UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

Case No. 03-33181

MARK PATRICK BREWER and
MARLENE DIETRICH BREWER,

Chapter 13

Debtors.

MARK PATRICK BREWER and
MARLENE DIETRICH BREWER,

Plaintiffs,

v. Adversary No. 03-2532

QC FINANCIAL SERVICES, INC.,
d/b/a QUICK CASH,

Defendant.

MEMORANDUM DECISION ON ASSESSMENT OF DAMAGES

BACKGROUND

After this court determined the defendant retained funds belonging to the debtors in violation of the automatic stay (*see* court's memorandum decision dated April 13, 2005), an evidentiary hearing was held to determine the debtors' actual damages and to assess the appropriate amount of punitive damages. On July 20 and July 22, 2005, the court heard testimony from Darrin Andersen, chief operating officer of QC Financial Services; Dr. David Nye, plaintiffs' expert witness; Michael Walrod, vice president of operation for QC Holdings; and Michael Watton, plaintiffs' attorney. The parties filed post-trial briefs on their respective positions regarding damages and the plaintiff filed a supplemental motion for taxing additional expert witness costs.

This court has jurisdiction under 28 U.S.C. § 1334 and this is a core proceeding under 28

U.S.C. § 157(b)(2)(E) and (O). This decision constitutes the court's findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

ARGUMENTS

The Plaintiffs' Arguments

The debtors argue damages should be assessed against the defendant in the amount of $321,290.70 for actual damages and $923,950.00 for punitive damages.

Actual damages include the $390.00 withheld from the debtors on their loan from August 19, 2003, plus $67.00 in bank fees for dishonored checks written in reliance on the $390.00 being in their account after notifying defendant of the bankruptcy filing. Counsel also requests $308,135.67 in attorney's fees, based on a contingency fee agreement, and $12,698.03 in costs. The debtors note that "[a]ttorneys' fees and costs are, in and of themselves, a form of damages under § 362(h) which can be awarded in the absence of other actual damages." *In re Omni Graphics, Inc.*, 119 B.R. 641 , 645 (Bankr. E.D. Wis. 1990).

At the commencement of the underlying bankruptcy case, the debtors and their counsel entered into a standard consumer bankruptcy agreement for fees and costs. After it became apparent that the cost of prosecuting this adversary proceeding was significant, the debtors and counsel agreed to handle the proceeding on a contingency fee basis, with counsel bearing all responsibility for costs and fees unless the debtors were successful. Counsel calculated its fees on a lodestar basis by multiplying the flat hourly rate by the number of service hours provided. From October 10, 2003, to August 31, 2005, the hourly rate would have resulted in a fee of $61,887.50, plus itemized costs, other than the costs of the expert witness, of $2,752.18. Expert witness charges were either $5,295.85, as stated in the motion, or $10,305.85, according to the

costs shown on plaintiff's counsel's statement, and the plaintiff filed a separate motion to allow these fees. Notwithstanding the lodestar calculation, however, debtors' counsel argues that recovery of attorney's fees on a contingency basis as actual damages under section 362(h) makes it possible for clients without resources but with good claims to secure competent help. Thus, debtor's counsel asks for a percentage of substantial punitive damages.

As the plaintiffs point out, the ultimate decision-making which resulted in the violation of the automatic stay occurred at the defendant's corporate headquarters as a result of an intentional act by Q.C. Financial's Loss Prevention Supervisor, Kerry Hart. Mr. Hart had access to and consulted with Q.C.'s general counsel prior to willfully violating the automatic stay, and just after settling the same type of stay violation with the same general counsel in two separate matters. The debtors take issue with Q.C.'s claim that deterrence is not necessary in this case since it no longer will hold funds that belong to others because Q.C. has not attempted to locate others who have not sued for return of their funds.

According to the debtors, Q.C. Financial was not forthcoming in its production of financial documents, forcing the debtor to file various motions to compel discovery; hence the significant attorney's fees. Since neither the law nor ongoing litigation adequately disciplined the defendant, the debtors assert only a large punitive damages award would move Q.C. to correct its bad acts.

