 hearing (as described in Section III.A.2 above) to ambush the Debtor's attorneys by agreeing that they could ask RFF's witnesses questions as if on direct examination while at the same time intending to lie in wait and reserve the right to later argue

[19]Because RFF did not identify Levinson as a potential witness during the status conference at which the Court ordered the depositions of all witnesses that might be called at trial, the Court permitted RFF to call Levinson only to rebut DeMarco's testimony that the Co-Makers Proviso and the Reservation of Rights Proviso could allow RFF to use the State Court Judgment against the Debtor and his estate under certain circumstances. Tr. II at 11–13. And because it would not have rebutted DeMarco's testimony as to the effect of those provisos, Levinson's testimony regarding his advice to RFF with respect to the cease and desist letter was the subject of an objection by counsel for the Debtor that the Court sustained. *Id.* at 38–41.

that the Debtor could not use the testimony elicited because the questions went beyond those that would have been permissible on cross-examination.[20]

Misrepresentations Levinson made in a brief he filed with the BAP on behalf of RFF before its appeal of *Johnson I* was dismissed also call his credibility into question.[21] In that brief, RFF argued that it continued the Arbitration Action "to try to protect the 2008 Ferrari collateral provided by the Debtor's parents," but that "[d]ue to the Contested Matter brought by the Debtor, the Opinion of the Bankruptcy Court, and the actions of the Debtor's parents, this has been rendered ineffective" because "[t]he Debtor's parents have now reported that the engine has been 'blown' on the 2008 Ferrari and it is worthless." *In re Johnson*, No. 16-8016, Doc. 20 at 9. Yet if protecting the Ferrari was ineffective, it was not because of the Enforcement Motion or *Johnson I*, as Levinson most certainly knew at the time he filed the brief with the BAP. After all, the testimony of the Debtor's father at his deposition—which Levinson attended well before he filed RFF's brief with the BAP—was that the Ferrari's motor was damaged about *nine months before the Enforcement Motion was even filed*. *See In re Johnson*, 546 B.R. 83, 141 n.59 (Bankr. S.D. Ohio 2016); Doc. 432 at 16 n.17.

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[20]Federal Rule of Evidence 608 provides in part that "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Fed. R. Evid. 608(b). But this rule does not apply to Levinson's conduct during the July 31, 2017 hearing in this matter, because it "limits only the use of evidence 'designed to show that the witness has done things, *unrelated to the suit being tried*, that make him more or less believable per se.'" *Learmonth v. Sears, Roebuck & Co.*, 631 F.3d 724, 734 (5th Cir. 2011) (quoting *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984)).

[21]As with Levinson's conduct during the July 31 hearing, Levinson's misrepresentations to the BAP also may be used to assess his credibility because they are directly related to the matter being tried.

Another reason to doubt the truthfulness of Levinson's testimony is his statement that the Debtor's initial proposal to resolve the Enforcement Motion (as set forth in Paragraph 1 of Kessler's email) was not objectionable to RFF even though it was Levinson himself who had twice rejected it on behalf of RFF. This also calls Parcells' credibility into question, because he elicited Levinson's testimony knowing full well that it was not accurate. In an apparent attempt to support his contention that he completely relied on Levinson's advice in deciding whether procuring the Arbitration Award and the State Court Judgment would violate the automatic stay and whether the Co-Makers Proviso and the Reservation of Rights Proviso should be inserted into the agreed order proposed by the Debtor, Tr. I at 33–34, 127–32, Parcells testified that "[w]henever RFF is in a bankruptcy matter, we have bankruptcy counsel, who is the primary counsel, and I assist," *id.* at 87. This testimony was not entirely true though, which casts further doubt on his credibility. Parcells was the sole counsel representing RFF in an adversary proceeding in the United States Bankruptcy Court for the Central District of California in which he signed a stipulation providing that a $3.75 million debt owed to RFF was nondischargeable. *See RFF Family P'Ship LP v. Virgil*, Adv. Pro. No. 8:08-ap-1300, Doc. No. 132 (Bankr. C.D. Cal. June 24, 2014). RFF's co-counsel had withdrawn from the representation more than two years earlier, *id.* Doc. 85, leaving Parcells as RFF's only attorney at the time he signed the stipulation.[22]

Furthermore, the testimony of Freedman—RFF's only other witness—was completely lacking in credibility. According to Freedman, during the period from 2014 to the date of the Damages Hearing, he met with Parcells two or three times a week to discuss matters in which

[22]The Debtor and RFF have stipulated that RFF was involved in this adversary proceeding. Doc. 888 at 4.

Parcells was representing RFF. Tr. II at 71. Given this, it is highly unlikely that Freedman would have no memory of any advice he received during those meetings relating to RFF's potential recovery on a multimillion-dollar asset such as the Note. Yet during his deposition Freedman testified repeatedly that he did not recall receiving *any* advice as to whether RFF should seek confirmation of the Arbitration Award in light of the Debtor's position that doing so would violate the automatic stay. Freedman Dep. at 97–98, 101, 153.[23] The only reasonable conclusion that can be drawn from this is that Freedman either did not receive any advice or does not wish to disclose the advice he did receive.[24]

It bears noting that Freedman did not consistently exhibit a poor recollection of his conversations with Parcells and the advice he received. But rather than rehabilitating his credibility, Freedman's selective recall serves only to further discredit his testimony. For it was only after a recess during his deposition that Freedman conveniently remembered receiving advice from Parcells and that he "knew our main objective was to get the car [s]o I think [Parcells] said this would be necessary for us to get the car." *Id.* at 108. Freedman testified similarly during the Damages

[23]Parcells suggested that Freedman "doesn't remember specifically all these things" because of his age (85 years old). Tr. I at 147. During the Damages Hearing, however, Freedman had vivid recall when it suited him. For example, he remembered having received a text from the Debtor giving his mother "authorization to act as his agent" in connection with the RFF loan. *Id.* at 70. Freedman would have received this text before the Note was issued in January 2014—that is, well before he received the advice that Parcells says he gave Freedman but that Freedman testified he cannot remember. Having observed Freedman on the witness stand, the Court is not persuaded by Parcells' explanation for Freedman's professed lack of memory.

[24]Freedman could not rely on the attorney-client privilege as a basis to decline to disclose the content of any such advice, because RFF asserted the advice-of-counsel defense to the imposition of punitive damages, thereby waiving the attorney-client privilege "as to the advice given with respect to the specific allegations or findings that there was a violation of the stay." Freedman Dep. at 11.

