UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL J. FICARRA
DONNA M. FICARRA

CASE NO. 00-62714

Debtors

Chapter 13

APPEARANCES:

SELBACH & VIENCEK, LLP
Attorneys for Debtors
One Lincoln Center
Syracuse, New York 13202

JAMES F. SELBACH, ESQ.
Of Counsel

KONSTANTY LAW OFFICE
Attorneys for Creditor Gary Enck's Car Store, Inc.
252 Main Street
Oneonta, New York 13820

JAMES E. KONSTANTY, ESQ.
Of Counsel

MARK W. SWIMELAR, ESQ.
Chapter 13 Trustee
250 S. Clinton St. 5th Floor
Syracuse, New York 13202

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed by Michael J. Ficarra and Donna M. Ficarra ("Debtors") on August 30, 2000, seeking a finding of a willful violation of the automatic stay by Gary Enck's Car Store, Inc. ("Enck"), pursuant to § 362(h) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Debtors further request awards of actual and punitive damages as well as attorneys' fees. Opposition to Debtors' motion was filed on Enck's behalf on September 25, 2000.

Oral argument was heard at the Court's regular motion term on September 26, 2000, in Utica, New York. On January 30, 2001, Debtors' attorney, James F. Selbach ("Selbach"), appeared before the Court to request an adjournment for the purpose of pursuing further discovery.[1] An evidentiary hearing ("Hearing") was thereafter conducted on October 17, 2001. At the close of the hearing, the Court held that Debtors proved Enck's willful violation of the automatic stay pursuant to Code § 362(h). The Court reserved, however, on the portion of Enck's post hearing argument which asserted that a stay violation based on a single instance of post-petition correspondence from a creditor to a debtor does not rise to a level meriting damage awards in Debtors' favor. The parties were provided an opportunity to file additional memoranda of law, and the matter was taken under submission for decision on November 9, 2001.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(O).

FACTS

Debtors purchased a 1994 Dodge Caravan ("Caravan") from Enck on January 7, 2000.

[1]Selbach sought adjournment to pursue the possibility of obtaining testimony from David Archer ("Archer"), Enck's salesman, with whom Debtors had nearly all of their contact. Selbach's statements to the Court on January 30, 2001, indicate that neither party had been able to obtain Archer's testimony, as his employment with Enck had been terminated and his whereabouts were unknown. The record does not indicate that testimony from Archer was ultimately obtained.

In order to facilitate the sale, Enck and Debtors entered a financing agreement, whereby Debtors were to pay Enck the purchase price of the Caravan in eighteen monthly installments of $280.13. Payments were to commence on February 7, 2000. According to the Hearing testimony of Debtor Michael J. Ficarra ("M. Ficarra"), Archer was Enck's sales representative who negotiated the price of the Caravan, finalized the paperwork for the purchase, established the monthly payment plan and performed a background review regarding Debtors' credit history. M. Ficarra testified that Debtors began making their installment payments in February 2000. However, two statements by Enck, dated August 21, 2000, indicate that Debtors failed to make monthly payments due from April 2000 through August 2000. *See* Debtors' Exhibits 4 and 5.

On May 30, 2000, Debtors filed a voluntary petition for relief under chapter 13 of the Code. Service of the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines ("Notice") was sent from Kansas City, Kansas on June 8, 2000, by EPIQ Systems, Inc. The Notice included a standard provision informing recipients of the automatic stay and providing examples of prohibited collection actions. Enck was included on the Notice's Certificate of Mailing, and the address to which Enck's Notice was sent was: "PO Box 787, Route 285, Cooperstown, NY 13326."[2]

Schedule B of Debtors' petition lists the Caravan as personal property with a current

---

[2]Enck's name is incorrectly set forth on the Certificate of Mailing as "Gary Eecks Car Store."