Dr. David Nye, the debtors' expert witness, opined that pursuant to efficient market theory and market discipline, real long-term deterrence would be best afforded by the marketplace. The theory he propounds is that a change in corporate behavior is accomplished by market oversight and reaction to economic penalties for bad acts. Consequently, the only

mechanism for this court to ensure SEC disclosure and explanation to shareholders of the wrongdoing and consequent market discipline is to issue punitive damages in the amount of 5% of net income. Five percent of net income, which in this case is $923,950, is the rule of thumb at which auditors are unlikely to succumb to managerial pressure against disclosure. Plaintiff would make this amount the level of damages that would effectively punish the defendant.

The debtors argue that a large punitive damage award is appropriate under traditional punitive damages theory, as well. The reprehensibility of the bad acts exacted on the debtors is great, the defendant's wealth is substantial, the defendant's motive is to keep funds it has no right to or force litigation it knows the debtors cannot afford, and there was no provocation by the debtors. If the defendant had reinvested all bi-weekly interest payments when received, a compounding of $390 bi-weekly at 572% (the interest rate charged on the Brewers' payday loan on an annual basis) would yield approximately $5.44 million by the trial date. The debtors concede a punitive damage amount of far less would achieve the goals of deterrence and punishment.

In their motion for taxing additional expert witness costs, the plaintiffs sought a finding from the court that extraordinary circumstances warrant taxing costs for the expert witness at trial in the amount of $5,295.85 (which is less than the amount shown on plaintiff's counsel itemization as payments to Dr. Nye). Pursuant to 28 U.S.C. § 1821, amounts taxable as costs for Dr. Nye's attendance at trial total $1,703.86. The witness costs should be awarded at the higher actual amount because (1) the language of section 362(h) requires an award of actual costs, (2) two non-consecutive days of attendance were required for the damages portion of the trial, and (3) extraordinary weather patterns in the southern United States greatly increased Dr. Nye's

travel time.

The Defendant's Arguments

Q.C. Financial contends the debtors' theories to recover damages in excess of $1 million for the improper retention of $390.00 are outlandish. Q.C. cites *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), which advised against awarding punitive damages of unprecedented proportions: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty." 517 U.S. at 574. Further citing *In re Kortz*, 283 B.R. 706 (Bankr. N.D. Ohio 2002), and *In re Bishop*, 296 B.R. 890 (Bankr. S.D. Ga. 2003), Q.C. notes that large punitive damages awards are reserved for those creditors that engage in serial violations of the automatic stay that cause significant distress to the debtor. Because the debtors have not established that Q.C. had fair notice that its conduct could subject it to a penalty as severe as proposed, adopting the debtors' damages calculations would violate due process.

Q.C. contends that the debtors have overreached in their calculation of actual damages. Q.C. further asserts that the debtors' counsel has failed to establish the existence of the contingency fee agreement. Even assuming the existence of the agreement, the debtors' attempt to obtain an eleven times multiplier enhanced fee is inconsistent with the bankruptcy code and Seventh Circuit precedent. The circuit court recognized in *Matter of Taxman Clothing Co.*, 49 F.3d 310, 316 (7th Cir. 1995), the "Bankruptcy Code limits professionals' compensation to '*reasonable* compensation for actual, *necessary* services.'" If the court determines that the fee is excessive, it may cancel any compensation agreement between the attorney and his client.

Matter of Geraci, 138 F.3d 314, 318 (7th Cir. 1998). Also, given the defendant's success in defending the plaintiffs' initial claim that the check was negotiated in violation of the automatic stay, the recalculation of plaintiffs' counsel's lodestar charges should be in the neighborhood of $18,000.

As to expert witness fees, Q.C. argues that market discipline has no role in determining punitive damages in this case. The fundamental flaw in the market discipline theory, according to Q.C., is that it punishes and deters profitability, rather than conduct. A defendant's wealth should not be the primary factor in determining the level of punitive damages. *See Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (noting that large net worth is not the wrong to be deterred). The market discipline theory is flawed in practice because it seeks to impose disproportionate punitive damages based solely on the defendant's status as a publicly-traded corporation, a status of which the defendant acquired almost a year after the stay violation. Furthermore, market discipline is not necessary in this case because Q.C. has corrected its conduct and disclosed the court's previous ruling in its 10-Q operations report for the second quarter of 2005.[1] Ultimately, the punitive damages award proposed by the debtors is wholly disproportionate to the wrong committed by Q.C. Financial. In Q.C.'s opinion, a punitive damages award not to exceed $10,000 may be excessive but would pass constitutional muster.