Hearing, Tr. II at 74, but only after first hearing Parcells and Levinson testify that they had advised him to seek confirmation of the Arbitration Award to obtain possession of the Ferrari despite the filing of the Enforcement Motion, *id.* at 73. And Freedman offered his testimony only after Parcells essentially coached him with leading questions:

> Q You heard the testimony of myself and Mr. Levinson concerning our recommendations and particularly Mr. Levinson's recommendations to RFF Family Partnership about proceeding to obtain a judgment on the arbitration award against the parents in light of the Debtor's objections. Do you remember hearing that testimony?
>
> A Yes.
>
> Q Did that refresh your recollection as to your and my discussions with Mr. Levinson and his recommendations as to how RFF Family Partnership should proceed?
>
> A Yes.
>
> Q Did you follow those recommendations?
>
> A Yes.

Id. at 73. For these reasons, Freedman's testimony during the Damages Hearing that RFF pursued the Arbitration Award and the State Court Judgment in order to protect the Ferrari is simply not credible.

Not only is the testimony of RFF's witnesses suspect for reasons particular to each individual, but their collective credibility also suffers from a common defect: the lack of a plausible innocent explanation for RFF's conduct. The story Freedman, Parcells and Levinson told—that RFF procured the Arbitration Award to obtain a judgment against the Debtor's parents and to protect RFF's interest in the Ferrari—does not hold up under scrutiny. They never offered any legitimate reason why RFF caused findings to the effect that it had a perfected security interest in the salary

payments under the Player Contract to appear in the Arbitration Award if indeed all RFF wanted was a judgment against the parents and possession of the Ferrari. Moreover, there was no reason to include a finding of fraud against TJI, an entity that had no interest in the Ferrari, other than to later argue that it was the Debtor (as the individual who signed the Note on behalf of TJI) who defrauded RFF, not the other way around. Further, the witnesses offered no credible explanation for why RFF rejected the Debtor's offer to settle this matter for nothing more than an agreed order providing that RFF could not use the Arbitration Award and the State Court Judgment against the Debtor and property of his estate. Nor were they able to explain how the Co-Makers Proviso and the Reservation of Rights Proviso that RFF sought to insert into the agreed order would have served any purpose other than permitting RFF to attempt to do just that. All of this casts grave doubt upon the overall credibility of RFF's witnesses.

For all these reasons, the testimony of Freedman, Parcells and Levinson concerning RFF's motivation for continuing the Arbitration Action and obtaining the State Court Judgment does not ring true. In sum, after hearing RFF's witnesses, observing their demeanor, considering their testimony and assessing their credibility—and having reviewed the other evidence, including the documentary and testimonial evidence relating to the No Foul Agreement, the Co-Makers Proviso and the Reservation of Rights Proviso—the Court concludes that RFF intentionally violated the automatic stay.

IV. Legal Analysis

A. RFF's Intentional Violation of the Stay Supports an Award of Punitive Damages.

1. The Four Grounds for Concluding That RFF Intentionally Violated the Stay

Under the Bankruptcy Code, an individual harmed by a willful violation of the automatic stay[25] may recover punitive damages "in appropriate circumstances." 11 U.S.C. § 362(k)(1). As RFF concedes, RFF's Br. at 6, appropriate circumstances include those in which the creditor violated the stay with reckless disregard for the law or rights of others. *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1325 (11th Cir. 2015); *see also In re Mocella*, 552 B.R. 706, 732 (Bankr. N.D. Ohio 2016) (holding that punitive damages are appropriate when the creditor "acted with actual knowledge that [it] was violating the federally protected right or with reckless disregard of whether [it] was doing so" (quoting *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 903 (Bankr. E.D. Pa. 1987))); *In re White*, 410 B.R. 322, 327 (Bankr. M.D. Fla. 2009); *In re Bivens*, 324 B.R. 39, 43 (Bankr. N.D. Ohio 2004).

Given that recklessness supports an award of punitive damages, "an intentional and deliberate automatic stay violation [also, of course,] weighs in favor of imposing punitive damages." *Credit Nation Lending Servs., LLC v. Nettles*, 489 B.R. 239, 250 (N.D. Ala. 2013). That is, "[w]hen a creditor knowingly and intentionally violates [the] automatic stay and the debtor's fundamental

[25]As noted above, a violation of the stay is willful if the creditor, with knowledge of the debtor's bankruptcy, commits a deliberate act that violates the automatic stay—even if the creditor did not intend to violate the stay. *E.g.*, *Lofton v. Carolina Fin., LLC (In re Lofton)*, 385 B.R. 133, 140 (Bankr. E.D.N.C. 2008) ("[W]illfulness does not refer to the intent to violate the automatic stay, but the intent to commit the act which violates the automatic stay.").

rights thereunder and refuses to mitigate the effects of its unlawful conduct, 'appropriate circumstances' exist for the imposition of punitive damages pursuant to section 362(k)." *Id.* at 251. The Debtor has the burden of proving that punitive damages are appropriate. *In re Baer*, No. 11-8062, 2012 WL 2368698, at *10 (B.A.P. 6th Cir. June 22, 2012).

Punitive damages are warranted here based on the Court's finding that RFF intended to violate the automatic stay. There are four reasons supporting the conclusion that RFF's stay violation was intentional. Tracking the order of the Court's findings of fact, those reasons are as follows:

First, there was absolutely no reason for RFF to obtain findings to the effect that it had a perfected security interest in the salary payments under the Player Contract other than to attempt to bolster its questionable claim of secured status. Further, there was no reason RFF needed an Arbitration Award containing findings that TJI (on whose behalf the Debtor signed the Note) defrauded RFF other than to defeat the Debtor's fraud-based claims against RFF. The inclusion of these findings did nothing to achieve what RFF claims it sought by obtaining the Arbitration Award—relief against the Debtor's parents and protection of its interest in the Ferrari.

Second, RFF obtained the State Court Judgment confirming the Arbitration Award in all respects "after being warned by [the Debtor's] counsel that [it] was violating the automatic stay." *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 228 (9th Cir. 1989). That warning first came in the form of a cease and desist letter and a follow-up email. When that was ineffective, the Debtor filed the Enforcement Motion, which likewise failed to deter RFF.

Third, in response to the Debtor's reasonable offer to settle this matter, RFF refused to enter into an agreed order that would have prevented it from using the Arbitration Award and the State

Court Judgment against the Debtor or property of his bankruptcy estate. RFF first countered the Debtor's settlement proposal with the No Foul Agreement, insisting that the Debtor resolve the matter with a Court-approved agreement under which (1) the Debtor would agree that RFF had not violated the automatic stay by obtaining the Arbitration Award and the State Court Judgment and (2) RFF would agree not to violate the automatic stay in the future. The Debtor understandably rejected RFF's multiple invitations to enter into the No Foul Agreement, because such an agreement would have left open the question of whether RFF would be violating the automatic stay if it attempted to seek preclusive effect for the State Court Judgment. RFF then attempted to insert two exceptions—the Co-Makers Proviso and the Reservation of Rights Proviso—into the Debtor's proposed agreed order. RFF's witnesses had no reasonable explanation for why it requested these exceptions, and there would have been no reason for RFF to add them if it truly had no intention of ever asserting that the State Court Judgment could be used against the Debtor or property of his bankruptcy estate.