At the Hearing, Gary Enck testified that Enck's mailing address is "PO Box 787, Cooperstown, NY 13326." He further testified that Route 28 is Enck's physical address where only packages are received. According to Gary Enck's testimony, mail bearing the street address, "Route 28," would not be received by Enck. In the present matter, the Certificate of Mailing indicates that both the post office box number and the street address were used to provide Enck with Notice of Debtors' bankruptcy. The street address used was incorrectly set forth as "Route 285," rather than "Route 28."

market value of $4,000. According to Schedule D, Enck is a secured creditor holding a claim in the amount of $4,700. The unsecured portion of that claim is set forth as $700. [3]

On June 12, 2000, a notice bearing Enck's letterhead was sent to Debtors. *See* Debtors' Exhibit 1. The notice stated that the balance owed by Debtors was $882.02.[4] *See id.* Near the bottom of the notice's first page was the following admonition: "IF THE AMOUNT OF $882.02 IS NOT PAID IN FULL WITHIN TEN (10) DAYS OF RECEIPT OF THIS NOTICE, YOUR VEHICLE WILL BE REPOSSESSED." *Id.* The notice was signed by David Archer, General Manager/Finance Specialist. *See id.*

On June 19, 2000, Selbach wrote a letter addressed to Enck, but the letter did not designate a specific person as the recipient. *See* Debtors' Exhibit 3. The letter stated that Debtors had filed a bankruptcy petition, and Enck was, therefore, prohibited from attempting to collect the debt owed to it. *See id.* The letter requested that Enck discontinue all collection efforts and restore matters to their status as it existed before collection efforts commenced. *See id.* The testimony of Gary Enck at the Hearing revealed that some representative of Enck was aware of Selbach's June 19, 2000, letter.

On August 21, 2000, two separate letters bearing Enck's letterhead were sent to Debtors. *See* Debtors' Exhibits 4 & 5. Each letter set forth Debtors' failure to make payments to Enck during the months of April, May, June, July and August 2000. *See id.* Each letter also stated the total amount due as $1,470.68. *See id.* Like the June 12, 2000, letter from Enck, one of the

---

[3]Enck did not file a Proof of Claim in Debtors' case until January 22, 2002. According to the Proof of Claim, the amount of the debt was $4,141.28.

[4]This figure includes nonpayment for the months of April, May and June 2000 and applicable late fees. A portion of the debt addressed by this notice was incurred pre-petition.

August 21, 2000 letters stated that "IF THE AMOUNT OF $1470.68 IS NOT PAID IN FULL WITHIN 10 DAYS OF THIS NOTICE, YOUR VEHICLE WILL BE REPOSSESSED." Debtors' Exhibit 4. Similarly, the other letter of August 21, 2000, warned as follows: "[i]f the amount of $1470.68 is not received within 10 days of receipt of this notice, we will be forced to take immediate action in repossessing your vehicle." Debtors' Exhibit 5. It further stated that Enck was "[i]n hopes of [Debtors'] immediate cooperation in this matter." *Id.*

In response to the August 21, 2000 letters, M. Ficarra telephoned Enck and spoke with Archer, while Donna M. Ficarra ("D. Ficarra") sat nearby. According to M. Ficarra's Hearing testimony, he informed Archer that Debtors had filed a bankruptcy petition, and Enck's claim would be paid through their chapter 13 plan. M. Ficarra informed Archer that Archer ought to contact Debtors' attorney if he wished to discuss the treatment of Enck's claim in Debtors' bankruptcy case. M. Ficarra further testified that Archer responded by angrily and loudly stating, "I don't give a god-damn about your lawyer, we want our money." Then, according to M. Ficarra, Archer "slammed the phone down" while M. Ficarra was still talking.

Debtors testified at the Hearing that, despite Selbach's assurances regarding the protection of the automatic stay, they nonetheless remained "nervous and afraid" that Enck was going to repossess the Caravan. According to M. Ficarra, they parked their other vehicle in their driveway behind the Caravan to impede Enck's ability to remove the Caravan from their property. Cross-examination revealed that Enck made no actual physical attempt to repossess.