Q.C. Financial opposes the debtors' motion for taxing additional expert witness costs because the court lacks discretion to award an amount higher than the maximum amounts provided for in 28 U.S.C. § 1821. Additionally, the expert witness fees and expenses are not

[1]Given the timing of the report, the disclosure on the 10-Q would have been after the trial on damages.

recoverable because the market discipline theory was fundamentally flawed in both theory and practice, making the fees and expenses neither reasonable nor necessary.

DISCUSSION

Actual Damages-Attorney's Fees

This case arose from a violation of 11 U.S.C. § 362(h), which requires payment by the defendant of actual damages, including costs and attorney's fees. The $390 wrongfully retained by the defendant is awarded as actual damages. The defendant argues that the resultant $67 bank charge is not an appropriate damage amount because the negotiation of the check was excepted from the automatic stay. However, the court is satisfied that under the circumstances, since the withholding of the funds was improper, the court will award $67 as actual damages.

Awarding costs and attorney's fees as actual damages requires more analysis. For section 362(h) purposes, actual damages should be awarded only if there is concrete evidence supporting the award of a definite amount. *See In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Ill.1994). "The party seeking damages pursuant to § 362(h) has the burden of proving what damages were incurred and what relief is appropriate." *In re Dominguez*, 312 B.R. 499, 508 (Bankr. S.D.N.Y. 2004). A damages award cannot be based on mere speculation, guess or conjecture. *See In re Sumpter*, 171 B.R. at 844; *In re Clarkson*, 168 B.R. 93, 95 (Bankr. D.S.C. 1994) ("The moving party bears the burden of proof in order to prevail on an action for violation of the automatic stay and must prove his case by clear and convincing evidence.").

While some award of damages is mandatory upon a finding that a creditor "willfully" violated the automatic stay, a bankruptcy judge has the discretion to determine the reasonableness of fees and costs and to set the amounts accordingly. *In re Halas*, 249 B.R. 182,

192 (Bankr. N.D. Ill. 2000). In determining the appropriate amount of attorney's fees to award for willful violations of the automatic stay, courts will consider the following factors: (a) time and labor required; (b) novelty and difficulty of the questions raised; (c) the skill required to properly perform the legal services rendered; (d) the preclusion of other employment by the attorney due to the acceptance of the case; (e) the customary fee charged for like work; (f) whether the fee sought is fixed or contingent; (g) the time limitations imposed by the clients or the circumstances; (h) the amount in controversy and the results obtained; (i) the experience, reputation and ability of the attorney; (j) the "undesirability" of the case; (k) the nature and length of the professional relationship between the attorney and the client; and (l) attorney fee awards in similar cases. *In re Watkins*, 240 B.R. 668, 679 (Bankr. E.D.N.Y. 1999).

As with all attorney's fees awarded by a federal court, the attorney's fees must be reasonable. *In re All Trac Transp., Inc.*, 310 B.R. 570, 573 (Bankr. N.D. Tex. 2004). The debtors must establish their fees with reasonable certainty, and in the event of a dispute over the reasonableness of the fees, the court may draw inferences of the reasonable amount of time necessary to perform legal services based on the record of the proceeding. *Id.* A federal court determines reasonable attorney's fees by applying a lodestar analysis. *See, e.g., Stark v. PPM America, Inc.*, 354 F.3d 666 (7th Cir. 2004). The court assesses the reasonable number of hours worked on a project times a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Federal courts presume that the lodestar establishes a reasonable fee, although the court may make adjustments when required by specific evidence. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 553-54, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986).

