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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-05-1157-KPaP
)
 STEVEN M. STEEHLER and) Bk. No. 03-25798
 LORI A. STEEHLER,)
) Ref. No. 05-14
 Debtors.)
)
)
 JIM MARSH AMERICAN CORP.,)
 dba MCMARSH'S USED CARS,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 STEVEN M. STEEHLER and)
 LORI A. STEEHLER,)
)
 Appellees.)

Argued and Submitted on July 21, 2006
at Las Vegas, Nevada

Filed - August 3, 2006

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding.

Before: KLEIN, PAPPAS and PERRIS,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the District of Oregon, sitting by designation.

1 This is an appeal from a bankruptcy court order awarding
2 actual and punitive damages in favor of the debtors against a
3 used car dealer who refused to turn over their repossessed
4 vehicle and, instead, sold it in defiance of the bankruptcy. The
5 appellant merchant argues on appeal that there was insufficient
6 evidence to support the court's awards of actual and punitive
7 damages. We AFFIRM.

8
9 Facts

10 Steven and Lori Steehler's 1997 Dodge Avenger ("Avenger")
11 was repossessed by appellant Jim Marsh American Corp., dba,
12 McMarsh's Used Cars (dealer), on October 28, 2003, and was still
13 in the dealer's possession when the Steehlers commenced a chapter
14 13 case on December 30, 2003.

15 The debtors filed a chapter 13 plan that would operate to
16 redeem the vehicle from the repossession and pay the debt through
17 the plan.

18 On January 5, 2004, the debtors' attorney's legal assistant,
19 Karyn Hollingsworth, notified the dealer by telephone and
20 requested turnover of the vehicle. She was told that one Steve
21 Cusack was the contact person in charge.

22 After leaving Cusack a voicemail message on January 6,
23 Hollingsworth faxed him a copy of the voluntary petition and the
24 chapter 13 plan that provided for paying the dealer. The cover
25 page of the fax explained: "Please release car to client Steven
26 Steehler. [H]e is now protected under Bk law and the car is
27 being paid thru his chapter 13 plan. If any questions please
28 call." No one from the dealer responded.

1 Also on January 6, armed with a copy of their bankruptcy
2 petition and their chapter 13 plan, the debtors went to McMarsh's
3 Used Cars to pick up their Avenger. They spoke directly with the
4 owner, Jim Marsh, who declined to turn over the Avenger and told
5 them to have their attorney write him a letter.

6 On January 14, 2004, debtors' counsel faxed another letter
7 to the dealer. Addressed to the attention of Jim Marsh, the
8 letter summarized the history of the communications with the
9 dealer, noted the absence of a response, and indicated that a
10 motion would be filed in the bankruptcy court seeking sanctions,
11 attorney fees, and costs.

12 On January 15, 2004, Marsh sent debtors' counsel a letter
13 acknowledging the January 14 letter, noting that the repossession
14 occurred before bankruptcy, and stating "this vehicle has since
15 been sold." The letter omitted to clarify that "since been sold"
16 meant that the Avenger had been sold earlier on January 15.

17 On January 16, 2004, the debtors filed a motion for turnover
18 of property and sanctions for violations of the automatic stay.
19 The motion requested immediate turnover of the Avenger and stay
20 violation damages under 11 U.S.C. § 362(h) of \$1,000, plus \$500
21 attorneys' fees as damages for the stay violation.

22 The ensuing stay violation litigation was resolved in two
23 phases. First, by memorandum decision entered May 28, 2004,
24 visiting Judge Tchaikovsky determined the existence of a stay
25 violation that warranted imposing § 362(h) liability based on
26 refusal to turn over the Avenger to the debtors and subsequently
27 selling it. Second, the parties litigated the amount of damages
28 before Judge Markell, who entered the order now on appeal.

1 During the second phase, the debtors filed a pleading
2 regarding the damages for the stay violations. They requested
3 attorneys' fees of \$4,040.50 and attached a summary of hours and
4 costs to evidence said amount.