D. Ficarra testified at the Hearing that she was "frightened" by the potential loss of the Caravan to the point where she would cry. According to D. Ficarra, M. Ficarra worked in the evenings. While M. Ficarra was at work, D. Ficarra stayed at home caring for their grandchildren. D. Ficarra testified that, because they live in a rural area, she felt it necessary to

keep their dog in front of their house while she remained at home in the evenings with the grandchildren. D. Ficarra further testified that she could not leave her personal belongings in the Caravan, and she would run to the window any time she heard a noise. Also, she was unable to sleep at night because she was listening for someone to come for the Caravan. Regarding the telephone conversation between her husband and Archer, she testified that she was not a party to the conversation, but she could hear everything that was said by Archer because she was sitting nearby and Archer was yelling so loudly. D. Ficarra also revealed that she is diabetic, has high blood pressure and has asthma - "the kind that, if [she] get[s] upset, it triggers it." According to her testimony, she went to the doctor after she received the August 21, 2000 letters and told the doctor that she needed another prescription for her inhaler because she finished her previous prescription as a result of the stress she was under. She also stated that she knows when her blood pressure is being affected because she can feel her face getting red, and the stress of the impending repossession induced such a reaction in her. As a result, she would take an additional blood pressure pill when she was feeling exceptionally stressed. On cross-examination, D. Ficarra could not remember if she had had her blood pressure taken by a doctor during the period in question, and she confirmed that she was unable to take her blood pressure herself. Debtors presented no medical testimony to support D. Ficarra's testimony regarding the agitation of her existing ailments.

ARGUMENTS

The arguments in relation to this matter are straightforward. Debtors argue that the actions of Archer, an agent of Enck, constituted a willful violation of the automatic stay pursuant

to Code § 362(h). According to Debtors, Archer's letters of June 12, 2000 and August 21, 2000, constituted an effort to collect a pre-petition debt after receipt of the Notice. Debtors further contend that Archer's defiant demeanor during his telephone conversation with M. Ficarra demonstrated his indifference to the Code and, in particular, to the automatic stay. As a consequence, Debtors assert that they are entitled to actual damages in the amount of $1,500, attorneys' fees in the amount of $1,500, punitive damages of $5,000, and the costs of pursuing this motion.

In opposition Enck argues that the June 12, 2000 letter was sent prior to its receipt of the the Notice. Once it received the Notice, Enck asserts that it took no formal legal action to recover the Caravan pursuant to the promissory note and security agreement. According to Enck, its only further communication with Debtors were the letters of August 21, 2000, which were merely intended to inquire of Debtors' position.

DISCUSSION

According to Code § 362(h), "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The Second Circuit set forth the standard for applying Code § 362(h) in *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104-05 (2d Cir. 1990). According to the *Crysen* decision, "[a]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." *Crysen*, 902 F.2d at 1105. Furthermore, "[a]n additional finding of maliciousness or bad faith on the part of the offending creditor

warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h)." *Id.*

At the Hearing in the matter *sub judice,* this Court found that the letters from Enck to Debtors, dated August 21, 2000, constituted a willful violation of the stay because it was an attempt to collect a pre-petition debt with knowledge of the automatic stay.[5] Still undetermined is the issue of whether the letter dated June 12, 2000, violated the stay as set forth by Code § 362(h). After reviewing the proof, the Court finds that the June 12, 2000 letter was not a willful violation of the automatic stay. The Notice was mailed from Kansas City, Kansas on Thursday, June 8, 2000. Enck is located in Cooperstown, New York. The June 12, 2000 letter was mailed by Enck on a Monday. Thus, in order for Enck to have known of the automatic stay at the time the June 12, 2000 letter was sent, Enck would have to have received a mailing from Kansas City, Kansas at Enck's office in Cooperstown, New York, in a window of approximately two days' mail service. It is unlikely that Enck actually knew of the automatic stay on June 12, 2000, and Debtors have not demonstrated otherwise.[6]