Plaintiffs' counsel obviously put a great deal of time and effort in this case – over $61,000 worth of time by his hourly calculations. The court does not doubt the time devoted to this proceeding. There have been several motions to compel discovery, and considerable time was obviously spent on pretrial issues and at trial. The issues were complex and important, even though the amount at issue was minuscule by litigation standards. The defendant had been in a position to collect its pre-bankruptcy claims with relative impunity, and with significant volume over a course of years, this could add up to serious money retained in violation of law, and probably has, simply because of the impracticality of recovery. The practice has apparently been stopped, thanks in no small part to this and similar proceedings. This court is nevertheless left with the distinct impression that the same result could have been accomplished with fewer machinations. Much of the discovery into defendant's financial condition, and related trial time, was unnecessary in determining either the damage to the plaintiffs or the deep pocket of the defendant (a matter of public record).[2] The potential for harm from the defendant's prior conduct is easily inferred.

Exploration of a variety of theories, some of which may turn out to lead to blind alleys, is to be encouraged, not penalized, but here some of those blind alleys should have been recognized earlier than they were. A good deal of time was spent on the issue of negotiation of the check, but 11 U.S.C. § 362(b)(11) is fairly clear. The matter should have been raised, but the result was sufficiently foregone that it could have been dealt with by the court with less effort than it was,

---

[2]On June 30, 2004, plaintiffs filed a motion to amend the complaint to proceed on a class basis. This matter was held in abeyance, pending the determination of liability. In the event the adversary proceeding is certified as a class action, the services performed by counsel could be reevaluated.

allowing all parties to focus on the more important issue of improvement of position.

Much of the analysis done with respect to the punitive damage request in this case has focused on the financial health of the defendant, and the defendant is decidedly financially healthy. Q.C. became a publicly traded company in July 2004 with an IPO that raised about $63 million. This is *after* the event complained of, and the defendant's current financial success is simply not something that should be the basis of punitive damages (explained in more detail below). The plaintiffs' expert testified to theories of market discipline that might be relevant to a widely traded public company, but it is totally irrelevant to the company that caused the wrong in 2003. Furthermore, Q.C. is still largely owned and run by the same family, which is also planning to buy back a significant amount of the stock, and the theory is not really relevant even now. Neither counsel nor the court should be blinded by the delicious prospect of an ever deepening pocket in determining the amount that might be recovered in litigation; the focus must remain on the wrong suffered by the plaintiffs and on the appropriate legal standards to right that wrong. Counsel ignored the fact that Q.C. had changed its practices, which was not refuted at the trial on liability, but he continued to push for a measure of damages as a percentage of net income, which was not necessary, appropriate, or supported by the facts or legal precedent. The court was left with the overall impression that this case was vastly overtried.

Punitive Damages

In appropriate circumstances, an individual injured by any willful violation of the automatic stay may recover punitive damages. 11 U.S.C. § 362(h). This court previously ruled that Q.C.'s conduct was egregious and intentional with respect to the plaintiff husband, and punitive damages would be imposed (*see* court's memorandum decision dated April 13, 2005).

Q.C. practiced a corporate policy of cashing debtors' post-dated checks, protected by the provisions of 11 U.S.C. § 362(b)(11), paying itself pre-petition claims to the exclusion of the interests of the debtors and other creditors, and relying on the small amount of its loans and the poverty of its clientele to make having to disgorge the funds unlikely. Other adversary proceedings, like this one, brought by undeterred debtors and their tenacious counsel, resulted in a change in this practice.

Many courts have considered the deterrent effect in determining punitive damages. *See, e.g., In re Ocasio*, 272 B.R. 815, 825 (B.A.P. 1st Cir. 2002) ("the primary purpose of punitive damages awarded for a willful violation of the automatic stay is to cause a change in the creditor's behavior; [and] the prospect of such change is relevant to the amount of punitive damages to be awarded"); *In re Diviney*, 225 B.R. 762 (B.A.P. 10th Cir. 1998) (in fixing punitive damages at $40,000, resulting in 2.25 to 1 ratio of punitive to actual damages, bankruptcy court expressed intent that award be sufficient to deter bank, and similarly situated creditors, from unilaterally determining scope and effect of automatic stay). This court is satisfied that the defendant has sufficiently changed its behavior as a result of this action. Managers are now being trained in bankruptcy law, which was not true at the time of the plaintiff's loan, and corporate policy is to return post-dated checks uncashed after a bankruptcy. However, the change in policy does not let the defendant off the hook for the reprehensible nature of the policy in effect when it dealt with these debtors, nor does it excuse the necessity for bringing the proceeding needed to change that policy.

Deterrence is not the sole factor in an award of punitive damages. Pursuant to section 362(h), individuals injured by willful violations of the automatic stay are entitled to

recover punitive damages in "appropriate circumstances." 11 U.S.C. § 362(h). The bankruptcy code does not attempt to delineate further what this means, leaving it to the sound discretion of the bankruptcy court. Usually, an award of punitive damages requires more than mere willful violation of the automatic stay. Relevant factors are: (1) the nature of the creditor's conduct; (2) the creditor's ability to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor. *In re Heghmann*, 316 B.R. 395 (B.A.P. 1st Cir. 2004).

The cases interpreting "appropriate circumstances" indicate that egregious, intentional misconduct on the violator's part is necessary to support a punitive damages award. *See, e.g., In re Sumpter*, 171 B.R. 835, 845-46 (Bankr. N.D. Ill. 1994) (holding "punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes"; listing cases where punitive damages have ranged from $100 to $100,000); *Davis v. IRS*, 136 B.R. 414, 424 (E.D.Va.1992) (finding "only egregious or vindictive misconduct warrants punitive damages for willful violations of the automatic stay"); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999) (upholding award of actual damages in the amount of $23,000, plus punitive damages, where the court found that the creditor's failure to turn over a repossessed automobile for two months after it received notice of the debtor's chapter 7 filing was a willful violation of the automatic stay); *In re Omni Graphics, Inc.*, 119 B.R. 641 (Bankr. E.D. Wis. 1990) (award of punitive damages requires not only willful violation of stay but also finding of "appropriate circumstances," such as egregious, intentional misconduct by violator).

This court's concern over the defendant's prior course of conduct lies in the opportunity for substantial financial advantage in wrongfully withholding small amounts from many people. The defendant's principals testified that bankruptcy plays a part in relatively few of its

transactions, about one per month in the Kenosha store, according to Mr. Walrod. Given the volume of loans and the economic status of its usual clientele, the court is not persuaded that bankruptcy is such a minor part of the defendant's business, notwithstanding Mr. Walrod's attempt to minimize its frequency. However, from the evidence presented, the overall harm appears to be more potential than actual, and since practices have been remedied, the need for punitive damages of the magnitude proposed by the plaintiffs is reduced.

Another theory of calculating damages propounded by the plaintiffs is to take the amount withheld by the defendant, and assume it was reinvested in the defendant's customary manner. If the money withheld were loaned out to others at the same rate as the debtor's loan, 572% APR, compounded bi-weekly, the defendant would have made over $5 million at the time of trial on this tiny sum alone. Therefore, the plaintiffs propose that a huge damage award should be paid, maybe not $5 million, but close to a million dollars. The math may be correct, but the conclusion is ridiculous. The idea is to compensate the plaintiffs, and there is no way the debtors could have received such a return on their $390, had it been returned to them. Also, the financial records of the defendant do not show they came close to realizing this kind of return on each loan. Again, the primary focus should be on compensating the debtors, and the plaintiffs' proposal is not appropriate in this instance.

Punishing the creditor is secondary to compensating the plaintiffs, and the amount suggested by the plaintiffs is likewise inappropriate as punishment. This court held that the defendant's conduct was egregious because it flaunted the law and depended on the small monetary amount of its loans to shield it from the consequences. Q.C. was wrong to do so, and its attempt to take advantage of someone in the plaintiffs' situation backfired. Still, in the

pantheon of egregious behavior, this defendant is not at the top of the list. There was no evidence of extensive suffering occasioned by its act. It defrauded no one, did not single out the plaintiff husband for abusive treatment, caused no physical or psychological harm, and generally cannot be described as mean, nasty, monstrous, or any other adjective that would seem to justify the shocking and confiscatory award sought by the plaintiffs.

As stated above, plaintiffs' counsel went too far afield in prosecuting this case, but he nevertheless provided a salutary service both to his clients and to the bankruptcy system in general. A wealthy lender will no longer bully impecunious debtors (we hope) by keeping money it has no right to, and other creditors of the same priority will be on the same footing in bankruptcy proceedings. Further, the creditor must find this proceeding sufficiently expensive to deter it from going back to its old practices or treating such damages as a cost of doing business. Therefore, the court awards the plaintiffs a combined total of $25,000 in punitive damages and attorney's fees. Plaintiffs may also recover actual expenses of $2,752.18. The defendants argued that the existence of a contingency fee agreement should not be used to drive up damages in order to compensate counsel, and it was not. The damages available under 11 U.S.C. § 362(h) were combined, as measurable damages are quite small, and the plaintiffs and counsel can divide them as they agree.

Expert Witness Costs

The successful party in civil litigation is generally permitted to recover costs as a means of indemnifying the successful party against the expense of asserting his rights in court because of another person's breach of a legal duty to the successful party. In federal litigation, costs are generally governed by the statutory allowances set forth in 28 U.S.C. § 1821, while the subject of

the taxation of costs is provided for in 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d).

Under Fed. R. Civ. P. 26(b)(4), experts are to be paid "reasonable fees" for their deposition testimony, as compared to the provision in 28 U.S.C. § 1821 that ordinary "fact" witnesses be paid only $40 per day. Allowed per diem, mileage and subsistence for all witnesses is set forth in 28 U.S.C. § 1821, which provides in pertinent part:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
> (2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.
> (b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
> (c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.
> (2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.
> (3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.
> (4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.
> (d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
> (2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by

> employees of the Federal Government.
> (3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government. ...

28 U.S.C. § 1821.

In accordance with the Supreme Court's decision *Henkel v Chicago, St. P., M & O. Ry. Co.*, 284 U.S. 444, 52 S. Ct. 223, 76 L. Ed. 386 (1932), numerous courts have adhered to or recognized the general rule that fees of expert witnesses are not taxable as costs which may be recovered by the prevailing party in federal civil litigation and that the recovery of such fees as an item of costs is limited to those amounts prescribed for witnesses generally in 28 U.S.C.A. § 1821. The weight of authority in the Seventh Circuit is that a prevailing party could not recover in excess of the fee specified in section 1821. *See Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 911 (7th Cir. 1986); *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Adams v. Carlson*, 521 F.2d 168, 172 (7th Cir. 1975). In *Sangamo*, the Seventh Circuit said, "The majority of courts interpreting the provision for witness fees in § 1920 [taxation of costs], including the Seventh Circuit, hold that recovery of fees paid to expert witnesses is limited to statutory costs specified in 28 U.S.C. § 1821." 657 F.2d at 865.

Nevertheless, Local District Court Rule 54.2(c) provides "Fees for expert witnesses are not taxable in a greater amount than that statutorily allowable in the case of ordinary witnesses, except in exceptional circumstances by order of the Court." Civil L.R. 54.2(c). And "as otherwise provided by law," 28 U.S.C. § 1821(a)(1), the relevant bankruptcy code section provides for recovery of "costs and attorneys' fees." 11 U.S.C. § 362(h). The question, then, is whether Dr. Nye's actual charges, or the statutorily authorized amount of $1,703.86, or any costs,

should be awarded plaintiff on account of prevailing in this action.

Dr. Nye attended two days of trial and testified at one. His theory of what might deter wrongful conduct by a publicly traded entity was interesting but came after the court had already noted in its April 13, 2005, decision that the defendant's inappropriate conduct had changed. No evidence to the contrary was ever presented, either at the initial trial or the damages trial in July 2005. Since the only purpose of his testimony was deterrence, not the calculation of compensation, no purpose was served by his testimony. Plaintiffs knew that when they brought in Dr. Nye. Therefore, this cost is denied.

CONCLUSION

For the reasons discussed above, the plaintiffs are awarded a combined total of $25,000 as attorney's fees and punitive damages, plus actual costs of $2,752.18. A separate order will be entered accordingly.

December 5, 2005

Margaret Dee. McGarity
U.S. Bankruptcy Judge