5 Additionally, it was asserted that the debtors had "out of
6 pocket damages of apparently \$2,000 between cabs, taxi's,
7 borrowing cars" and requested punitive damages of \$5,000 against
8 the creditor for refusing to return the vehicle and \$15,000 for
9 selling the vehicle with knowledge of the bankruptcy.

10 The dealer contested the damages request, arguing: (1) the
11 debtors did not present evidence to substantiate their claim for
12 out-of-pocket expenses of \$2,000; (2) the debtors did not
13 demonstrate the reasonableness, necessity and beneficial nature
14 of each time entry to support the attorneys' fees request; and
15 (3) the request for punitive damages was excessive and
16 unwarranted under the circumstances.

17 The court ordered that additional evidence be provided about
18 the terms and conditions of debtors' use of and payment for their
19 relatives' 2003 Honda Element, which had replaced the car that
20 was repossessed. The court, noting the intervening Ninth Circuit
21 decision in Dawson v. Washington Mutual Bank (In re Dawson), 390
22 F.3d 1139 (9th Cir. 2004), also invited additional briefing and
23 evidence on the question of emotional distress damages.

24 Thereafter, the debtors filed a supplemental brief,
25 exhibits, and an affidavit in support thereof.

26 The dealer did not object to the method by which evidence
27 was taken, did not request a trial in open court, and did not
28 attempt to take a deposition or other discovery of the debtors.

1 After the court received the additional evidence and
2 arguments that it had requested, it decided the sanctions matter
3 and entered an order in which it awarded \$5,425.30 in attorney's
4 fees, together with \$2,000 in other actual damages and \$8,700 as
5 punitive damages (which equaled the value of the Avenger).

6 The first attempted appeal was premature because the order
7 was not on a separate document, which led us to remand. It was
8 re-entered as a separate document on August 3, 2005. This timely
9 appeal ensued.

10
11 JURISDICTION

12 The bankruptcy court had jurisdiction over the core
13 proceeding by virtue of 28 U.S.C. § 1334(a) and § 157(b)(2)(G) &
14 (O). We have jurisdiction under 28 U.S.C. § 158(a).

15
16 ISSUE

- 17 1. Whether the court erred in awarding actual damages.
18 2. Whether the court erred in awarding punitive damages.

19
20 STANDARD OF REVIEW

21 The bankruptcy court's findings of fact are reviewed for
22 clear error and its legal conclusions are reviewed de novo.
23 Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1, 7 (9th
24 Cir. BAP 2002). The court's assessment of stay violation damages
25 under § 362 is reviewed for an abuse of discretion. Id.

26 //

27 //

28 //

1 DISCUSSION

2 The dealer appeals the bankruptcy court's award of \$2,000 in
3 actual damages and \$8,700 in punitive damages. The dealer does
4 not contest the award of \$5,425.30 in attorneys' fees in favor
5 the debtors. Nor does the dealer contest that the automatic stay
6 was violated.

7
8 I

9 Section 362 creates a statutory remedy for individual
10 debtors who are injured by a violation of the automatic stay.
11 Roman, 283 B.R. at 8. The version of § 362 that pertains to this
12 appeal provides:

13 (h) An individual injured by any willful violation of a stay
14 provided by this section shall recover actual damages,
15 including costs and attorneys' fees, and, in appropriate
16 circumstances, may recover punitive damages.

17 11 U.S.C. § 362(h).¹

18 It is settled that the "willfulness" that is prerequisite
19 for stay violation damages merely requires that: (1) the
20 creditor know of the automatic stay; and (2) actions that violate
21 the automatic stay be intentional. Eskanos & Adler, P.C. v.
22 Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002); Morris v. Peralta
23 (In re Peralta), 317 B.R. 381, 389 (9th Cir. BAP 2004);
24 Associated Credit Servs., Inc. v. Champion (In re Champion), 294
25 B.R. 313, 316 (9th Cir. BAP 2003).