Having concluded, however, that Enck violated the automatic stay by sending Debtors the two letters, dated August 21, 2000, the Court must now determine appropriate damages, given the facts and circumstances presented in this case. "Once the Court has found that there is a willful violation, the Debtor still must establish that there are actual damages, even though the damage provisions of section 362(h) of the [Code] are mandatory." *In re Flack*, 239 B.R. 155, 163 (Bankr. S.D. Ohio 1999) (citation omitted). Courts do not award damages pursuant to Code

---

[5]Because two letters, similar in substance, were sent by Enck to Debtors on August 21, 2000, the Court concludes both of them to be willful violations of the automatic stay. *See* Debtors' Exhibits 4 & 5.

[6]This conclusion is supported by the apparently numerous mistakes made to Enck's address on the Certificate of Mailing annexed to the Notice. *See supra*, note 2.

§ 362(h) "where the debtor has not been injured by issuance of collection correspondence." *Id.*

Debtors request actual damages of $1,500. Debtors have failed to demonstrate any pecuniary loss resulting from Enck's stay violation, and, consequently, are unable to recover actual damages on that basis. They do not assert that, at any time, they were unable to use the Caravan due to Enck's threats of repossession. Likewise, they do not complain of any expenditures made to avoid repossession, other than the cost of this litigation. Furthermore, testimony at the Hearing revealed that no employment leave was required and no lost wages were suffered.

Debtors' request for actual damages also includes a claim for emotional distress. Some courts have held that the definition of actual damages, in the context of Code § 362(h), includes damages for purely emotional injury, even where no financial loss was suffered. *See Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999) (citing *Holden v. IRS (In re Holden)*, 226 B.R. 809, 812 (Bankr. D. Vt. 1998); *In re Carrigan*, 109 B.R. 167, 170 (Bankr. N.C. 1989); *In re Covington*, 256 B.R. 463, 467 (Bankr. D.S.C. 2000). In contrast, the Court of Appeals for the Seventh Circuit has cautioned against the possible abuses that could result from a policy of awarding damages for purely emotional injury to redress automatic stay violations. *See Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 881 (7th Cir. 2001). The Seventh Circuit *Aiello* decision held that only a debtor who first demonstrates financial injury may "piggyback" claims for incidental emotional distress. *See id.* In the present matter, Debtors failed to show that a financial loss resulted from the stay violation. The Court concludes, however, that emotional distress is an injury itself, and, therefore, may be the basis for an award of actual damages, even where no financial injury has been demonstrated.

Another issue that surfaces in relation to damages for emotional distress is whether courts may grant such relief without proof in the form of medical testimony. Several courts have granted damages for emotional distress, even in the absence of medical testimony. *See Fleet* 196 F.3d at 269 (holding that debtor had sufficiently shown psychological suffering without introducing medical testimony); *In re Flynn*, 185 B.R. 89, 93 (S.D. Ga. 1995) (finding that actual damages based on emotional distress were warranted even in absence of medical testimony because emotional harm was clearly the direct result of stay violation); *In re Alberto*, Case No. 98-14005, slip op. at 5 (Bankr. N.D.N.Y. 2000) (B.J. Littlefield) (stating that appropriate circumstances preclude the need for medical testimony in determining actual damages for emotional distress), *rev'd on other grounds*, 271 B.R. 223 (N.D.N.Y 2001); *Covington*, 256 B.R. at 467 (holding that medical testimony was not necessary under the circumstances). In contrast, where the circumstances underlying Code § 362(h) motions are not relatively disturbing on the continuum of egregiousness, courts have denied actual damages for emotional distress where no medical testimony has been introduced and no other evidence has been offered to corroborate debtor's claims of emotional suffering. *See In re Taylor*, 263 B.R. 139, 152-53 (N.D. Ala. 2001) (refusing to award emotional distress damages where trial testimony revealed only "fleeting embarrassment, humiliation, or annoyance," and no medical attention was sought); *In re Skeen*, 248 B.R. 312, 318-19 (Bankr. E.D. Tenn. 2000) (stating that debtor's own testimony of being nervous and shaken was inadequate basis for emotional distress damages where debtor did not seek medical relief); *In re Robinson*, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998) (stating that "[i]n the absence of admissible evidence of Debtor's emotional upset and harm flowing therefrom, the Court finds no basis for awarding damages for emotional injuries"). A persuasive analysis of the factors involved in awarding emotional distress damages was set forth by the U.S. District Court