In short, RFF rejected a settlement proposed by the Debtor under which it would have paid nothing in exchange for an agreed order prohibiting it from using the State Court Judgment against the Debtor or property of his estate. In lieu of that settlement, RFF proposed one that contemplated that the State Court Judgment could be given preclusive effect against the Debtor and his estate under certain circumstances. RFF's attorneys ask the Court to believe that this is not what it intended. But the words its counsel used when negotiating with the Debtor, not RFF's wholly implausible after-the-fact explanations, provide the best evidence of its intent. The Court therefore concludes that RFF intended to use the Co-Makers Proviso and the Reservation of Rights Proviso to preserve its ability to assert that its claim against the Debtor was secured by the salary payments

under the Player Contract and to use those provisos to defeat the Debtor's claims against RFF if this Court or another court had permitted it to do so.

Fourth, the lack of credibility of RFF's witnesses leads the Court to give no credence to their protestations that the efforts to procure the Arbitration Award and the State Court Judgment had nothing to do with defeating the Debtor's claims against it or asserting a security interest in the salary payments under the Player Contract. Because parties or witnesses rarely admit that they intended to engage in misconduct, intent "may be inferred from circumstantial evidence," *LaRocco v. Smithers (In re Smithers)*, No. 04-2024, 2005 WL 4030095, at *3 (Bankr. S.D. Ohio July 13, 2005), and the evidence here is inconsistent with the assertions of RFF's representatives that its primary purpose in seeking the Arbitration Award and the State Court Judgment was to protect its interest in the Ferrari.

2. RFF's Counterarguments Are Meritless.

Each of the arguments RFF makes in support of its contention that it had no intent to use the Arbitration Award to assert a security interest in the salary payments under the Player Contract or to defeat the Debtor's claims against it is utterly unpersuasive. During the Liability Hearing, Levinson argued that the statements in the Arbitration Award to the effect that RFF had a security interest in the salary payments under the Player Contract were unproblematic because they were findings of fact, not holdings. Because findings in a confirmed arbitration award are binding, the Court rejected this argument. *Johnson I*, 548 B.R. at 783. Undaunted, Parcells took a different tack during the Damages Hearing, arguing that the statements were not even findings, but instead constituted the arbitrator's nonbinding "recitation of the evidence." Tr. I at 31. RFF provided no authority for this position, and it is contrary to the only relevant case law the Court has found. *See*

Lehigh Valley R. Co. v. Am. Hay Co., 219 F. 539, 540 (2d Cir. 1914) ("No formal marked and numbered set of findings is required. Findings are findings just as well when imbedded in the colloquial statements of an opinion.").

RFF next contends that its lack of intent to violate the stay is evidenced by the fact that it did not cite the State Court Judgment on several occasions even though it would have been in its interest to do so. But when the Debtor's counsel pointed out that each of those instances occurred after this Court had already voided the State Court Judgment—meaning that it could not be given preclusive effect at that point—Parcells conceded that this was the case. Tr. I at 136–37.

According to RFF, it obtained the State Court Judgment believing that it could never have been given preclusive effect against the Debtor or his bankruptcy estate. *Id.* at 113–14; *see also* RFF's Br. at 17–18. But the Co-Makers Proviso and the Reservation of Rights Proviso are entirely inconsistent with RFF's purported belief. By inserting those two provisos, RFF was proposing that the State Court Judgment would be binding on the Debtor and property of the estate under certain circumstances. Quite simply, if RFF's representatives had determined that the State Court Judgment could not possibly be given preclusive effect against the Debtor or his estate, then there would have been no reason to insert exceptions into the agreed order proposed by the Debtor under which the State Court Judgment could have been given preclusive effect under certain circumstances.

Furthermore, RFF's contention that a judgment against an agent (here, the Debtor's parents, or at least his mother)[26] could not possibly be given preclusive effect against the principal (here, the Debtor) under California law is not well taken. While it is true that a judgment against an agent is

[26]"[I]n April 2012, the Debtor signed a power of attorney granting extensive authority over his financial affairs to his mother." *In re Johnson*, 546 B.R. 83, 100 (Bankr. S.D. Ohio 2016).

not *necessarily* binding on the principal,[27] the Supreme Court of California has held that a judgment against an agent can be binding on the principal under certain circumstances:

> The circumstances justifying such a holding would seem to be present when notice comes to the agent while he is acting for his principal in the very transaction in controversy. The general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal. It rests on the assumption that the agent will communicate to his principal all information acquired in the course of his agency, and when the knowledge of the agent is ascertained the constructive notice to the principal is conclusive.

Shamlian v. Wells, 242 P. 483, 484 (Cal. 1925) (citation omitted).[28]

It is not difficult to see how RFF might have tried to use the principles set forth in *Shamlian* to argue that the State Court Judgment would be entitled to preclusive effect. During the Damages Hearing, counsel for the Debtor noted RFF's allegation that the Debtor's mother, Kristina Johnson, acted as his agent during the negotiations of the RFF loan documents. Tr. I at 114–15. And Parcells conceded that RFF has alleged in its nondischargeability adversary proceeding that the Debtor's mother acted as his agent. *Id.* at 116. In addition, answering a question by the Debtor's attorney, Freedman testified that he received an email or text from the Debtor "giving her authorization to act as his agent." *Id.* at 70. Counsel for the Debtor then showed Freedman RFF's motion for leave to amend its complaint in the nondischargeability adversary proceeding,[29] in which RFF stated that the

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[27]By way of example, "if a plaintiff sues [an agent] for injuries caused by the [agent's] alleged negligence," a judgment against the agent typically would not be binding on the principal if the principal was not made a party to the lawsuit. *Bernhard v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 122 P.2d 892, 895 (Cal. 1942).

[28]The court stated that "[t]he rule would seem to be especially applicable when, as here, the principal is undisclosed," *Shamlian*, 242 P. at 484, but it did not limit the application of the rule to circumstances involving undisclosed principals.

[29]The Court granted the motion to amend. Adv. Pro. No. 15-2117, Doc. 37.

Debtor was indebted to it "through a series of borrowings ultimately memorialized in various loan documents negotiated by the Debtor, including through his agent[.]" *Id.* at 71. When Freedman was asked whom RFF was referring to, Parcells attempted to keep him from answering by asserting a relevance objection and an objection based on the work product doctrine. *Id.* at 71–75. Both objections were overruled, and Freedman confirmed that "agent" referred to the Debtor's mother. *Id.* at 73–75.

RFF's witnesses pointed out that there were frequent communications between the Debtor's attorneys and his parents. *Id.* at 22–23, 141–42. They also repeatedly cited the payments the Debtor made to or on behalf of his parents. *Id.* at 23, 138, 141–42; Tr. II at 29–31. RFF likewise took the position that the Debtor and his attorneys were trying to protect the parents. Tr. II at 17–19, 28–29. One of RFF's attorneys stated that, as late as the negotiations over the agreed order proposed by the Debtor, RFF's "concern was that giving . . . the Debtor prior notice of what it was that we were going to do with respect to collection, was tantamount to giving the Debtor's parents prior notice of what it was that we were going to do[.]" *Id.* at 18. So by inserting the Co-Makers Proviso and the Reservation of Rights Proviso into the agreed order proposed by the Debtor, RFF was preserving its ability to argue that providing notice to the Debtor's mother was tantamount to giving notice to him. This calls to mind the *Shamlian* court's statement that "[t]he general rule is well settled that the knowledge of the agent in the course of his agency is the knowledge of the principal" for purposes of preclusion. *Shamlian*, 242 P. at 484.[30]

[30]As RFF contends, "[p]ersons are not in privity with each other under California law based on their business partnership or cosigner status." RFF's Br. at 17. But this is beside the point, because neither the Court nor the Debtor has identified partnership or cosigner status as a basis for potentially giving the State Court Judgment preclusive effect against the Debtor or his estate.

To be clear, the Court is not saying that RFF would have been successful in using the State Court Judgment against the Debtor or his estate. But the Debtor could not assume that the threat of issue preclusion was nonexistent, and "an arbitration award or judgment may violate the automatic stay even if a court ultimately were to decide that it could not give its findings preclusive effect." *Johnson I*, 548 B.R. at 797. Before the State Court Judgment was voided, the Debtor could not "simply be a bystander . . . and risk potential prejudice," even if the arguments that RFF might have made in favor of giving the judgment preclusive effect ultimately would have been "unavailing." *Klarchek Family Tr. v. Costello (In re Klarchek)*, 508 B.R. 386, 397 (Bankr. N.D. Ill. 2014); *see also Johnson I*, 548 B.R. at 797 (citing cases supporting the proposition that "an arbitration award or judgment may violate the automatic stay even if a court ultimately were to decide that it could not give its findings preclusive effect").

In the end, these arguments are all unavailing: They do nothing to shake the Court's confidence in its conclusion that RFF's stay violation was both willful and intentional.

B. The Amount of Damages Recoverable by the Debtor

1. The Amount of Reasonable Attorneys' Fees and Expenses Incurred by the Debtor as the Result of RFF's Stay Violation

"Under the plain language of § 362(k), once a willful violation of the automatic stay is found, an award of actual damages is mandatory." *Johnson I*, 548 B.R. at 799. The term "*actual* damages" implies injury, and § 362(k) makes clear that injury includes "costs and attorneys' fees" incurred as a result of the stay violation. 11 U.S.C. § 362(k)(1).

Despite § 362(k)'s mandate that the Court award the Debtor his costs and attorneys' fees, RFF asserts that it should not be required to pay any fees and costs whatsoever. According to RFF, the Debtor will not be injured even if he is unable to recover attorneys' fees from RFF because all

of the funds he contributed from his salary and other property to pay attorneys' fees—funds that were deposited into "the Administrative Holdback (for pre-Effective Date fees) and the Effective Date Holdback (for post Effective Date fees)"—inevitably will be paid to the Debtor's creditors if they are not paid to Hahn Loeser.[31] RFF's Br. at 8. In other words, RFF's position is that there is no possibility that the Debtor could be harmed financially by its stay violation because he does not have a "reversionary interest in the funds" that the Plan contemplates will be used to pay attorneys' fees. *Id*. But RFF is flatly wrong on this point.

Under the Plan, any funds remaining in the Administrative Holdback and the Effective Date Holdback after the payment of attorneys' fees and certain other items become "Residual Holdback, Rebate and Retained Litigation Claim Proceeds," which in turn fund the "Creditor Trust" and the "Class 5A Escrow." Plan at 10, 20. And, as § 8.03 of the Plan makes clear:

> Once all claims to be paid out of the Creditor Trust and the Class 5A Escrow have been paid in full in accordance with the terms of the Plan, *any surplus shall be returned to Debtor* and Debtor shall have no further obligation to make any payments to or for the benefit of the Creditor Trust or the Class 5A Escrow.

Id. at 21 (emphasis added). In light of this provision, RFF's contention that the Debtor has no reversionary interest in the funds set aside to pay attorneys' fees simply disregards the plain language of the Plan. In short, RFF's argument that it should not be required to pay any of the Debtor's attorneys' fees is based on a mischaracterization of the Plan.

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[31]The effective date of the Plan occurred on December 8, 2016. Doc. 770 (notice of the effective date). By the Court's calculation, $155,427.50 of attorneys' fees were incurred prior to the effective date and therefore were included in Hahn Loeser's final award of compensation ($100,509.50 in proceedings before this Court and $54,918 in the appeal to the BAP), while $310,176.50 in fees and all of the expenses ($3,424.51) were incurred after the effective date.

RFF's contention that the Debtor has not been injured by its conduct also ignores the fact that debtors can be harmed by being forced to pay attorneys' fees using funds that otherwise would have been distributed to creditors. For instance, debtors with nondischargeable debt suffer financial injury if they must divert funds that could have been used to pay down the debt and instead use the funds to pay attorneys' fees. Every dollar that a creditor with a nondischargeable debt does not receive because it went to the debtor's attorney is a dollar that the debtor is going to remain liable for after exiting bankruptcy. This is not merely a hypothetical concern in this case, because RFF asserts that the Debtor owes it a nondischargeable debt of more than $1.7 million, plus interest accruing after the Petition Date. As a result of RFF's violation of the stay, the Debtor has incurred attorneys' fees that, if not paid by RFF, will be paid with dollars that could have been used in part to pay any allowed claim of RFF.

RFF went so far as to cite an overturned decision in support of its position that "as a matter of jurisprudence there is no cause to allow fees incurred in pursuing . . . damages." RFF's Br. at 11. In support of this position, RFF relied on *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 765 F.3d 1096 (9th Cir. 2014), and that decision's citation to *Sternberg v. Johnston*, 595 F.3d 937, 948 (9th Cir. 2010), for the proposition that "a damages action for a stay violation is akin to an ordinary damages action, for which attorney fees are not available under the American Rule." *Schwartz-Tallard*, 765 F.3d at 1100 (quoting *Sternberg*, 595 F.3d at 948). But following a rehearing en banc of the panel decision in *Schwartz-Tallard*, the Ninth Circuit overruled *Sternberg*, holding that "§ 362(k) is best read as authorizing an award of attorney's fees incurred in prosecuting an action for damages" for violations of the automatic stay. *Am.'s Servicing Co. v.*

Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015) (en banc). RFF's argument therefore bordered on—if not crossed the line into—a violation of Rule 11.[32]

Having rejected these untenable arguments, the Court next must determine the amount of attorneys' fees and expenses that the Debtor is entitled to recover. The fees and expenses the Debtor seeks are set forth in multiple exhibits. Exhibit A to the Debtor's Brief identifies $223,238.50 of fees incurred through August 2017 related to litigation in this Court, and Exhibit B identifies fees related to the BAP appeal in the amount of $54,918. The invoices for those amounts are provided in Debtor Exhibits 32 and 46. Exhibit 46 also includes an invoice for fees and expenses incurred during September 2017 in the respective amounts of $41,607.50 and $865.03, for a total of $42,472.53. And after the Damages Hearing, the Debtor filed a statement (Doc. 921) of attorneys' fees in the amount of $145,840 and expenses of $2,559.48, for a total of $148,399.48 incurred during the month of October 2017. Doc. 921 at 26. The aggregate amount the Debtor seeks to recover is $469,028.51, made up of $465,604 of fees and $3,424.51 of expenses.

The Debtor must show that these fees and expenses were incurred as a result of RFF's violation of the stay. *Cf. Ross v. Meyers*, 883 F.2d 486, 491 (6th Cir. 1989) ("A compensatory sanction [for contempt of court] must 'be based upon . . . actual losses sustained as a result of the contumacy.'" (quoting *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 810 (2d Cir. 1981))). The Court finds that all of the expenses for which the Debtor is seeking reimbursement resulted from RFF's stay violation. Likewise, a review of Hahn Loeser's invoices shows that, with

[32]On the first day of the Damages Hearing, counsel for the Debtor pointed out that *Sternberg* had been overruled by the Ninth Circuit's en banc decision in *Schwartz-Tallard*. Tr. I at 166–67. During his closing argument the next day, Levinson acknowledged this and apologized for RFF's reliance on the Ninth Circuit's panel decision. Tr. II at 105.

two exceptions, the fees were incurred because of RFF's violation of the stay. The exceptions, which appear to be the result of the inadvertent inclusion of time spent on other matters, were identified by Levinson as follows: "On March 3, 2017, Mr. DeMarco billed time regarding retrieving documents from the [Debtor's] storage units," and "on July 5 of '17, Ms. Beitel checked on the status of the motion to amend the complaint" in the nondischargeability adversary proceeding. Tr. II at 109. The fees for this time were $56.50 and $49, respectively, for a total of $105.50. Debtor's Br. Ex. A at 11, 15. That leaves $465,498.50 of fees to consider ($465,604 – $105.50).

In all but its first fee application (which would not have included any time related to RFF's violation of the stay), Hahn Loeser stated that it was "applying a voluntary, 10% reduction to cumulative fees incurred . . . [in part] to take into account any actual or potential inefficiencies attendant to representing clients in complex matters such as [the] Debtor's case." *E.g.*, Doc. 788 at 2. It is reasonable to assume that any such inefficiencies also would have been attendant to Hahn Loeser's representation of the Debtor in connection with RFF's stay violation.[33] Given this, the Court will apply the 10% reduction to the amount of fees the Debtor seeks to recover from RFF and

[33]During the Damages Hearing, Goldfarb stated:

> If it should have been two attorneys [working on a particular matter related to RFF's violation of the stay] instead of three or one attorney instead of two, well, then we accept the Court's cuts on this or cuts on that. But, from my perspective, when the law firm goes forward, it always has to make a decision of what's in the best interest of the client. Whether the Court is going to approve it or not, we want to do what we have to do to do a good job. And if the fee gets cut back a little bit, that's what happens, we're willing to accept that.

Tr. II at 89.

only consider awarding him 90% of $465,498.50 (which is the total fees of $465,604 minus the $105.50 inadvertently sought), or $418,948.65.

The amount of attorneys' fees a "party seeks to recover under § 362(k) must be reasonable," and "courts generally apply the 'lodestar' method when determining the reasonableness of attorney's fees," *Webb*, 2012 WL 2329051, at *16, an approach this Court has taken in other similar cases, *see In re Nicole Gas Prod., Ltd*., 542 B.R. 204, 218–19 (Bankr. S.D. Ohio 2015). Under this method, the Debtor has the burden of proving that the number of hours expended by Hahn Loeser was reasonable. *Id.*

The Debtor carried this burden as to fees in the amount of $418,948.65. The documentation and testimony offered in support of the hours charged are of "sufficient detail and probative value to enable the [C]ourt to determine with a high degree of certainty that such hours were actually and reasonably expended." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 553 (6th Cir. 2008) (quoting *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co*., 732 F.2d 495, 502 n.2 (6th Cir. 1984)). "Once a party has established that the number of hours and the rate claimed[[34]] are reasonable, the lodestar amount is presumed to be the reasonable fee to which counsel is entitled." *Gunasekera v. Irwin*, 774 F. Supp. 2d 882, 887 (S.D. Ohio 2011) (citing *Imwalle*, 515 F.3d at 552). Given the 10% reduction noted above, the lodestar is $418,948.65. Combined with the reasonable costs of $3,424.51, this amounts to a total award of $422,373.16. The Court recognizes that this a sizeable award. But bound as it is by § 362(k), the Court must award this amount because (1) it is the reasonable amount of fees and

[34]As noted above, RFF stipulated that "[t]he hourly rates charged by the attorneys and other professionals of [Hahn Loeser] are reasonable and comparable to those of professionals of like skill, experience and standing in the community." Doc. 888 at 3.

expenses the Debtor incurred as a result of RFF's willful violation of the automatic stay and (2) RFF's arguments in support of a further reduction of this amount all lack merit.

RFF first argues that "significant awards of attorney fees are rarely appropriate where the debtor has no other damages besides the attorney fees." RFF's Br. at 5. This proposition applies if the party that violated the stay ceases doing so without forcing the debtor to incur significant fees. But it is entirely inapposite here, because RFF's "actions prior to and during this litigation [show] that any attempt to resolve the violations [of the automatic stay] outside of litigation would have been pointless." *Nicole Gas Prod.*, 542 B.R. at 220 (quoting *Henderson v. Auto Barn Atlanta, Inc. (In re Henderson)*, No. 09-5114, 2011 WL 1838777, at *7 (Bankr. E.D. Ky. May 13, 2011)). In fact, the Debtor's efforts to negotiate a reasonable settlement were repeatedly rebuffed by RFF. Incredibly, RFF contends that it undertook "reasonable efforts" to resolve this matter and that Hahn Loeser "failed in its duty to mitigate by refusing to negotiate settlement in good faith." RFF's Br. at 10, 13. But this bald assertion flies in the face of the evidentiary record, which established that RFF never engaged in serious settlement efforts. To the contrary, RFF stiff-armed the Debtor at every turn, rejecting his good-faith efforts to resolve this matter *without asking RFF to pay any of his fees or expenses*. In short, the attorneys' fees are as high as they are in part due to RFF's unreasonable rejection of a settlement proposed by the Debtor.

Continuing in this vein, RFF also argues that Hahn Loeser's fees should be reduced because the Debtor made "[o]verreaching discovery requests." RFF's Br. at 12. Not so. After the Liability Hearing, the Debtor propounded a reasonable number of requests for admissions, interrogatories and documents. Further, the Court ordered RFF to produce most of the information and documents that the Debtor requested. But RFF did so only after it unnecessarily prolonged the discovery process

by, among other things: (1) asserting that the Damages Hearing must be bifurcated; (2) asserting a tax return privilege that was not supported by controlling law; (3) taking the position that it need not provide certain financial information and documents until the Court found that the ability to pay an award of punitive damages is an appropriate factor in the analysis even though it had already done so; (4) attempting to ambush the Debtor's attorneys by agreeing that they could ask questions of RFF's witnesses as if on direct examination while at the same time intending to seek to limit how that testimony could be used; and (5) adding 13 more witnesses to its witness list after originally identifying only the Debtor. As for depositions, RFF contends that Hahn Loeser "purposely delay[ed] [them] until the Damages Hearing was imminent and then [sought] to compel those depositions through court intervention on the eve of the discovery cutoff." *Id.* Although there may have been some delay on the Debtor's part in attempting to schedule depositions, this provides no basis for reducing the fees for which RFF should reimburse the Debtor. This is especially true given that RFF sabotaged the Court's proposal for resolving the dispute over the depositions.

It is therefore clear that the unnecessarily contentious approach that RFF took to this litigation multiplied the fees incurred by the Debtor considerably. And RFF cannot be heard to complain about the amount of fees incurred by the Debtor when its own litigation conduct caused the fees to be so high. *Cf. Schepis v. Burtch (In re Pursuit Capital Mgmt., LLC)*, 874 F.3d 124, 137 (3d Cir. 2017) (suggesting that disappointed bidders' argument that a § 363 sale should be disapproved based on allegedly inadequate auction procedures—procedures that "were, in significant measure, a function of [their] contentious and at times obstreperous behavior"—"sounds a bit like the old story of the boy who shot his parents and then asked for special treatment because he was an orphan").

Making yet another attempt to deflect responsibility from itself, RFF argues that "the fact that the Debtor did not seek expedited consideration of the [Enforcement] Motion so it could be determined before the state court hearing on the [A]rbitration [A]ward needlessly increased the fees." RFF's Br. at 12–13. This objection to the Debtor's request for attorneys' fees "consists largely of what fairly may be characterized as either misdirection, or blaming the victim, or both." *MTC Dev. Grp., LLC v. Lewis*, No. 11 C 7062, 2011 WL 5868236, at *4 (N.D. Ill. Nov. 20, 2011). Yet RFF has only itself to blame. It was RFF's obligation to comply with the automatic stay, not the Debtor's obligation to ensure that it did so. *See, e.g., Littke v. Trustcorp Mortg. Co. (In re Littke)*, 105 B.R. 905, 911 (Bankr. N.D. Ind. 1989) (holding that "the burden falls upon the creditor to come into this court and seek relief" from the automatic stay, not on the debtor to enforce the stay). Thus, RFF's argument that the Debtor's recovery should be reduced because he did not request expedited relief falls flat.

Taking the scattershot approach it has often used during the Debtor's bankruptcy case,[35] RFF next contends that "[f]ees with respect to the appeal should be disallowed for policy reasons." RFF's Br. at 12. Of course, it does not identify the policy, and its contention is contrary to the law. *See Mantiply v. Horne (In re Horne)*, 876 F.3d 1076, 1078 (11th Cir. 2017) (holding that "the Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending

[35]Many courts have criticized this style of advocacy. *See, e.g., Max M. v. New Trier High Sch. Dist. No. 203*, 859 F.2d 1297, 1300 (7th Cir. 1988) ("This scattershot approach is the antithesis of sound advocacy."); *Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, No. 4:11CV1299 RWS, 2014 WL 793732, at *1 n.2 (E. D. Mo. Feb. 27, 2014) (criticizing litigant's "'throw everything against the wall and see what sticks' approach to litigation"), *aff'd*, 784 F.3d 1183 (8th Cir. 2015); *Black Radio Network, Inc. v. Nynex Corp.*, 44 F. Supp. 2d 565, 588 (S.D.N.Y. 1999) (decrying "kitchen-sink approach to litigation").

the damages award on appeal"); *Schwartz-Tallard*, 803 F.3d at 1101 (same); *Young v. Repine (In re Repine)*, 536 F.3d 512, 522 (5th Cir. 2008); *see also Liberis v. Craig*, No. 87-5321, 1988 WL 37450, at *8 (6th Cir. Apr. 25, 1988) ("[T]he costs associated with these appeals were a direct result of the plaintiffs' initial contumacious conduct. . . . Therefore, we find that the bankruptcy judge did not abuse his discretion by awarding attorneys' fees and expenses incurred by the trustees as a result of the plaintiffs' unsuccessful appeals of the orders holding them in contempt.").[36]

RFF also argues that "Hahn Loeser consistently overstaffed and billed excessive time on this matter, generating unreasonable fees." RFF's Br. at 9. But this is simply not true. In fact, as DeMarco testified, the one purported instance of this cited in RFF's Brief—that "[t]hree partners attend[ed] depositions in Columbus, Ohio," *id.* at 9 n.2—is based on "a complete distortion of facts that are known to RFF," Tr. I at 162–63. According to DeMarco:

> A We had three depositions in Columbus: Mr. Johnson, Mr. Kessler and myself. There were three Hahn Loeser attorneys at each of those depositions. We made it clear in the depositions there was one lawyer who was defending the deponent. In the case of [the Debtor], that lawyer was Mr. Kessler. In the case of Mr. Kessler, that lawyer was Mr. Yeager, and in the case of my deposition, it was Mr. Kessler.
>
> During the course of Mr. Kessler's deposition—I know this is on the record—the statement was made that Hahn Loeser would only be charging for the lawyer defending that deposition, not for the other lawyers who were in the room.
>
> Q And in fact, do you intend to live up to that representation on the record when you finalize the relevant invoices?
>
> A Yes, we do.

[36]The appeal-related fees being awarded at this time are those incurred in connection with RFF's appeal that was dismissed by the BAP on the basis of lack of jurisdiction.

Id. at 163. The applicable time entries show that Hahn Loeser did indeed live up to this representation: Only Kessler charged time for defending the Debtor's deposition, only Yeager charged time for defending Kessler's deposition, and only Kessler charged time for defending DeMarco's deposition. Debtor Ex. 46 at 000118–119; Doc. 921 at 7.

The other instances of alleged over-billing put forth by Levinson during the Damages Hearing and in RFF's objection to the Debtor's supplemental statement of attorneys' fees and expenses, Tr. II at 107–11, Doc. 924 at 3, likewise fail to persuade the Court that the attorneys' fees sought are anything other than reasonable, especially in light of the 10% reduction made above. In this regard, the Court credits DeMarco's testimony that (1) Hahn Loeser "staffed the case in a way that [it] felt was appropriate, given that Mr. Levinson is a 25 or 30 year bankruptcy lawyer veteran, Mr. Parcells is a California trial lawyer [with] 25 to 30 years' experience" and (2) "given the gravity of the issues at stake . . . and potential harm, and the skills of [its] adversary, [Hahn Loeser] needed to respond and staff the case as [it] did." Tr. I at 164–65.

RFF's final objection to the Debtor's attorneys' fees is that the fees he incurred pursuing punitive damages are not recoverable because "there is no basis for punitive damages here." RFF's Br. at 11. As explained above, however, this is an appropriate case for an award of punitive damages. And this is true even though, as RFF points out, the Enforcement Motion did not mention punitive damages in its title or elsewhere on its first page. *Id.* The fact that the Enforcement Motion requested punitive damages only on its eighth page does not, as RFF contends, raise "constitutional due process issues." *Id.* After all, the request for punitive damages was conspicuous enough for the Court to provide notice in *Johnson I* that the questions of whether punitive damages should be imposed against RFF and, if so, the appropriate amount of damages would be at issue during the

Damages Hearing. *Johnson I*, 548 B.R. at 773–74. RFF therefore had more than a full and fair opportunity to present its case after being made aware that punitive damages were at issue.

2. The Appropriate Amount of Punitive Damages

In an effort to avoid paying any punitive damages at all, RFF asserts reliance on advice it purportedly received from its counsel that its conduct would not violate the automatic stay.[37] This defense would shield RFF from liability for punitive damages only if it could show that there was "(1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel's advice." *Eifler v. Wilson & Muir Bank & Tr. Co.*, 588 F. App'x 473, 478–79 (6th Cir. 2014). But there are several reasons why RFF has not shown good faith reliance on the advice of Parcells or Levinson.

First, no persuasive evidence was offered to establish that Parcells and Levinson advised RFF that its conduct would not violate the automatic stay. Indeed, the evidence presented by RFF regarding the circumstances in which this purported advice was given is so insubstantial that the Court is not persuaded that RFF actually relied upon any legal advice when it obtained the Arbitration Award and the State Court Judgment. There is no documentary evidence showing that Parcells or Levinson provided any advice to RFF. And the only evidence on this point—the testimony of Freedman, Parcells and Levinson—is so hopelessly contradictory that it falls far short of establishing good faith reliance on advice of counsel. Freedman repeatedly testified during his deposition that he did not recall receiving any advice after RFF filed its request in June 2015 that the state court confirm the Arbitration Award, meaning that he did not recall having received *any*

[37]Good-faith reliance on the advice of counsel does not relieve a creditor of liability for violating the automatic stay or serve to reduce the actual damages (including attorneys' fees and expenses) recoverable by the debtor. *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 483 (9th Cir. 1989); *In re Daniels*, 316 B.R. 342, 352 (Bankr. D. Idaho 2004); *Littke*, 105 B.R. at 911.

advice after counsel for the Debtor sent the cease and desist letter in August 2015 and after the Debtor filed the Enforcement Motion in September 2015. Freedman Dep. at 84–85, 97–98, 101. Nor did Freedman recall receiving any advice about whether obtaining the State Court Judgment would violate the stay—a point Parcells conceded. Tr. I at 143.[38] Further, while Parcells testified that he did not make the decision to seek the State Court Judgment, *id.* at 123, and that it instead was "RFF Family Partnership's decision based upon the advice of Mr. Levinson," *id.* at 143, Freedman denies having made the decision to obtain the State Court Judgment:

> Q The decision to move forward with the October 16, 2015, hearing, despite the motion to enforce pending and the cease and desist letters that had been issued, who made those decisions?
>
> A My lawyer.[39]
>
> Q Did you have anything to do with making those decisions?
>
> A None.

Freedman Dep. at 158. According to Freedman, then, Parcells was the decisionmaker, meaning that any advice Parcells gave essentially was to himself. For these reasons, RFF's purported reliance on advice of counsel is not a viable defense to a punitive damages award.

That leaves for the Court's consideration the amount of punitive damages. In his brief, the Debtor suggested that punitive damages of $1 million were warranted, Debtor's Br. at 20, but during

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[38]Yet when Freedman was questioned about more distant events, he had a clear recollection of them. For example, as noted above, he recalled having received a text from the Debtor giving his mother authorization to act as his agent. Tr. I at 70.

[39]Freedman clearly was identifying Parcells, not Levinson, as the decisionmaker. Freedman testified that he gave Parcells the authority to act on RFF's behalf. Freedman Dep. at 82, 93–95, 116. In addition, he answered "Yes" when asked "[w]hatever [Parcells] did in connection with this arbitration, this bankruptcy estate, and the proceedings, he was authorized?" *Id.* at 93. In fact, according to Freedman, "Parcells is authorized to do anything he wants to do on my behalf." *Id.*

the Damages Hearing his counsel stated that "we'd leave it to the Court's discretion to fashion what would be an appropriate amount in that regard," Tr. II at 96.

The factors courts consider in determining the appropriate amount of a punitive damages award include: "(1) the nature of the creditor's conduct; (2) the nature and extent of harm to the debtor; (3) the creditor's ability to pay [damages]; (4) the level of sophistication[40] of the creditor; (5) the creditor's motives; (6) and any provocation by the debtor." *Henderson*, 2011 WL 1838777, at *9; *Bivens*, 324 B.R. at 44. Further, in assessing the appropriateness of an award of punitive damages from a constitutional due process standpoint, the Court also must consider "the degree of reprehensibility" of the conduct and "the disparity between the harm or potential harm suffered . . . and [the] punitive damages award." *Bavelis v. Doukas (In re Bavelis)*, 571 B.R. 278, 326 (Bankr. S.D. Ohio 2017) (quoting *B.M.W. of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996)).[41]

Applying these factors, the Court concludes that a punitive damages award of several hundred thousand dollars would not be excessive here. Considering the nature of RFF's conduct, it is clear that RFF not only intentionally violated the automatic stay, it also continued to do so even after the Debtor (1) sent RFF a cease and desist letter, (2) filed the Enforcement Motion and

[40]RFF has not argued that it is an unsophisticated creditor. Nor could it reasonably do so given that RFF has been in the business of making high-dollar loans for over 20 years. Tr. I at 13, 16. Further, when asked during the Damages Hearing whether RFF "made any loans that led to default and resulted in litigation" and whether "a fair number of those matters involved cases in the United States bankruptcy courts," Freedman answered in the affirmative. *Id.* at 50–51.

[41]The due process analysis also considers the difference between the amount of punitive damages and "the civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575. But as courts have recognized, this factor "poses something of a problem" in the context of the automatic stay, because "there is not a . . . statutory scheme designed to respond to violations of the automatic stay other than the Bankruptcy Code itself." *Varela v. Ocasio (In re Ocasio)*, 272 B.R. 815, 826 (B.A.P. 1st Cir. 2002).

(3) proposed resolving the matter with an order under which RFF would have paid nothing in exchange for an agreement that it could not use the State Court Judgment against the Debtor or property of his bankruptcy estate. RFF's intentional stay violation—and its adamant refusal to take the reasonable steps necessary to remedy the violation—make a significant award of punitive damages appropriate here.

So too does the extent of the harm and the potential harm to the Debtor. The Debtor's actual injury—the more than $400,000 of attorneys' fees incurred as a result of RFF's violation of the stay—is substantial. And the potential harm to the Debtor and his estate if the State Court Judgment had not been voided also was significant. For one, the Debtor may have had to confront a request by RFF to use the State Court Judgment to establish that he defrauded RFF, thereby defeating the fraud claim and the other counterclaims the Debtor asserted against RFF in the nondischargeability action. He also may have had to face an attempt by RFF to use the State Court Judgment to assert a security interest in the asset that Freedman saw as RFF's most valuable collateral—the Player Contract. Freedman Dep. at 138 (testifying that the Player Contract was RFF's primary collateral). This was a significant issue for the Debtor and the estate because RFF filed a secured a claim in excess of $1.7 million as of the Petition Date. Not only that, but RFF asserts entitlement to postpetition interest at a rate of 3% per month, compounded monthly, Debtor Ex. 4 at 2, which means that RFF would be seeking more than $4 million from the Debtor's salary payments under the Player Contract. Claim 5-1. Thus, the extent of harm to the Debtor was significant, and the potential harm was far greater.

Further, as the Court found above, RFF's motive was to use findings in the Arbitration Award to improperly assert secured status with respect to the salary payments under the Player

Contract and to defeat the Debtor's claims against RFF, all to the detriment of the Debtor and the creditors of his bankruptcy estate. As for the provocation-by-the-debtor factor, RFF stated in its brief only that the provocation was "to be shown at the Damages Hearing." RFF's Br. at 19. During the Damages Hearing, Parcells testified that RFF was provoked into continuing the Arbitration Action by the failure of the Debtor's attorneys to help facilitate the payment of the insurance premium on the Ferrari while his attorneys were communicating with the Debtor's parents about other matters and while the Debtor continued to assist his parents financially. Tr. I at 138–42. RFF's purported desire to protect the Ferrari (even if not entirely pretextual) provides no excuse for its attempt to improperly assert a security interest in the salary payments under the Player Contract and to obtain findings in another forum designed to defeat the Debtor's—and thus the estate's—claims against RFF.

Taking into account the ability-to-pay factor, there is no question that RFF could pay the attorneys' fees and expenses that are being awarded plus punitive damages of several hundred thousand dollars. Indeed, given that RFF's net worth as of the end of 2016 exceeded $7.7 million and that its net income for that year was nearly $1.7 million, Debtor Ex. 45 at 000346–347, RFF has the ability to pay more.

Citing the Supreme Court's decision in *Gore*, RFF contends that the lack of any evidence that it has committed prior violations of the automatic stay provides a reason to decline to award any punitive damages at all. RFF's Br. at 19. The Supreme Court, however, did not provide a "first offense" defense to punitive damages in *Gore*. That said, "[i]n the absence of a history of noncompliance with known statutory requirements," the Court finds that "a more modest sanction" than the several hundred thousand dollars the Court could award would be "sufficient to motivate

full compliance" by RFF with the automatic stay in the future. *Gore*, 517 U.S. at 585. In particular, the Court concludes that, when combined with the substantial amount of attorneys' fees and expenses for which RFF is liable, $100,000 of punitive damages will be sufficient to deter RFF from future violations.

Finally, $100,000 of punitive damages would be warranted even if the evidence had not shown that RFF intended to use the Arbitration Award and the State Court Judgment against the Debtor and his bankruptcy estate. As RFF concedes, RFF's Br. at 6, punitive damages are appropriate if the creditor acted with reckless disregard of whether it was violating the automatic stay. *E.g.*, *Bloom*, 875 F.2d at 228. In *Bloom*, the Ninth Circuit held that the imposition of punitive damages was justified under the recklessness standard given that the creditor, after being warned that it was violating the automatic stay, "blatantly attempted to circumvent the jurisdiction of the bankruptcy court." *Id.* That would be just as true in the counterfactual world postulated by RFF in which it did not intentionally violate the automatic stay. Counsel for the Debtor warned RFF at least three times that it was violating the automatic stay—in a cease and desist letter, in a subsequent email, and in the Enforcement Motion. Yet RFF obtained the State Court Judgment confirming the Arbitration Award in all respects without waiting for this Court to rule on the Enforcement Motion. This would have been a reckless violation of the stay even if it was not—as the Court has found it to be—an intentional one.

V. Conclusion

The Debtor would not have incurred attorneys' fees and expenses in the amount of $422,373.16 but for RFF's violation of the automatic stay, and this amount of fees and expenses is reasonable. Further, punitive damages in the amount of $100,000 are warranted under the

circumstances of this case. The Court accordingly enters final judgment (a) holding that RFF willfully and intentionally violated the automatic stay and (b) awarding the Debtor attorneys' fees and expenses in the amount of $422,373.16, plus punitive damages in the amount of $100,000.

IT IS SO ORDERED.

Copies to:

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