26 No specific intent is required. Thus, a good faith belief
27 that the stay is not being violated "is not relevant to whether

28 ¹Section 362(h) was redesignated as § 362(k)(1) in BAPCPA,
Act of April 20, 2005, Pub. L. 109-8. Since the former version
of the statute applies to this case, we use § 362(h).

1 the act was 'willful' or whether compensation must be awarded."
2 Johnston Env't'l Corp. v. Knight (In re Goodman), 991 F.2d 613,
3 618 (9th Cir. 1993); Tsafaroff v. Taylor (In re Taylor), 884 F.2d
4 478, 482 (9th Cir. 1989); Campion, 294 B.R. at 316.

5 It is beyond cavil that the dealer knew about the automatic
6 stay in this case and that the sale of the Avenger was
7 intentional. Hence, the stay violation was willful, and that
8 point is not contested on appeal. The question is on the damages
9 that were awarded.

11 II

12 The statute speaks in terms only of "actual damages" and
13 "punitive damages." Hence, we assess this appeal in view of
14 those two categories.

16 A. Actual Damages

17 The term "actual damages" in § 362(h) is a broad concept
18 that includes compensation for financial harm and for non-
19 financial harm. One form of financial harm, by virtue of the
20 manner Congress chose for designating actual damages, includes
21 attorneys' fees and costs. 11 U.S.C. § 362(h) ("actual damages,
22 including costs and attorneys' fees"); Roman, 283 B.R. at 9-13.
23 As to non-financial harm, "actual damages" include emotional
24 distress damages upon a showing of significant harm. Dawson, 390
25 F.3d at 1148-49.

26 As applicable to financial harm, we have previously
27 established that the term "actual damages" in § 362(h) connotes
28 the same concept as actual damages as they are generally known in

1 the law and are an "amount awarded to a complainant to compensate
2 for a proven injury or loss" and include "damages that repay
3 actual losses." Roman, 283 B.R. at 9 n.9, quoting BLACK'S LAW
4 DICTIONARY (7th ed. 1999).

5 The court awarded the Steehlers a total of \$7,425.30 in
6 actual damages, consisting of \$5,425.30 in attorneys' fees and
7 costs, plus \$2,000.00 in other actual damages related to
8 financial harm. It did not award damages for non-financial harm.

9 In this appeal, the dealer does not question the portion of
10 the actual damages that reflect attorneys' fees and costs and,
11 instead, complains that the \$2,000.00 portion of the actual
12 damages award was not supported by evidence.

13 The narrow question is whether there is evidence to support
14 the \$2,000.00 award. Lori Steehler testified by affidavit
15 executed January 19, 2005, about additional expenses that had
16 been incurred as a result of the loss of the Avenger. That
17 affidavit was presented as exhibit H to the debtors' Supplemental
18 Brief Regarding Order On Damages For Stay Violation, to which
19 brief were also attached bank records of the debtor, the contract
20 relating to substitute transportation, insurance expense records,
21 and the installment contract regarding the Avenger. She
22 testified that the substitute vehicle cost her \$500.00 per month,
23 including contract payments of \$478.85. The Avenger contract
24 called for payments of \$380.02. She also testified that she had
25 "incurred out of pocket expenses because of Creditor McMarsh
26 failure to return my vehicle post petition."

27 The court relied on this declaration as evidence in support
28 of its award:

1 The court credits the declaration of the debtors that their
2 out-of-pocket travel expenses for the time they were without
3 a car amounted to \$2,000, and it overrules the objection
4 made by the creditor that "the Debtors have not presented
5 even a scintilla of evidence to substantiate their claim."
6 The creditor had full opportunity to depose or otherwise
7 challenge the debtors on this point, but it did not do so.

8 Order Regarding Remedies For Violating Automatic Stay (March 21,
9 2005), at 3 (footnote omitted).

10 The court's finding is supported by evidence in the record
11 that the court was entitled to believe.

12 The dealer's argument on appeal is that this declaration was
13 not probative of the actual damages that were awarded. Rather,
14 at oral argument it was contended, that it was limited to an
15 attempt to obtain "cram down" damages and did not apply to the
16 "incidental" damages that were awarded.² Thus, it is argued, the
17 only support for the \$2,000.00 award was a statement in the
18 debtors' September 7, 2004, request for a hearing regarding
19 damages: "Debtors have out of pocket damages of apparently
20 \$2,000 between cabs, taxis, and borrowing cars." [Request For]
21 Hearing Regarding Damages For Stay Violations, Sept. 7, 2004, at
22 2.

23 The dealer's argument is based on the strawman fallacy.
24 First, it artificially compartmentalizes actual damages in a
25 manner that does not square with the law or with how the court
26 was viewing the matter. Second, it incorrectly describes the

27 ²We are mindful that the court drew a distinction between
28 "general" damages, of which it said there were none, and
"incidental" damages, of which it said there were \$2,000.00.
Order Regarding Remedies For Violating Automatic Stay at 2-3
(March 21, 2005). In the actual award announced at the end of
that Order, the court returned to the statutory classification of
"actual" damages and "punitive" damages.

1 Supplemental Brief to which the Lori Steehler declaration was
2 attached as limited to the debtor's ultimately unsuccessful
3 request for "cram down" damages. That Supplemental Brief,
4 however, also addressed increased monthly expenses and attorneys'
5 fees and is the place where counsel pegged attorneys' fees and
6 costs at the \$5,425.30 that was awarded. Supp. Brief at 4.

7 Although the assertion by debtors' counsel in the Request
8 For Hearing that the debtors "have out of pocket damages of
9 apparently \$2,000 between cabs, taxis, and borrowing cars" was
10 not evidence, the Lori Steehler declaration executed on January
11 19, 2005, included her statement that: "I have incurred out of
12 pocket expenses because of Creditor McMarsh failure to return my
13 vehicle post petition."

14 There was no objection to the Lori Steehler declaration.
15 The dealer did not attempt to cross-examine Lori Steehler by
16 deposition or by requesting testimony in open court as provided
17 by Federal Rule of Bankruptcy Procedure 9014(d). Hence, the
18 creditor has waived any issue regarding the court's manner of
19 taking evidence.

20 In short, it is apparent that there was some evidence to
21 support the court's determination of the \$2,000 component of
22 actual damages that was separate from the \$5,425.30 in attorneys'
23 fees and costs that were also awarded as actual damages. We
24 cannot say that this was clearly erroneous.

25
26 B. Punitive Damages

27 Under § 362(h), a debtor, in appropriate circumstances, may
28 recover punitive damages. 11 U.S.C. § 362(h). The question is

1 whether this case presents "appropriate circumstances" for
2 punitive damages.

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4 1

5 Although the Ninth Circuit has not attempted to define what
6 constitute "appropriate circumstances" for § 362(h) punitive
7 damages, it has explained in the § 362(h) context that it has
8 "traditionally been reluctant to grant punitive damages absent
9 some showing of reckless or callous disregard for the law or
10 rights of others." Goichman v. Bloom (In re Bloom), 875 F.2d
11 224, 228 (9th Cir. 1989).

12 In addition to using the Bloom some-showing-of-reckless-or-
13 callous-disregard-for-the-law-or-rights-of-others rubric, we have
14 mentioned, in dictum, other formulations including "malicious or
15 wanton or oppressive" and "egregious, intentional misconduct."
16 Stinson v. B-Rite Rest. Supply, Inc. (In re Stinson), 295 B.R.
17 109, 123 (9th Cir. BAP 2003), rev'd in part on other grounds, 128
18 F. App'x 30 (9th Cir. 2005); McHenry v. Key Bank (In re McHenry),
19 179 B.R. 165, 168 (9th Cir. BAP 1995); Ramirez v. Fuselier (In re
20 Ramirez), 183 B.R. 583, 590 (9th Cir. BAP 1995); see also, In re
21 Daniels, 316 B.R. 342, 355-56 (Bankr. D. Idaho 2004).

22 For example, in the Ramirez dictum we referred with apparent
23 approval to trial court decisions that look at punitive damages
24 through a matrix of whether the conduct in question was malicious
25 (including ill will or spite), or wanton (including reckless
26 indifference or callous disregard for the rights of another), or
27 oppressive (including misuse or abuse of authority or power).
28 Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 590 (9th Cir.

1 BAP 1995), citing with approval, Sansone v. Walsworth (In re
2 Sansone), 99 B.R. 981, 987-88 (Bankr. C.D. Cal. 1989) (§ 362(h)),
3 and Shuman v. Standard Oil Co. of Ca., 453 F. Supp. 1150, 1154
4 n.2 (N.D. Cal. 1978) (Equal Credit Opportunity Act).³

5 In fact, however, there is some convergence among the
6 formulations. The some-showing-of-reckless-or-callous-disregard-
7 for-the-law-or-rights-of-others concept mentioned in Bloom is a
8 standard statement of "wanton" in federal law. See Shuman, 453
9 F. Supp. at 1154 n.2.

10 The dealer, citing Stinson, says there was no evidence that
11 his conduct was malicious, wanton, or oppressive. We do not
12 agree.

14 ³These cases all refer back to note 2 in Shuman:

15 Standard civil jury instructions advise the jury that
16 punitive damages may be awarded if damage to the plaintiff
17 was maliciously, or wantonly, or oppressively done, and
define the key words as follows:

18 An act or a failure to act is "maliciously" done, if
19 prompted or accompanied by ill will, or spite, or grudge,
20 either toward the injured person individually, or toward all
persons in one or more groups or categories of which the
injured person is a member.

21 An act or a failure to act is "wantonly" done, if done in
22 reckless or callous disregard of, or indifference to, the
rights of one or more persons, including the injured person.

23 An act or a failure to act is "oppressively" done, if done
24 in a way or manner which injures, or damages, or otherwise
25 violates the rights of another person with unnecessary
26 harshness or severity, as by misuse or abuse of authority or
27 power, or by taking advantage of some weakness, or
disability, or misfortune of another person. Devitt &
Blackmar, Federal Jury Practice and Instructions § 85.11
(3rd Ed. 1977).

28 Shuman, 453 F. Supp. at 1154 n.2.

1 We need not be precise about the correct formulation in this
2 appeal, because the dealer's conduct, based purely on the face of
3 the record, satisfies the "appropriate circumstances" criterion
4 of § 362(h) under any formulation. The dealer was notified of
5 the Steehler bankruptcy verbally and in writing on multiple
6 occasions; the dealer was told that the vehicle had to be turned
7 over; the dealer, with unambiguous knowledge of the bankruptcy
8 and the demand to turn over the vehicle, intentionally sold the
9 vehicle.

10 The dealer's conduct was in stark disdain and defiance of
11 the Bankruptcy Code and was outrageous under any standard. It
12 displayed "reckless or callous disregard for the law or rights of
13 others." It was "wanton" for the same reason. Moreover, it was
14 "egregious, intentional misconduct."

15 The appellant makes much of a comment in the court's
16 decision that "no lender or businessperson of any standing who
17 deals in credit can claim to be ignorant of the automatic stay
18 without lying." This reference to "lying" prompted the dealer to
19 assign an error based on the notion that the court needed to have
20 evidence that the appellant was lying. This tangent misses the
21 point.

22 The essential point did not turn on whether appellant was
23 lying. Rather, the key point is that it is not a persuasive
24 argument against punitive damages for a merchant who deals in
25 used cars at high rates of interest (i.e., to sub-par credit
26 risks) to claim to be ignorant of the automatic stay.

27 The "appropriate circumstances" for punitive damages are
28 necessarily contextual. It is significant that the appellant is

1 a merchant because merchants are legitimately held to the
2 standards of the marketplace. The role of the automatic stay in
3 bankruptcy is so important and well-known that it functions as
4 one of the standards of the marketplace to which every merchant
5 must adhere, regardless of an individual merchant's state of
6 mind. Hence, in the context of a merchant, punitive damages are
7 more easily justified than in other contexts.

8 Here, the dealer-merchant knew about the bankruptcy and the
9 demand for turnover when it sold the Avenger. We can affirm for
10 any reason supported by the record. Dittman v. California, 191
11 F.3d 1020, 1027 n.3 (9th Cir. 1999); Donald v. Curry (In re
12 Donald), 328 B.R. 192, 203-04 (9th Cir. BAP 2005). This record,
13 regardless of the veracity of the dealer, amply supports the
14 existence of "appropriate circumstances" for imposing § 362(h)
15 punitive damages.

16
17 2

18 Recent developments in basic law regarding the amount of
19 punitive damages awards also merits consideration to assure that
20 the amount of the award comports with the law of the circuit.

21 The Supreme Court decided two punitive damages cases in
22 2003. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408,
23 409(2003); BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 575 (2003).
24 The Ninth Circuit thereafter restated the law of the circuit.
25 Planned Parenthood of the Columbia/Willamette Inc. v. Am.
26 Coalition of Life Activists, 422 F.3d 949, 953 (9th Cir.
27 2005) ("Planned Parenthood").

1 Punitive damages are aimed at both deterrence and
2 retribution. Notions of fairness dictate that a person receive
3 fair notice not only of the conduct that will subject him to
4 punishment, but also of the severity of the penalty that may be
5 imposed. Planned Parenthood, 422 F.3d at 953. Accordingly,
6 “[t]he Due Process Clause of the Fourteenth Amendment prohibits
7 the imposition of grossly excessive or arbitrary punishments on a
8 tortfeasor.” Planned Parenthood, 422 F. 3d at 953. Whether an
9 award comports with due process is measured by three guideposts:

10 (1) the degree of reprehensibility of the defendant’s
11 misconduct; (2) the disparity between the actual or
12 potential harm suffered by the plaintiff and the punitive
13 damages awarded by the jury and the civil penalties
14 authorized or imposed in comparable cases.

15 Planned Parenthood, 422 F.3d at 953, citing State Farm, 538 U.S.
16 at 409, and BMW, 517 U.S. at 575.

17 First, the court spoke to the degree of the creditor’s
18 reprehensibility by making clear that it was awarding punitive
19 damages as a result of the dealer’s “mendacity.” As we have
20 explained, it is simply not acceptable for a merchant selling
21 used cars to people with inferior credit to defy the Bankruptcy
22 Code in the face of specific notice of the fact of bankruptcy and
23 of the requirement to turn over the property.

24 The record supports the inference that the dealer sold the
25 Avenger in plain defiance of the automatic stay. That is
26 reprehensible misconduct for purposes of punitive damages.

27 As to the second factor, there is no material disparity
28 between the harm, measured by the actual damage award of \$2,000,
and the punitive damages award of \$8,700. Infliction of economic

1 injury, especially when done intentionally through affirmative
2 acts of misconduct, or when the target is financially vulnerable,
3 can warrant a substantial punitive damages award. Planned
4 Parenthood, 422 F. 3d at 959.

5 Finally, there is the relation of the punitive damages
6 awarded to what could be awarded in comparable cases. Here, the
7 court awarded the \$8,700.00 value of their vehicle that appellant
8 sold. The court noted the transaction was comparable to the
9 Nevada state law definition of theft – anyone who “[c]onverts,
10 makes an unauthorized transfer of an interest in, or without
11 authorization controls any property of another person” – for
12 which restitution is prescribed as part of the penalty. Nev.
13 Rev. Stat. § 205.0835. It follows that the punitive damages
14 remedy was appropriately tailored to the situation.

15 We cannot say that the court abused its discretion in its
16 award of punitive damages.

17
18 CONCLUSION

19 For the foregoing reasons, we AFFIRM.
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