in *Aiello v. Providian Fin. Corp.*, 257 B.R. 245, 250-53 (N.D. Ill. 2000), *aff'd*, 239 F.3d 876 (7th Cir. 2001).[7] In *Aiello*, a chapter 7 debtor was sent a reaffirmation agreement pursuant to which she was requested to repay all or a portion of the debt she accumulated on her credit card account. *See Aiello*, 257 B.R. at 247. The creditor's correspondence was formatted to look like a complaint and was sent to her directly despite her disclosure that she was represented by counsel. *See id.* Upon receiving the letter, the debtor alleged that she "cried, felt nauseous and scared and the letter caused [her] to quarrel with her husband." *Id.* According to the debtor, she believed that the creditor had sued her because the correspondence had been drafted to look like a pleading. *See id.* In response, she commenced a class action on behalf of herself and others similarly situated. *See id.* The District Court cogently evaluated the emotional distress claim as follows:

> [E]motional distress must be more than "fleeting, inconsequential and medically insignificant" to be compensable. Surely, this requisite severity can be established by medical or other supporting evidence. Where no medical evidence exists, however, emotional distress can be reasonably presumed where the stay violation is sufficiently offensive. . . . [S]uch a presumption is justified when, for example, the debtor is physically threatened, the violative act constitutes an invasive and personal attack, or a tangible and substantially adverse action results from the stay violation.

Aiello, 257 B.R. at 250-51 (quoting *In re Crispell*, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987)) (citations omitted). On appeal, the Seventh Circuit cautioned against the potential abuses that

---

[7] As stated *supra* pp. 8-9, this Court disagrees with the Seventh Circuit in *Aiello* regarding the issue of whether a court should consider an emotional distress claim without a preliminary demonstration by the debtor that he or she has suffered a financial injury. However, the *Aiello* decision at the District Court level provides a logical analysis for courts to use in evaluating emotional distress claims once a court has determined that consideration of emotional distress is proper.

could result from the unconfined allowance of emotional distress claims within the context of Code § 362(h). *See Aiello,* 239 F.3d.at 876. Affirming the District Court decision, the Seventh Circuit noted that the debtor failed to prove her injury to be more than a "transient and trivial shock," and reliance on the creditor's similar violations against others was inadequate corroboration of the debtor's own suffering. *See id.*

Courts that have awarded actual damages, intended at least in part to compensate for emotional distress, have consistently relied on medical testimony or some other corroborating evidence that the creditor's conduct was particularly outrageous or the effect on the debtor was exceptionally severe. *See Fleet,* 196 F.3d at 269-70 (awarding $25,000 for eighty-five-year-old debtor's emotional distress where bank's stay violation resulted in sharp decline of social invitations and debtor testified to changed eating and sleeping habits and social anxiety); *Flynn,* 185 B.R. at 93 (affirming bankruptcy court's award of $5,000 for emotional distress where freeze on debtor's bank account forced her to cancel her son's birthday party, caused her to be embarrassed in supermarket checkout line and resulted in justified worry that her checks would bounce); *Covington,* 256 B.R. at 467 (awarding $1,000 for IRS's notice of intent to levy where debtors' bank account was previously levied by Department of Revenue and debtors' fears of a reoccurrence were, therefore, substantiated); *In re Smith,* 185 B.R. 871, 872-73 (Bankr. M.D. Fla. 1994) (granting sanctions of $500 against creditor who wrote damaging letter to debtor's employer criticizing employer for continuing to employ unscrupulous debtor and debtor was forced to explain his use of bankruptcy relief to employer); *In re Shealy,* 90 B.R. 176, 177, 180 (Bankr. W.D.N.C. 1988) (awarding actual damages of $2,000 where language of five separate instances of post-petition correspondence to debtor husband was strong enough to be expected to produce anxiety or worse and did produce anxiety in debtor wife which resulted in medical

treatment). *But cf. In re McCrosson*, 1997 WL 47625, at *1-2 (Bankr. E.D. Pa. 1997) (awarding damages of $500 where court admitted that no significant injuries were alleged but creditor's post-petition attempts to collect credit card debt through twelve letters and six telephone calls was "bothersome and humiliating" and on one occasion caused debtor to cry). Conversely, courts are reluctant to award emotional distress damages where the creditor's conduct was not the sort that obviously resulted in damages or the debtor was only able to demonstrate inconvenience or minor upset. *See Taylor*, 263 B.R. at 152-53 (denying emotional distress damages where debtor's bankruptcy caused creditor to discriminate against debtor regarding her loan, but debtor suffered only fleeting embarrassment, humiliation and annoyance, she provided no testimony of public humiliation or embarrassment and she received no medical attention); *Skeen*, 248 B.R. at 318-19 (stating that, although debtor testified to being "torn-up," shaken and nervous, she did not seek medical attention, she was able to continue her daily routine, and she was able to receive assurances from her attorney soon after the violative telephone calls were received); *Robinson*, 228 B.R. at 85 (holding that emotional distress damages resulting from creditor's post-petition judgment of foreclosure were not warranted because debtor did not allege more than that she was "concerned," "upset" and needed reassurances to calm her fears); *In re Price*, 179 B.R. 70, 72 (Bankr. S.D. Ohio 1995) (stating that "[i]t is beyond the realm of reason to conclude that the mailing of collection correspondence for a $62.00 medical bill, as occurred in this case, is of the same magnitude as for example the unauthorized removal of one debtor's garage door by a creditor, as occurred in another case before this Court"); *In re Withrow*, 93 B.R. 436, 438-39 (Bankr. W.D.N.C. 1988) (awarding only nominal damages of $100 to debtor who had received four post-petition demand letters from creditor but failed to offer evidence of actual damages beyond minor aggravation).

The matter *sub judice* is the result of two simultaneous letters from Archer, as Enck's agent, threatening to repossess Debtors' Caravan. According to D. Ficarra's testimony, the letters of August 21, 2000, caused her to be frightened to the point where she would cry. She also asserted that Selbach's assurances regarding the Code's protections did little to assuage her worry. She further testified to visiting her doctor in order to request additional medication for relief of her increased asthma symptoms, and she stated to the Court that her high blood pressure condition had been exacerbated by the ordeal with Enck. Significantly, however, Debtors provided the Court with no medical testimony to substantiate the allegedly profound repercussions to D. Ficarra's health resulting from Archer's actions.

Although Debtors have failed to provide medical proof of their suffering, the Court, as indicated, concludes that actual damages for emotional distress may nonetheless be granted where other corroborating evidence is presented or the circumstances of the stay violation are so egregious that they obviously merit emotional distress damages. Enck mailed two simultaneous collection letters after receiving notice from both the Court and Selbach regarding Debtors' bankruptcy filing and the effect of the automatic stay. While these circumstances portray the quintessential stay violation, the collection notices alone are not relatively shocking in the scheme of debt collection practices. However, the Court is persuaded by Debtors' testimony regarding the telephone conversation between M. Ficarra and Archer, Enck's General Manager, after receipt of the August 21, 2000, letters. Archer's language during that conversation demonstrated flagrant disregard and utter indifference toward the Code and its automatic stay provision. Based on Archer's offensive language, defiant demeanor and overbearing tone, the Court finds corroborating evidence that Debtors experienced emotional distress resulting from their fear that Archer would ignore Debtors' rights pursuant to the automatic stay and repossess

the Caravan. Consequently, the Court concludes that Debtors shall be awarded $1,000 for actual damages resulting from their emotional distress.

The Court further concludes that, based on the finding of a willful violation of the automatic stay, Debtors are entitled to reasonable attorneys' fees. *See In re Layton*, 220 B.R. 508, 517-18 (Bankr. N.D.N.Y. 1998) (B.J. Gerling) (awarding attorneys' fees for willful violation of automatic stay even though no actual damages were awarded). Because no time records have yet been filed with the Court, a determination regarding the amount of attorneys' fees to be awarded is not possible at this time. Time records shall be filed with the Court and copied to Enck's attorney no later than fifteen (15) days from the date of this Decision, in order for the necessary determinations to be made.

As a supplement to actual damages and attorneys' fees, the Second Circuit has held that the provision in Code § 362(h) for punitive damages applies where there is "[a]n additional finding of maliciousness or bad faith on the part of the offending creditor . . . ." *Crysen*, 902 F.2d at 1105.

In the matter *sub judice* Archer's collection efforts imply a "callous disregard for the [automatic stay]." *Layton*, 220 B.R. at 518. They do not, however reach the level of "maliciousness" or "bad faith," as those terms have been held to reference particularly egregious conduct. *See In re Solis*, 137 B.R. 121, 133 (Bankr. S.D.N.Y. 1992) (citations omitted) (holding that IRS's two violations of automatic stay in the form of levy on debtor's bank account and subsequent notice of intent to levy did not warrant punitive damages); *see also Layton*, 220 B.R. at 518 (holding that relevy of pre-petition school taxes by addition to post-petition county taxes constituted willful violation of automatic stay but no award of punitive damages was necessary where there was no evidence of maliciousness or bad faith). *Cf. Bank of Boston v. Baker (In re Baker)*, 140

B.R. 88, 91 (D. Vt. 1992) (affirming punitive damages award of $10,000 because malice or bad faith was the only explanation for bank allowing repossession of debtor's vehicle, even though bank had been notified several times of debtor's bankruptcy).

In declining to award punitive damages, the Court also notes that this appears to be the first instance requiring this Court to address a stay violation by Enck. *See In re Orr*, 234 B.R. 249, 255 (Bankr. N.D.N.Y. 1999) (B.J. Gerling) (declining to award punitive damages for violation of automatic stay where bank's policies had not previously been brought to Court's attention in context of stay violation). Moreover, testimony at the Hearing revealed that all of Enck's significant contact with Debtors took place through Archer. Because the Court is unaware of any previous stay violation by Enck, which required this Court's interference, Enck's only stay violation appears to have taken place through Archer's agency. According to Gary Enck's testimony at the Hearing, Archer has not been employed with Enck since September 2000. Thus, the policy of deterrence through punitive damages would not be met in this matter, as the primary culprit is no longer employed by the entity to be punished. *See Solis*, 137 B.R. at 133 (stating that punitive damages are awarded for both punitive and deterrent purposes). Consequently, the Court declines to award punitive damages as they are inappropriate under the circumstances.

Based on the foregoing, it is hereby

ORDERED that Debtors' request for actual damages in the amount of $1,000 is granted; and it is further

ORDERED that Debtors' request for costs and attorneys' fees is granted in an amount to be determined by the Court upon receipt of pertinent time records, which shall be filed with the Court and sent to Enck no later than fifteen (15) days from the date of this Decision; and it is

further

ORDERED that Debtors' request for punitive damages is denied.

Dated at Utica, New York

this 17th day of April 2002

_____

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge