

1 months and \$4,200.00 for the next six months.

2 Moving expenses incurred vacating the foreclosed property
3 and later moving back in are a component of alternative housing
4 expense. The Sundquists assert that moving expenses were
5 \$10,000.00. That sum is credible and was not questioned.

6 Hence, actual damages for alternative housing expense are
7 \$73,200.00 in rent, plus \$10,000.00 in moving expenses, for a
8 total of \$83,200.00.

9

10 C

11 Section 362(k) designates attorneys' fees as an element of
12 damages, rather than an item separate from damages.

13 Such fees are regarded as "mandatory." Schwartz-Tallard,
14 803 F.3d at 1099-1101; Snowden, 769 F.3d. at 657.

15 While there are a variety of ways to determine attorney's
16 fees, the common denominator regarding fees in bankruptcy courts
17 is that fees should not exceed the "reasonable" value of services
18 rendered. See, e.g., 11 U.S.C. §§ 328(a), 329(b), 330(a)(1)(A),
19 502(b)(4), 503(b)(4) & 506(b) ("reasonable").

20 The "reasonable" value of services, of necessity, is
21 determined on a case-by-case basis in light of the peculiar
22 circumstances of each case, as modulated by the sound discretion
23 of the bankruptcy court.

1 The key circumstance is Bank of America's institutional
2 obstinance and dishonesty (including lying to the CFPB regarding
3 the status of the state-court litigation) in refusing all
4 recompense after the Sundquists discovered that Bank of America
5 had secretly restored them to title after they moved and was
6 demanding that they pay for damages resulting from Bank of
7 America's incompetent stewardship of its illegally-acquired
8 property.

9 The Sundquists' general practice lawyer recognized that the
10 overall situation implicated several state-law causes of action
11 and elected to sue in state court on multiple theories, including
12 the automatic stay violation, on the theory that more
13 comprehensive relief would be available in the state forum.

14 Twenty-twenty hindsight reveals that the state appellate
15 court deemed the automatic stay violation theory to be a matter
16 of exclusive federal jurisdiction, which would have permitted
17 immediate resort to federal court. But it is also significant
18 that other causes of action stated in the state-court action were
19 deemed meritorious.

20 The Sundquists would not have commenced that state-court
21 action "but for" the actions of Bank of America regarding the
22 automatic stay. The evidence is that they did not consult the
23 counsel who filed the state-court lawsuit for them until after

1 rescinded its illegal foreclosure.

2 The assertion of the wrongful foreclosure action in state
3 court premised on Bank of America's violation of the automatic
4 stay was merely the first step in obtaining the § 362(k)(1)
5 remedy. As such, the legal fees associated with that cause of
6 action qualify as § 362(k)(1) damages.

7 While reasonable legal professionals might disagree as to
8 the efficacy of the initial strategy, it was reasonable to pursue
9 state-law causes of action against Bank of America that
10 potentially encompassed damages greater than what might be
11 anticipated from a mere § 362(k) stay violation.

12 Hence, this court cannot say that the fees paid by the
13 Sundquists to state-court counsel for the state-court phase of
14 the litigation exceeded the reasonable value of services under
15 the circumstances. In any event, Bank of America is in no
16 position to complain because its conduct necessitated the fees.

19 Federal Rule of Bankruptcy Procedure 2016(b) implements 11
20 U.S.C. § 329 by requiring that every attorney for a debtor,
21 regardless of whether the attorney plans to apply for
22 compensation, must file a statement of compensation paid or
23 agreed to be paid in connection with a bankruptcy case. 11

1 court that bear a nexus to enforcing bankruptcy law.

2 If the compensation exceeds the reasonable value of
3 services, then the court has the power to cancel the agreement
4 and to order the return of payments. 11 U.S.C. § 329(b).

5 Here, the key cause of action in the state-court was
6 premised on violation of 11 U.S.C. § 362, which is at the heart
7 of enforcement of bankruptcy law. Accordingly, the Sundquists'
8 state-court counsel was required to file his Rule 2016(b)
9 statement.

10 Likewise, the Sundquists' counsel in this adversary
11 proceeding also must comply with Rule 2016(b).⁶³

12

13 a

14 The Sundquists' state court counsel filed a Rule 2016(b)
15 statement (after this court called the requirement to his
16 attention) in which he reported having received \$17,882.00.⁶⁴

17 This court has reservations about the quality of performance
18 by that counsel and the wisdom and efficacy of his strategy.
19 Nevertheless, it cannot say, in the face of the nature of the
20 litigation strategy of Bank of America, that \$17,882.00 exceeded
21 the reasonable value of services within the meaning of § 329(b).

22 Those services led to a state appellate determination of the
23 theretofore open question whether California's remedies for

1 wrongful foreclosure can be premised on nothing other than a
2 violation of the federal bankruptcy automatic stay. That, at a
3 minimum, clarified the law in a murky area and redirected the
4 Sundquists to this court. In addition, the Sundquists were
5 provoked to consult state court counsel because Bank of America
6 secretly rescinded its illegal foreclosure and tried to leave the
7 Sundquists holding the bag for expenses attributable to its
8 incompetent stewardship of the Sundquists' residence.

9 It follows that the services rendered in the state court
10 litigation have a sufficient nexus to the § 362 stay violation to
11 qualify as § 362(k) damages.

12 Hence, the component of § 362(k)(1) attorney's fee damages
13 attributable to the state-court litigation is \$17,882.00.

14
15 b

16 The Sundquists engaged different counsel to prosecute this
17 adversary proceeding. That attorney, who was also their counsel
18 in the chapter 13 case, complied with 11 U.S.C. § 329 by filing
19 the supplemental statement required by the last sentence of Rule
20 2016(b) for any payment or agreement not previously disclosed.
21 Her initial statement had been made contemporaneous with the
22 filing of the chapter 13 case in 2010.

23 In the subsequent statement, she reported having taken the

1 pursuant to court order.⁶⁶

2 The agreed contingency fee is the higher of 30 percent of
3 the total recovery or the amount of fees that the court orders
4 paid by the other side.⁶⁷

5

6 i

7 If the agreed compensation for debtors' counsel exceeds the
8 reasonable value of services, the court may cancel the agreement.
9 11 U.S.C. § 329(b).

10 In principle, contingent fees are permissible in bankruptcy
11 cases. Trustees and committees are expressly authorized to
12 employ professionals on a contingency fee basis. 11 U.S.C.
13 § 328(a). There may even be scenarios in which contingency fees
14 are appropriate for counsel representing a debtor.

15 Contingency fees for debtor's counsel in § 362(k)(1) stay
16 violation disputes, however, present logical difficulties.
17 Attorneys' fees are an element of § 362(k)(1) damages. A simple
18 contingency fee agreement in a situation in which attorneys' fees
19 are an element of damages leads to contingency fees on
20 contingency fees, which would set up a repetitive loop in which
21 fees would increase to infinity.

22 While it may be possible to draft a debtors' counsel
23 contingency fee agreement that might solve the problem described

1 not do so.

2 It follows that the agreement between counsel and the
3 debtors calls for fees that exceed the reasonable value of
4 services. Accordingly, pursuant to § 329(b) the portion of the
5 Attorney-Client Retainer and Fee Agreement calling for a
6 contingency fee is cancelled to the extent that it calls for
7 excessive compensation. 11 U.S.C. § 329(b).

8

9

ii

10 The consequence of the § 329(b) cancellation of the
11 excessive portion of the fee agreement means that the court must
12 determine the portion of the fee that is not excessive.

13 In response to this court's order to justify the contingency
14 fee under §§ 329(b) and 362(k)(1), the Sundquists' counsel
15 restated her fees on the hourly lodestar basis commonly used in
16 fee award cases.

17 Lodestar fees consistent with § 330 are presumptively
18 reasonable for purposes of § 329 so long as they are proportional
19 in terms of time, rate, and the nature and amount of the
20 controversy. 11 U.S.C. §§ 329(b)-330.

21 Here, the statement of lodestar fees in the hourly fee
22 application documents 207.56 hours devoted to representation of
23 the Sundquists in the stay violation matter and uses an hourly

1 § 329(b). If anything, as implied by comments elsewhere in this
2 opinion, counsel could have taken more time, effort, and expense
3 to prepare a more complete evidentiary presentation.

4 The component of § 362(k)(1) damages based on attorney fees
5 is \$70,000.00, which sum includes the documented fees and
6 expenses, together with an additional sum to compensate for the
7 time spent preparing the statement of fees.⁶⁸

8

9

D

10 Lost income is another element of § 362(k)(1) economic
11 damages, which subdivides into the income of the respective
12 plaintiffs.

13

14

1

15 Renée Biagi Sundquist has a bachelor's degree in marketing
16 and finance. She stopped working in the finance industry about
17 1999 when her twin sons were born.

18

19 She is an ice skater. As a youth, she competed in the
20 United States, was National Champion of Italy, and qualified for
21 the 1980 Italian Olympic Team but was unable to compete because
22 of illness. This background matters in this case because it
23 connotes the mental toughness inherent in individual performance
athletes who are able to compete at national and Olympic levels.

1 at Skatetown (Roseville Sportworld Inc.) in Roseville,
2 California, at \$20.00 per hour. In addition, she taught private
3 lessons for \$79.00 to \$100.00 per hour.

4 In August 2010, she accepted employment as Skating Director
5 at Skatetown on a job-share basis in which her share of the job's
6 annual salary was \$37,500.00. And she was able to teach private
7 lessons. Her IRS Form W-2 for 2010 reflects compensation from
8 Roseville Sportworld Inc. of \$22,732.29. The court infers that
9 her lesson-based income was about \$7,100.00 in 2010.⁶⁹

10 She found the work increasingly difficult because the stress
11 of dealing with Bank of America was draining her physical and
12 emotional resources. Migraine headaches, diagnosed by her
13 neurologist as stress-induced,⁷⁰ interfered with her ability to
14 work.

15 In August 2011, she was offered the Skating Director
16 position at Skatetown on a full-time basis with an annual salary
17 of \$80,000.00. But the effect of the stress of dealing with Bank
18 of America and concomitant migraine headaches prevented her from
19 accepting the job.⁷¹

20 Her IRS Form W-2 for 2011 reflects compensation from
21 Roseville Sportworld Inc. of \$47,491.68.

22 By 2012, her income as skating instructor dwindled as her
23

1 physical reactions to the situation with Bank of America
2 worsened.

3 Her IRS Form W-2 for 2012 reflects compensation from
4 Roseville Sportworld Inc. of \$7,397.00.

5 Tax returns for 2013 and 2014 reflect that she had no income
6 during those years.

7 She testified that her health is now "terrible" and that she
8 is unable to work and has insufficient prior work credits to
9 qualify for Social Security disability. Migraine headaches are
10 near daily occurrences. Multiple rounds of migraine medication
11 make her slow. Anti-seizure medication makes it hard for her to
12 speak.⁷²

13 The court is persuaded that Renée Sundquist was unable to
14 accept the \$80,000.00 Skating Director position in August 2011
15 because of the stress induced by the difficulties resulting from
16 the stay violation by Bank of America and its refusal to redress
17 the stay violation by eliminating inappropriate charges. It is
18 further persuaded that, "but for" the conduct of Bank of America
19 regarding its stay violation, she would have been successful in
20 that job and would still be employed in that position.

21 The court is not persuaded that she actually lost a material
22 amount of income in 2010 due to the stay violation.

23 Nor is the court persuaded that lost income should be

1 violation and its aftermath is: 2011 \$8,908;⁷³ 2012 \$72,603;⁷⁴
2 2013 \$80,000; 2014 \$80,000; 2015 \$80,000; 2016 \$80,000.⁷⁵ Hence,
3 her total lost income for purposes of § 362(k)(1) actual damages
4 is \$401,511.00.

2

7 After Erik Sundquist graduated from the University of
8 California at Berkeley, he joined, and eventually succeeded to
9 ownership of, the construction company founded by his father in
10 the 1960s. He also formed some development-related businesses.

11 A downturn in construction business led him to wind up the
12 construction firm. The development businesses, Finn-Am, Inc.,
13 Sundquist Custom Design Build, Sundquist Associates, and
14 Chandelle, LLC, fizzled out during the Great Recession.

15 On the downslope, his earnings were \$154,238.00 in 2007,
16 \$87,178.00 in 2008, and \$20,125.00 in 2009.⁷⁶

17 He also has engaged in professional acting, but that
18 endeavor produced negligible income during the period relevant to
19
20
21

22 ⁷³Eight months of \$37,500 (\$25,000) as job-sharing Skating
23 Director + 4 months of \$80,000 Skating Director (\$26,667) + eight
months of \$7,100 teaching income (\$4,733) - Actual W-2 income
(\$47,400)

1 this stay violation matter.⁷⁷

2 In 2012, he developed a consulting business based on his
3 status as a Reserve Specialist certified by the Community
4 Associations Institute. That business, SMA Reserves, LLC,
5 advises homeowner associations on the reserves that need to be
6 established in light of long-term maintenance and construction
7 needs. These so-called reserve studies are then used by the
8 client HOA for budget purposes. Tax return documents in evidence
9 reflect that through SMA Reserves, LLC, he earned \$39,776.00 in
10 2012, \$67,931.00 in 2013, and \$85,899.00 in 2014.⁷⁸ SMA
11 Reserves, LLC, is taxed as a partnership in which Erik Sundquist
12 has a 60 percent share.

13 He testified that his HOA clients have primarily been in the
14 San Francisco Bay market area and that he has found himself
15 frozen out in the Sacramento market area.

16 Erik Sundquist asserts that Kocal Management Group: A
17 Division of The Management Trust,⁷⁹ the large management company
18 that manages the HOA for the Sundquist residence and a number of
19 other HOAs in the Sacramento area, has blackballed him on account
20 of the dispute between the Sundquists and Bank of America.

21 This explanation rings true. The record reflects
22 considerable hostility directed by the HOA towards the Sundquists

23

⁷⁷His 2011 IRS Form 1040 reflects \$32.00 from the Screen

1 because of their stance that Bank of America is responsible to
2 pay the HOA monthly charges and the \$20,000.00 fine that accrued
3 during the time that Bank of America owned their residence. The
4 issue has festered because it is about more than money. The
5 eyesore of the dead landscaping has been an annoyance because the
6 standoff with Bank of America has made the Sundquists reluctant
7 to invest in landscaping if they are going to be unable to keep
8 the house. That, in turn, infuriates the HOA leadership.⁸⁰

9 The court concludes that Bank of America's refusal to pay
10 HOA charges during the time that it owned the residence in 2010
11 has had the consequence of reducing the number of engagements by
12 HOAs for reserve studies that Erik Sundquist's firm is asked to
13 do.

14 The problem becomes how to determine the amount of loss
15

16 ⁸⁰From the Renée Sundquist Journal:
17

18 [July 2015] "I worried all day, and was so mad about our
19 homeowners association calling a hearing to discuss our lawn.
20 After the bank sold our home, they forgot to water, now we are
supposed to pay the association penalties and replace our lawn
and s[h]rubs. How will all this wrong be right?"

21 "Really excited we were given an opportunity for a lynch mob
22 Association meeting to discuss, oh, I mean embarrass us into
23 paying fees we don't owe. We found out that man recently
blocking my garage and pounding on our door for 20 mins is from
the association board. Life is good. Still dealing with my
children's fear and my pounding heart. So upset tonight, the

1 caused by Bank of America. No evidence has been presented
2 regarding the market for reserve studies, the degree of
3 competition, or other logically relevant factors. Ordinarily,
4 one would expect to see expert testimony on the point.

5 While some might believe that this leaves the court in the
6 uncomfortable position of needing to speculate, that is
7 incorrect. The court can and, based on the evidence of the
8 business success in the nearby San Francisco Bay area, does have
9 the ability to fashion an award. But it will be done in a
10 conservative fashion that will award less than what likely could
11 have been proved with a more focused evidentiary presentation.

12 The concrete evidence is the income actually received
13 through SMA Reserves, LLC, for 2012, 2013, and 2014. These sums
14 are sufficiently modest as to warrant the inference the firm has
15 excess capacity - i.e. the ability to undertake additional
16 reserve studies.

17 The question is how much additional reserve study business
18 would have ensued if Erik Sundquist had not been frozen out of
19 his home market. While an expert focusing in on the numerous
20 intangibles might be able to make a case for more than an
21 additional 50 or 100 percent, the court concludes that an
22 appropriately conservative number, giving Bank of America the
23 benefit of the doubt, is 25 percent.

1 speculative without actual evidentiary support.

2 Accordingly, the computation of lost business damages under
3 § 362(k)(1) is: 2012 - \$9,944.00 (= \$39,776.00 x .25); 2013 -
4 \$16,982.75 (= \$67,931.00 x .25); 2014 - \$21,474.75 (= \$85,899.00
5 x .25); 2015 - \$21,474.75; 2016 - \$21,474.75. Total \$91,351.00.

6

7 E

8 Lost property warrants an award of § 362(k)(1) actual
9 damages. During the time that Bank of America owned the
10 Sundquist residence pursuant to its stay-violating foreclosure,
11 the major appliances (cooktop, oven, built-in refrigerator,
12 washer, dryer), window coverings, and carpet went missing through
13 no fault of the Sundquists.

14 The court believes the Sundquists' testimony that they left
15 the premises in good order and did not take any of the subject
16 property.

17 The personal property would not have been lost "but for" the
18 actions of Bank of America in violating the automatic stay by
19 foreclosing and thereafter prosecuting an unlawful detainer
20 action that had the effect of driving the Sundquists out of their
21 home and into a rental property.

22 The court also believes the Sundquist testimony that the
23 value of the lost personal property was \$24,000.00.

1 The Verdera Homeowners Association assessed a charge of
2 \$20,000.00 because Bank of America permitted the landscaping to
3 die while it owned the Sundquist residence pursuant to its stay-
4 violating foreclosure.

5 Bank of America is also liable for all HOA fees that accrued
6 during the time that it owned the Sundquist residence.

7 And Bank of America is liable for all HOA fees - \$235.00 +
8 \$15.50 late fee per month - that accrued between the time it
9 rescinded the foreclosure sale on December 30, 2010, and the time
10 that the Sundquists moved back in during late January 2012, a
11 total of 13 months.

12 Placing liability on Bank of America for HOA fees between
13 December 30, 2010, and January 31, 2012, is appropriate for two
14 independent reasons. First, the bank permitted the rescission to
15 remain secret until the Sundquists' curiosity about the resumed
16 billing got the better of them and prompted them to look at the
17 land records on March 21, 2011. Bank of America was content to
18 permit the rescission to remain secret through January 31, 2012,
19 if the Sundquists had not taken the initiative. If the bank had
20 foreclosed during that period, it would have been liable for the
21 accrued HOA fees.

22 Second, the Sundquists were locked into a lease for their
23 alternative housing. The reason they were in alternative housing

1 One related item relates to the landscaping. The HOA
2 assessment of \$20,000.00 in 2010 presumably was an approximation
3 of the cost of lawn and landscaping. Prices have risen nearly 10
4 percent in the interim and likely will be subject to further
5 increases before the Sundquists actually recover. Accordingly,
6 an extra \$2,000.00 will be awarded to enable replacement of the
7 landscaping that Bank of America permitted to die. This is yet
8 another fruit of the poisoned foreclosure tree; "but for" the
9 stay violations by Bank of America, the Sundquists would not have
10 moved and would not have suffered the landscaping penalty charge.

11 The § 362(k)(1) actual damages attributed to HOA fees,
12 charges, assessments, and penalties total \$26,637.50.⁸¹

13
14 G

15 The record is replete with descriptions of the many
16 occasions after June 14, 2010, that the Sundquists sent loan
17 modification applications and supporting materials to Bank of
18 America.⁸² These application packages typically consisted of

19
20 ⁸¹The accrued balance as of the May 2011 HOA assessment was
21 \$22,633.50. Sundquist Ex. 29. Since the monthly assessment and
22 late fee was \$250.50, the eight months remaining total through
23 January 31, 2012, is \$2,004.00. Thus, the HOA total is
\$22,633.50 + \$2004.00 = \$24,637.50. Adding the \$2,000.00
increased cost of replacing landscaping yields \$26,637.50.

⁸²Ex. 30. From the Penée Sundquist Journal:

1 more than thirty pages.⁸³

2 A persistent feature of the loan modification situation is
3 that the payoff statements from Bank of America include a demand
4 that the Sundquists pay expenses of \$5,696.61 incurred by Bank of
5 America during the time that it was in title to the Sundquist
6 residence in 2010 pursuant to its stay violations. The
7 Sundquists take umbrage at the demand that they pay Bank of
8 America's expenses incurred when Bank of America owned the
9 property by virtue of its stay-violating void foreclosure.

10 That \$5,696.61⁸⁴ includes, for example, "HOA fee \$562.50,"
11 which was the payment by Bank of America on September 17, 2010,
12 of the HOA invoice dated August 11, 2010.⁸⁵ It includes \$450.00
13 for yard maintenance that occurred while Bank of America was in
14 possession of the property. It includes \$120.00 in property
15 inspection fees incurred before the rescission of the foreclosure
16 on account of the stay violations.

17 _____
18 "[2012] Called and left a message for [CEO Representative]
19 Lexi asked why we needed to sent the modification so many times
and asked for the current payoff.

20 Renée Sundquist Decl. ¶ 393.

21 "Today we received another random loan modification packet
22 to be completed. There must be a rule to send out a bogus denial
or send out a new modification packet."

23 Renée Sundquist Decl. ¶¶ 394-95.

1 When one compares the payoff statement dated March 3, 2016,
2 with the payoff statement dated June 12, 2012, the additional
3 charges confirm the Sundquists' contention that Bank of America
4 has been continuing to demand to be reimbursed for expenses it
5 ran up during the period it owned the property.⁸⁶ This has been
6 a major sticking point in loan modification efforts from the
7 standpoint of the Sundquists.

8 The court agrees with the Sundquists that it is both wrong
9 and in bad faith for Bank of America to continue to demand that
10 Bank of America be reimbursed for the fruits of its own
11 misconduct.

12 This unreasonable and unconscionable position by Bank of
13 America is the main reason that there has been a six-year
14 standoff with the Sundquists. During that time, there has been
15 no meaningful effort by Bank of America to atone for its stay
16 violations. Hence, these are fruits of the poisoned foreclosure
17 and unlawful detainer.

18 The court finds that in the six years since the stay
19 violation there have been twenty loan modification requests and
20 finds that Bank of America's insistence on reimbursement of fees
21 and expenses incurred after its stay-violating foreclosure and
22 stay-violating unlawful detainer is not consistent with its
23 obligation of good faith and fair dealing. It follows that all

1 applications with extensive documentation that, the court finds,
2 they faithfully completed and submitted, like Sisyphus, hoping
3 that this time would be different. The fact (which the court
4 finds as fact) that Bank of America had no intention of seriously
5 entertaining the applications that included requests for
6 adjustments on account of Bank of America's stay violations
7 created a burden that appropriately is included as actual damages
8 for stay violation.

9 Actual damages for each incidence of bad faith refusal to
10 entertain loan modification requests adjustments on account of
11 Bank of America's stay violations are \$1,000.00 per incidence.
12 Hence, § 362(k)(1) actual damages on this account are \$20,000.00.
13

14 H

15 Medical expenses are also an item for § 362(k)(1) actual
16 damages.
17

18 1

19 Renée Sundquist testified that after moving to the house in
20 Folsom over Labor Day weekend 2010 she was distracted, confused,
21 and angry at what seemed to her (and to him) as an eviction. She
22 started having trouble breathing and suffered panic attacks.

23 Erik Sundquist testified that he came home one day and found

1 determine whether she was having a heart attack.

2 The ultimate conclusion was that the symptoms resulted from
3 stress. The prescribed treatment included Xanax and Valium.

4 She had been suffering from occasional migraine headaches
5 that had begun about one year before the move to the rental.
6 Beginning in September 2010, their incidence increased noticeably
7 to about one per week. Since then, they have become chronic and
8 nearly daily. Sometimes she has four three-day migraine
9 headaches in a month. She is under the care of a neurologist and
10 finds that the prescribed medication - Amatrex - has debilitating
11 side effects. She understands that stress is at the root of the
12 migraines.

13 She testified that she has incurred medical bills totaling
14 \$30,000.00.⁸⁷ There is no evidence of medical bills for Erik
15 Sundquist.

16 The court believes her testimony and finds that Bank of
17 America's stay violating activity in 2010 was the "but for" cause
18 of her medical issues that led to \$30,000.00 in medical bills.
19 They are fruits of the poisoned foreclosure and unlawful
20 detainer.

21 Once again, however, the problem is that the evidentiary
22 presentation is weak. One would expect to see, at a minimum,
23 medical bills and medical records and perhaps hear from medical

1 The award of § 361(k)(1) actual damages on account of
2 medical bills that would not have been incurred "but for" the
3 automatic stay violations of Bank of America is \$30,000.00.

4
5 2

6 Erik Sundquist testified that he suffered physical injury
7 during the move over Labor Day weekend 2010 - he hurt his back
8 due to the heavy lifting and now suffers from a herniated disc.

9 The treatment for what is now chronic back pain includes
10 steroid injections, ibuprofen and prescription opioids.⁸⁹

11 Although the court is persuaded that at least some of his
12 back condition is attributable to having been propelled by Bank
13 of America to move during Labor Day weekend, the difficulty is
14 that there is no evidence of medical bills that this court can
15 use as a basis for making an award of medical expenses.

16 Accordingly, there is no § 362(k)(1) actual damages award for
17 Erik Sundquist's medical expenses.⁹⁰

18
19 I

20 Actual damages under § 362(k)(1) may include personal injury
21 when a personal injury is the proximate result of a stay
22 violation. Erik Sundquist's back injury is eligible for such an
23 award.

1 prosecution of its stay-violating unlawful detainer action
2 consequent to its stay-violating foreclosure, Erik Sundquist had
3 always been healthy and had no prior back injury.

4 This court believes his testimony and finds as fact that
5 Erik Sundquist hurt his back for the first time in the course of
6 the Bank of America-induced move in September, 2010. It further
7 finds that the injury is a material factor in his current
8 condition.

9 Before the move, Erik Sundquist was an athlete who played
10 soccer, skied, ran, and cycled. His athletic history included
11 membership on UCLA's NCAA National Championship soccer team in
12 1985.

13 After the move, he lost the physical ability to play soccer,
14 ski, run, or cycle. His exercise is restricted to using an
15 elliptical machine. He cannot sit for long periods of time. He
16 is in chronic pain from a herniated disc.

17 The court is persuaded that there is a lingering and chronic
18 pain back injury proximately caused by the heavy lifting and
19 twisting that commonly occurs in connection with moving household
20 furniture and that was occasioned by the move induced by Bank of
21 America's stay violations.

22 The injury significantly degraded his ability to continue
23 his habitual athletic activity. For an athletically-inclined man

1 accretions of the aging process - have also been at work.
2 Without such evidence, the court will adopt a conservative
3 approach and make an award that is less than what would be likely
4 if there were to be a better evidentiary presentation.

5 In these circumstances, actual § 362(k)(1) damages for the
6 back injury to Erik Sundquist is \$10,000.00.⁹¹

7
8 J

9 Emotional distress is an additional basis for actual
10 § 362(k)(1) damages.

11 As noted, proof of egregious conduct causing emotional
12 distress suffices. Alternatively, proof of less-than-egregious
13 circumstances suffice if it is obvious that a reasonable person
14 would suffer significant emotional harm. Dawson, 390 F.3d at
15 1149-50.

16 Here, the relevant proof comes from the testimony of Renée
17 Sundquist, which the court believed, and from her remarkably
18 self-revealing journal that she has had the courage to expose to
19 the world.

20
21 1

22 Renée Sundquist descended to depths of emotional despair
23 during the six years between Bank of America's illegal

1 doorbell by hiding under the clothes hanging in her closet,
2 developed suicidal thoughts, and responded to written
3 communications from Bank of America by cutting herself with a
4 razor and bleeding all over the bathroom.

5 The process of how Bank of America drove her into the status
6 of an "eggshell plaintiff" warrants review.

7 By the time that the stay violation occurred in June 2010,
8 her prior dealings with Bank of America had been nothing short of
9 frustrating. Bank of America had induced the Sundquists to
10 default on their mortgage on the representation that a mortgage
11 modification would be entertained in good faith. Yet their
12 application papers were repeatedly declared to be "lost" or "not
13 received" or "stale," while Bank of America simultaneously
14 pursued foreclosure.

15 Throughout, the Sundquists were acting in good faith, not
16 realizing that Bank of America had no intention of acting in good
17 faith. The elimination of business debt concomitant to obtaining
18 a chapter 7 discharge following the closing of Erik Sundquist's
19 construction business was of no moment to Bank of America. Nor
20 was Bank of America impressed by the fact that Renée Sundquist's
21 mother was in a position, once a modified mortgage was agreed
22 upon, to cure the mortgage default that Bank of America had
23 induced.

1 the automatic stay, pursue an unlawful detainer, drive the
2 Sundquist family out of their home, cause a \$20,000 HOA liability
3 while it was in title, permit the home to be looted before
4 secretly restoring them to title and then try to saddle them with
5 liability for Bank of America's conduct.

6 Her journal reveals the central role that Bank of America
7 assumed in her life during those six years. She kept submitting
8 and resubmitting mortgage information in response to requests by
9 Bank of America.

10 But, unlike Camus' conclusion about Sisyphus,⁹² she became
11 increasingly unhappy. Early entries connote optimism;⁹³ later
12 entries resignation.⁹⁴

14 ⁹²"One must imagine Sisyphus happy" ("Il faut imaginer
15 Sisyphe heureux"). Albert Camus, THE MYTH OF SISYPHUS (Penguin
16 Books, London, 2000), at 89 (tr. Justin O'Brien).

17 ⁹³From the Renée Sundquist Journal:

18 "[Fall 2009] Bank sends out new modification packet. The
19 representative at bank's HOPE department told me that they
20 are actually modifying loans and we should fill out the
modification again. For some strange reason I felt
hopeful."

21 Renée Sundquist Decl. ¶¶ 78-80. The court believes, and so
22 finds as fact, this testimony.

23 ⁹⁴From the Renée Sundquist Journal:

"August 2010 sent another modification packet to bank this

1 She began to realize that Bank of America was animated by
2 bad faith.⁹⁵

3 She started hiding in the closet when there was activity at
4 the door.⁹⁶ As time went by, this reaction to activity and the
5 front door persisted.⁹⁷ Eventually, it was viewed as a symptom

6
7 ⁹⁵From the Renée Sundquist Journal:

8 "I realized at 2 am this morning that the letter that our
9 attorney received and the modification packet sent out was
10 when they had sold the house and we no longer owned it. How
11 can they do a modification. I need professional help to get
past this. What a horrid pit in my stomach and my head
hurts so badly too."

12 Renée Sundquist Decl. ¶¶ 174-76; accord, B of A Ex. QQQ-001
13 ("when our attorney received a letter from b/a stating they
14 wanted to work with us on a modification, they had already sold
15 our house when they sent that email! I hope God is watching! I
16 predicted they wouldn't work with us, I didn't predict they would
17 sell our home while in bk! Wow, I need professional help to get
past this! What a horrid pit in my stomach. My head hurts so
badly too! We were just were [sic] instructed by b/a to submit
another loan modification. ahhhhhhh really, we don't own the
house any longer!!!!!!!!!!!!!!!!!!!!!! I hate them!"). The court
believes, and so finds as fact, this testimony.

18 ⁹⁶From the Renée Sundquist Journal:

19 "[August 2010] [Son] noticed someone across the street and
20 said 'someone is casing the joint' Where did he hear that.
21 First I wanted to laugh then I ran upstairs to my closet and
22 sobbed. I hate being so scared, but I can't show that to my
23 children."

24 Renée Sundquist Decl. ¶¶ 125-27. The court believes, and so
finds as fact, this testimony.

1 of Post-Traumatic Stress Disorder.⁹⁸

2 Suicidal thoughts began to be articulated in her journal and
3 became more frequent.⁹⁹

4 The cutting is evident in the journal and worsened as time

5
6 Renée Sundquist Decl. ¶¶ 254-55 & 313-14. The court believes,
and so finds as fact, this testimony.

7 ⁹⁸From the Renée Sundquist Journal:

8 "[2015] Met with the doctor today, she says I have PTSD and
9 its not weird that when the doorbell rings I hide in the
closet"

10 Renée Sundquist Decl. ¶¶ 489. The court believes, and so finds
11 as fact, this testimony. If there needs to be another trial
12 following an appeal, the medical evidence is likely to be robust.

13 ⁹⁹From the Renée Sundquist Journal:

14 "[Feb. 2012] Thought of driving off a cliff today [today] as
I went to pick up [sons]"

15 "Strange day; could not talk to anyone I have lost my life."

16 "[2013] My life is stuck like I am in quicksand but not
17 going under to die and finally done with this pain."

18 "I thought a long while about killing myself tonight. I
19 feel so sad, I would miss my family so much, I just don't
20 know how to get through this bank crap, it seems it won't
ever end."

21 "[June 2014] There was blood all over the bathroom. Erik
22 tried to help, I feel my life is gone."

23 "If I were to die tonight I know I would regret all the time
lost worrying about this stupid house, and how wrong the
situation is, but we are so broken."

1 passed.¹⁰⁰ And, was corroborated by Erik Sundquist in his

2
3 ¹⁰⁰From the Renée Sundquist Journal:

4 "[Dec. 2012] Trying not to cut myself."

5 "July 2013 My head and the cutting is so bad I need a
6 break."

7 "Sometimes getting a migraine and sadly cutting myself is
8 the only relief from this horrible bank pain."

9 "So very sad, I cut myself after the doorbell rang and the
10 delivery of this paperwork. I hate that this is happening.
11 Cutting is the only way the pain from the bank stops and all
12 [of] the sudden I have physical pain from the cutting. This
13 cannot be my life. It's almost like [I] am looking at
14 myself from afar. My arm stings in the shower. The cuts
15 are bad. Blood everywhere."

16 "[Nov. 2013] Lots of cutting today, crumbling under bank
17 pressure."

18 "[Dec. 2013] took [?] upset the cutting is awful our family
19 is falling apart."

20 "[Jan. 2014] Received an email from Trustee Sale, I cut
21 myself so bad today. The bad news has to stop, I hate all
22 my scars, and dream I could have them treated some day. I
23 am so embarrassed and people judge you, good thing I don't
see my friends anymore. I will never wear shorts again."

"June 2014 Today was awful I am getting a headache and cut
myself so bad it took so long to stop bleeding. There was
blood all over the bathroom. Erik tried to help, I feel my
life is gone."

"[Nov. 2014] The doorbell rang today, Erik cautiously open
door it is an orange slip. I hid in the bathroom and cut
myself."

1 testimony, which the court believed.

2 This emotional distress is the human cost proximately
3 resulting from the conduct of Bank of America in stringing out
4 the Sundquists and constitutes § 362(k)(1) actual damages.

5 Nor can Bank of America's conduct be chalked off to low-
6 level employees who were not paying attention. Rather, the
7 record implicates senior executives. There are a number of
8 communications to the Sundquists from the office of the Bank of
9 America Chief Executive Officer. Those communications disclaimed
10 responsibility for its illegal foreclosure in violation of the
11 automatic stay and its refusal to adjust for the ensuing
12 consequences.

13 The Bank of America executive staff even lied to the CFPB in
14 an astonishingly brazen manner, denying the existence of the
15 Sundquist state-court litigation. Their appeal was then pending
16 at the California Third District Court of Appeal and was soon to
17 be decided in their favor on such questions as whether they had
18 stated a claim for fraud.

19 This court finds as fact that Bank of America's brazen
20 conduct towards the Sundquists, done in a heartless manner and in
21 their plain view, inflicted a significant emotional toll on Renée
22 Sundquist. This emotional distress would not have occurred but
23 for Bank of America's course of conduct following upon its

1 While evidence probative of the appropriate amount of
2 emotional distress damages is thin, the fact of severe emotional
3 distress is so clear that this court can make an award. As with
4 other damage components in this case, the amount of the award
5 will be less than what likely would have been awarded if the
6 evidentiary record had been more complete.¹⁰¹

7 The emotional distress damages for Renée Sundquist are
8 \$200,000.00.

9

10

2

11 Erik Sundquist ultimately was driven by Bank of America's
12 conduct, and its effect upon his wife, to attempting suicide.

13 In testimony that the court believed, he related how he felt
14 driven to act and how one of his school-age sons helped locate
15 him before it was too late.¹⁰²

16 His wife's journal captures the incident from her
17 perspective.¹⁰³

18

19 ¹⁰¹If the case were to need to be retried, the Sundquist
evidence likely would be considerably more robust.

20

21 ¹⁰²A plausible case could be made that the two Sundquist
minor children also suffered emotional distress as a proximate
22 result of Bank of America's stay-violating conduct. However,
they are not, at least not as yet, parties. If this case were to
23 need to be retried following an appeal, it is conceivable that
they might be permitted to intervene.

1 The court finds as fact that the Bank of America ordeal

2
3 with Erik and talks to him for a long time. I sat on the
4 pavement staring."

5 Renée Sundquist Decl. ¶¶ 470-78; accord, B of A Ex. VVV-001
6 ("Yesterday was one of the worst days of my life. Dear God.
7 Erik and I were just in a horrid place in the morning, too much
8 stress, were are both so ready to move on from the current state
9 of house and lawsuit limbo. I texted him awful stuff about the
10 past five years, at some point, when I can't call up the bank of
11 holy hell and scream, I guess I decided to scream in a text to
12 Erik. I received a text from him later in the afternoon where he
13 apologized for our life, and wrote he would always love me and
14 the boys and then wrote goodbye. Oh my God! My life stopped.
15 That moment - where you read the word 'goodbye', all of a sudden
16 I couldn't hear, I couldn't breathe, I couldn't think, and I most
17 certainly couldn't move! After the longest 20 seconds of my life
18 I screamed for [son] and immediately asked him to text his
19 father. I knew instinctively this was my only hope for Erik to
20 read a text message from his son, and my only hope for Erik not
21 to hurt himself. Oh my God is all I was thinking. Oh my
22 God!!!!!! I didn't tell [son] much, other than we need to find
23 Dad quick. [Son] knew I was serious. What seemed like hours, no
response from Erik, we figure out his phone was shut off!!! [Son]
then ran to the car where he started tracking Erik's ipad
location, we could see he was in a CVS drug store. Dear Lord.
Usually Erik and I are always so mad at [Son] with all his
technology, yesterday I was so grateful he had the knowledge to
track his dad. Erik's location started moving, and eventually we
could tell he drove and parked nearby, our worst nightmare, what
did he buy in CVS and will we get there in time before he
swallows too much? Oh my God! It is truly so hard to write in
words what that 20 minute car ride felt like while imagining Erik
did something horrible to himself. What seemed like forever, we
finally got to the parking lot and saw Erik's car, as we pull up
he was asleep. I just remember screaming and pounding on his
window, thank God he could open the window, but had taken way too
much of something. I just kept screaming, finally he showed me
the bottle of pills. my god. I am thinking at least he is awake

1 occasioned by its unrepentant disregard of the consequences of
2 its illegal violation of the automatic stay was a material factor
3 in the emotional state of mind that brought Erik Sundquist to the
4 brink of suicide. This emotional distress would not have
5 occurred but for Bank of America's course of conduct following
6 upon its violation of the automatic stay.

7 While evidence probative of the appropriate amount of
8 emotional distress damages for Erik Sundquist is thin, the fact
9 of severe emotional distress is so clear that this court can make
10 an award. As with other damage components in this case, the
11 amount of the award will be less than what likely would have been
12 awarded if the evidentiary record had been more complete.¹⁰⁴

13 The emotional distress damages for Erik Sundquist are
14 \$100,000.00.

15
16 VI

17 Congress authorized punitive damages under § 362(k)(1) in
18 "appropriate" cases when individuals are victimized by willful
19 violation of the automatic stay.

20
21 A

22 Unlike most punitive damages situations, this is a federal
23 punitive damages statute. Congress has given no specific

1 Some threshold basics have been identified. An
2 "appropriate" case for punitive damages under § 362(k)(1) entails
3 some showing of reckless or callous disregard for the law or for
4 rights of others. Bloom, 875 F.2d at 228.

5 Proof of conduct that is malicious, wanton, or oppressive
6 suffices to satisfy Bloom's "reckless-or-callous-disregard"
7 standard. Snowden, 769 F.3d at 657.

8 Beyond these basics, there is comparatively little judicial
9 precedent grappling with complexities of this punitive damages
10 statute. While there are plentiful small-case decisions, there
11 is a paucity of larger cases that have necessitated probing the
12 depths of punitive damages under § 362(k)(1).

13 In other words, at this late date there is still much about
14 the law of § 362(k)(1) punitive damages that amounts to writing
15 on a clean slate.

16 By any measure, this case presents an "appropriate" case for
17 punitive damages as authorized by § 362(k)(1). The magnitude of
18 the case requires more careful consideration of punitive damages.

19
20 B

21 The leading Supreme Court cases involve common law punitive
22 damages. Philip Morris USA v. Williams, 549 U.S. 346 (2007);
23 State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408

1 reprehensibility of the defendant's misconduct; (2) the disparity
2 between the actual or potential harm suffered by the plaintiff
3 and the punitive damages award; and (3) the difference between
4 the punitive damages awarded and the civil penalties authorized
5 or imposed in comparable cases. State Farm, 538 U.S. at 418,
6 citing Gore, 517 U.S. at 575.

1

9 The first Supreme Court guidepost focuses on degree of
10 reprehensibility. This case may constitute the paradigm case of
11 the "reckless or callous" disregard for the law and for the
12 rights of others and of malicious, wanton, or oppressive conduct
13 contemplated by Bloom and Snowden in order to present an
14 "appropriate" case for § 362(k)(1) punitive damages.

a

17 Black-letter law provides that § 362 automatically stays
18 foreclosures and stays subsequent acts to implement foreclosures.

19 Case law in this circuit establishes that all acts in
20 violation of the stay are void from the outset, not merely
21 voidable. E.g., Schwartz, 954 F.2d at 572-73. Similarly,
22 subsequent dismissal of a case does not ratify an act that was
23 void from the outset. 40235 Washington St. Corp., 329 F.3d at

1 black-letter statutory law and the concomitant case law.

2

3 b

4 Bank of America's actions, however, tell a story that smacks
5 of cynical disregard for the law when dealing with the
6 Sundquists.

7 Let us enumerate the ways in which Bank of America
8 intentionally disregarded the law in the course of the Sundquist
9 saga.

10 Knowing of the existence of the automatic stay, Bank of
11 America nevertheless foreclosed on the Sundquist residence.

12 Knowing of the existence of the automatic stay, Bank of
13 America nevertheless recorded a trustee's deed transferring title
14 to itself.

15 Knowing of the existence of the automatic stay, Bank of
16 America nevertheless filed an unlawful detainer action in state
17 court.

18 Knowing of the existence of the automatic stay, Bank of
19 America nevertheless conducted open and notorious harassing
20 inspections of the Sundquist residence, including, by way of
21 example, terrorizing one of the Sundquists' minor children by
22 beating on a sliding door in the rear of the house and demanding
23 entry and, by way of further example, openly and notoriously

1 Knowing that the foreclosure was void as a violation of the
2 automatic stay, Bank of America nevertheless failed to inform the
3 Sundquists before they vacated the premises in panic that it
4 realized the foreclosure was void and must be rescinded.

5 Knowing that its state-court unlawful detainer action was
6 void as a violation of the automatic stay, Bank of America
7 nevertheless failed to dismiss the unlawful detainer action
8 before the Sundquists vacated the premises in panic.

9 Knowing that the foreclosure was void as a violation of the
10 automatic stay and must under Bank of America's written
11 procedures be rescinded "immediately," Bank of America dallied
12 nearly four months before recording the rescission.

13 Knowing that the foreclosure was void as a violation of the
14 automatic stay and must be rescinded, Bank of America failed to
15 inform either the Sundquists or their counsel that it would be
16 taking such action. In fact, Bank of America never would have
17 informed them if the Sundquists and their counsel had not
18 inquired of Bank of America about the state of title.

19 Knowing that the foreclosure was void as a violation of the
20 automatic stay and that it had been rescinded, Bank of America
21 failed for approximately three months after recording the
22 rescission of the trustee deed of foreclosure to inform either
23 the Sundquists or their counsel that it had restored them to

1 Knowing that the foreclosure was void as a violation of the
2 automatic stay and had been rescinded, Bank of America failed for
3 an additional two months after recording the rescission of the
4 trustee deed of foreclosure to dismiss the state-court unlawful
5 detainer action seeking to enforce the void foreclosure.

6 Knowing that there was a pending appeal in a California
7 state court, the office of the Chief Executive Officer of Bank of
8 America responded to an official inquiry by the Consumer
9 Financial Protection Bureau by falsely stating that no litigation
10 was pending and that the court papers requested by the CFPB did
11 not exist.

12 Knowing that HOA charges were incurred during the period
13 that Bank of America held title to the residence, Bank of America
14 refused to pay those charges and continues to demand that the
15 Sundquists reimburse it for the HOA charges that it did pay.

16 Knowing that a \$20,000.00 charge was levied by the HOA
17 because Bank of America did not water the lawn and shrubbery
18 during the period that Bank of America held title to the
19 residence and that the Sundquists had vacated at the demand of
20 Bank of America and in fear of Bank of America's threatened
21 eviction, Bank of America refuses to make any adjustment and
22 insists that the \$20,000.00 charge is the Sundquists' problem.
23 Bank of America's refusal has precipitated a hateful animus of

1 In the calculus of reprehensibility, Bank of America's
2 intentional conduct adds up to reckless and callous disregard for
3 the rights of others. Bloom, 875 F.2d at 228. It has been
4 wanton and oppressive. Snowden, 769 F.3d at 657. This equates
5 with a high degree of reprehensibility. State Farm, 538 U.S. at
6 418, citing Gore, 517 U.S. at 575.

7
8 2

9 Passing on to the second Supreme Court guidepost, the
10 disparity between actual harm and the punitive damages award,
11 this is a case of substantial actual harm where simplistic ratios
12 are of limited utility.

13 The high degree of reprehensibility, coupled with the
14 significant involvement by the office of the Bank of America
15 Chief Executive Officer, calls for punitive damages of an amount
16 sufficient to have a deterrent effect on Bank of America and not
17 be laughed off in the boardroom as petty cash or "chump change."

18 It is apparent that the engine of Bank of America's problem
19 in this case is one of corporate culture. The evidence is
20 replete with so many communications from the office of Bank of
21 America's Chief Executive Officer that the oppression of the
22 Sundquists cannot be chalked off to rogue employees betraying an
23 upstanding employer. This indicates that the engine is driven by

1 no investor to notify.

2 It follows that a sum greater than a modest multiple of the
3 actual damages suffered by the Sundquists is necessary to serve
4 the deterrent function.

5

6

3

7 The Supreme Court's third guidepost focuses upon the
8 relationship between the punitive damages awarded and the civil
9 penalties authorized or imposed in comparable cases.

10 It happens that Bank of America has a long rap sheet of
11 fines and penalties in cases relating to its mortgage business.
12 In March 2012, Bank of America agreed to pay \$11.82 billion to
13 settle litigation prosecuted by federal and state regulators
14 regarding its foreclosure and mortgage servicing practices. In
15 June 2013, Bank of America agreed to pay \$100 million to settle
16 litigation regarding mortgage loan origination issues. In
17 December 2013, Bank of America agreed to pay \$131.8 million to
18 settle litigation with the Securities Exchange Commission
19 regarding the structuring and sale of mortgage securities to
20 institutional investors. In March 2014, Bank of America was
21 fined \$9.5 billion by the Federal Housing Finance Agency for
22 defrauding Fannie Mae and Freddie Mac regarding mortgage-backed
23 securities.

1 consequences of Bank of America's behavior comes to the fore for
2 the first time is appropriate and proportional.

4 4

5 After Gore and State Farm, the Supreme Court ruled in
6 Williams that adequate notice of punitive damages is essential
7 and that punitive damages awarded under state law must be focused
8 on redressing harm caused to the parties before the court, not to
9 other persons. Harm to others is relevant mainly to the question
10 of degree of reprehensibility. Williams, 549 U.S. at 355.

11 Bank of America had ample notice in this case that
12 substantial punitive damages might be awarded. It was taking the
13 position that any stay violation liability terminated at the
14 dismissal of the Sundquist chapter 13 case and no later than the
15 time of the rescission of the foreclosure sale. On multiple
16 occasions during pretrial conferences, this court, as prospective
17 trier of fact, noted to counsel for Bank of America that it
18 needed to be mindful that substantial damages, actual and
19 punitive, might be awarded if the facts alleged and the
20 Sundquists' theory of the case were to turn out to be correct.

21 By nevertheless choosing to go to trial, Bank of America
22 knowingly assumed the risk of substantial punitive damages.¹⁰⁵

23
¹⁰⁵Williams also prompts a clarification of the record. In

C

A conceptual problem arises at this juncture regarding how punitive damages are awarded.

It is settled that, in addition to extra recompense for plaintiffs, punitive damages serve legitimate governmental and societal interests in punishing unlawful conduct and deterring its repetition. Gore, 517 U.S. at 568; Newport, 453 U.S. at 266-68; Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). But, how are those societal interests to be vindicated?

To the extent that legitimate societal interests are to be served, the remedy needs to fit the wrong. The award should be sufficient to serve those interests, which may be an "eye-popping" sum in the view of bystanders not possessed of great wealth.

When a large award is necessary, the problem arises of why plaintiffs should be allowed to appropriate to themselves unrestricted use of the governmental and societal component of a large punitive damages award - beyond a few multiples of compensatory damages.

Bank of America's counsel that the Sundquist testimony about their own experience was not inherently incredible to the trier of fact and needed to be taken seriously as Bank of America

1
2 This case illustrates the problem. Simplistic damage
3 multiples that are not tied to economic reality would produce
4 punitive damages that do not accurately serve their purposes.

5 In 2015, Bank of America earned net income of
6 \$15,900,000,000 and paid its top seven executives \$80,500,000,
7 which sum included \$50,000,000 to the positions of Chief
8 Executive Officer, Chief Operating Officer, and Head of Global
9 Wealth and Investment Management. 2016 Proxy Statement, Bank of
10 America, at pp. ii & 39 (March 17, 2016).¹⁰⁶

11 To award punitive damages measured by a conventional
12 multiplier of three to six times of the Sundquist compensatory
13 damages would be laughed off in Bank of America's boardroom as a
14 mere "cost of doing business" payable out of the petty cash
15 account.

16 If the punitive damages award does include an amount
17 sufficient to serve the legitimate societal interests justifying
18 punitive damages but can only be directed to the Sundquists, the
19 award to them would be greater than what principles of fairness
20 would justify.

21 Conversely, why should Bank of America be permitted to evade
22 the appropriate measure of punitive damages for its conduct? Not
23 being brought to book for bad behavior offensive to societal

Several responses to the problem of economically efficient allocation of punitive damages have emerged in recent years.¹⁰⁷

The Ohio Supreme Court, dealing with Ohio law, treated society as a de facto party. It recognized that there is a "philosophical void between the reasons we award punitive damages and how the damages are distributed" and ordered a remittitur according to which it reduced a \$49 million punitive damages jury award for bad faith denial of coverage to a cancer victim down to \$30 million on the condition that the excess over \$10 million (plus attorney's fees) be distributed to a cancer research fund sponsored by the State of Ohio. Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 77, 102-04, 2002-Ohio-7113, 781 N.E.2d 121, 144-45 (Ohio 2002).

The Ohio judicial innovation redirecting part of a punitive damages award to a public purpose linked to the defendant's bad conduct was a matter of Ohio common law. As such, it was justified by the "common law evolution" rationale. See Li v. Yellow Cab Co., 532 P.2d 1226, 1238-39 (Cal. 1975).

In principle, the realm of federal common law is subject to the same common law evolution doctrine.

Legislatures have also innovated with enactment of so-called split recovery statutes.¹⁰⁸ According to these schemes, which are

1 designed to ameliorate the perceived problem of the plaintiff
2 windfall, the lion's share of punitive damages are redirected to
3 public purposes for the benefit of society.

4 An example relevant in this judicial circuit is Engquist v.
5 Oregon Dep't of Agriculture, 478 F.3d 985 (9th Cir. 2007). The
6 Ninth Circuit affirmed, against challenges under constitutional
7 and common law theories, Oregon's statutory allocation of 60
8 percent of a punitive damages award in a tort case to the Oregon
9 Criminal Injuries Compensation Account pursuant to state statute.
10 Or. Rev. § 31.735; Engquist, 478 F.3d at 999-1007.

11 As a matter of procedure, the Ninth Circuit ruled that for
12 purposes of execution under Federal Rule of Civil Procedure 69(a)
13 it was sufficient for the State of Oregon to be identified in the
14 judgment as a judgment creditor without the need formally to
15 intervene as a party. Engquist, 478 F.3d at 1001.

16
17 VII

18 Having concluded that punitive damages are "appropriate" in
19 this case and having noted a trend toward calibrating punitive
20 damages to serve their intended purposes, the question becomes
21 how to determine the appropriate amount and allocation under the
22 federal punitive damages statute in Bankruptcy Code § 362(k)(1).
23

1 Where Congress authorizes punitive damages in a general
2 manner, as in § 362(k)(1), it may be presumed that it intends
3 that punitive damages be in an amount that serves the full
4 panoply of interests, including societal interests, that are
5 vindicated by punitive damages.

6 In the context of the Bankruptcy Code, a key societal
7 interest underlying § 362(k)(1) is to have a self-executing
8 private law mechanism to enforce the automatic stay that is
9 crucial to effective operation of the bankruptcy system. The
10 statutory punitive damages remedy evinces a public purpose that
11 the automatic stay not be a toothless tiger that can be flouted
12 with impunity.

13 It also may be presumed that Congress meant to tolerate a
14 certain degree of perceived windfall to victims (not always
15 debtors) of willful violations of the automatic stay. One might
16 say that in the ordinary punitive damages situation the perceived
17 plaintiff windfall implicit in punitive damages functions as an
18 acceptable byproduct of the effort and risk of privately
19 enforcing the mandate of Congress. One might even say that the
20 plaintiff is being compensated for acting as the equivalent of a
21 private attorney general.

22

23

1 conferring an excessive windfall. In other words, how is one to
2 proceed when the punitive damages are not excessive per se, but
3 the windfall to the plaintiff is perceived as excessive?

4

5

1

6 To let a defendant escape well-deserved punitive damages
7 that are needed to vindicate the societal interests served by the
8 law authorizing the award merely because a plaintiff would be
9 receiving too much money is not a satisfactory answer.

10 Here, the law is poorly developed. Appellate jurisprudence
11 regarding "excessive" punitive damages tends to conflate the
12 distinct concepts of the appropriate amount of the punitive
13 damages award that the defendant's conduct justifies (i.e.
14 whether the award itself is "excessive" in light of the conduct)
15 and of the amount that the plaintiffs ought to be allowed to
16 receive (i.e. whether the non-excessive punitive damages are
17 nevertheless "excessive" in the hands of the plaintiff). This is
18 a byproduct of our case-law system in which appellate courts are
19 prisoners of the facts determined in the trial court in the
20 particular case on appeal and generally decline to consider
21 issues not raised, and arguments not made, at trial.

22 The "excessive punitive damages" cases that have come before
23 the Supreme Court have not been cases that present the issue of

1 what private victims ought to be allowed to retain – the societal
2 interest component of punitive damages. This is what the Ohio
3 Supreme Court did as a matter of Ohio common law. Dardinger, 98
4 Ohio St. at 102-04, 781 N.E.2d at 144-45.

5 Under such a solution, the relevant public purpose should be
6 rationally linked to redressing the underlying conduct that
7 warrants punitive damages in the first place.

8

9

2

10 It is apparent that Bank of America's strategy regarding the
11 Sundquists has been infused with a sense of impunity. The
12 reasons for this attitude of impunity no doubt are complex and
13 overdetermined. The governmental regulatory system has failed to
14 protect the Sundquists. Bank of America held out the Comptroller
15 of the Currency as a source of redress, but that turned out to be
16 a chimera. The Consumer Financial Protection Bureau was thwarted
17 by Bank of America's bald-faced lie that there was no pending
18 litigation with the Sundquists and that there were no litigation
19 papers that could be sent to CFPB.

20 The flaw in the armor of Bank of America's attitude of
21 impunity is the potential for damages in civil litigation. Even
22 there, however, the field is unbalanced. The record reflects
23 that Bank of America has been represented in the Sundquist

1 there is a dearth of consumer lawyers with the resources and
2 skills to be effective when representing consumers against Bank
3 of America.

4

5 3

6 It follows that the public purpose of the societal component
7 of punitive damages against Bank of America in this case should
8 be focused on consumer law in the form of better education in
9 consumer law and more robust resources for leading public service
10 consumer law organizations.

11 On the education front, the public law schools in the
12 University of California system are the appropriate
13 beneficiaries. There are five such law schools: Berkeley Law
14 School, Hastings College of Law, UC-Davis Law School, UC-Irvine
15 Law School, and UCLA Law School.

16 On the consumer legal front, the appropriate beneficiaries
17 are the National Consumer Law Center and the National Consumer
18 Bankruptcy Rights Center. Both are charitable entities qualified
19 under Internal Revenue Code § 501(c)(3). One is prominent in the
20 field of general consumer rights, the other is prominent in the
21 field of consumer rights in bankruptcy.

22 The problems presented by this case span issues of general
23 consumer law and of consumer bankruptcy law. By channeling to

1
2 The question becomes how to square this remedy channeling a
3 portion of the punitive damages to public purposes with the
4 operative language of § 362(k)(1): "[A]n individual injured by
5 any willful violation of a stay provided by this section shall
6 recover actual damages, including costs and attorneys' fees, and,
7 in appropriate circumstances, may recover punitive damages."
8 11 U.S.C. § 362(k)(1).

9 At first reading of this statute, one might assume that all
10 damages must go to the injured individual. The phrase
11 "individual injured ... shall recover actual damages, including
12 costs and attorneys' fees" appears to require all actual damages
13 to be paid to the injured individual. Yet, few would doubt that
14 Congress expected the attorneys' fees and costs can be channeled
15 to the professionals involved.

16 The use of the verb form "may" in the phrase "may recover
17 punitive damages" affords more latitude and can be read to
18 connote another element of discretion contemplated by Congress.

19 It is noteworthy that the language of the statute does not
20 prohibit a court from putting strings on what may be done with a
21 portion of the amount awarded.

22 It would not offend the statute to make an award of punitive
23 damages to the injured individual, which damages are ordinarily

1 This would achieve full vindication of the individual
2 interests and the societal interests that are being vindicated in
3 a substantial award of punitive damages. From the perspective of
4 the individual, allowing the individual to pocket the societal
5 interest component smacks of too much of a windfall for the
6 individual no matter how deserved the total award may be. From
7 the perspective of the violator, limiting punitive damages to an
8 amount that is not perceived as too big a windfall to stomach
9 enables the wrongdoer to avoid paying the societal component of
10 punitive damages that are genuinely deserved.

11 This court concludes that § 362(k)(1) permits a portion of
12 punitive damages awarded to an individual injured by willful
13 violation of the automatic stay to be channeled, after receipt by
14 the injured individual and payment of taxes incurred by such
15 receipt, to entities that serve the interests of preventing the
16 willful violator's transgressions in the future.

17
18
19 It is appropriate, as an alternative, to give the willful
20 violator the opportunity to earn a remittitur of the channeled
21 portion of the punitive damages.

22 Thus, in lieu of the sums that are channeled to the
23 designated public service organizations, Bank of America may have

1 For example, if the Sundquists are enjoined to deliver to
2 National Consumer Law Center the post-tax remainder of \$10
3 million of the punitive damages awarded to them, then there would
4 be a remittitur of \$10 million on the condition that Bank of
5 America contribute \$7.5 million to National Consumer Law Center
6 to be used only for education in consumer law and delivery of
7 legal services in matters of consumer law.

8

9

VIII

10 The § 362(k)(1) actual damages for the willful stay
11 violation that Bank of America committed and has heretofore
12 declined to remedy total, as described above, \$1,074,581.50.

13 Of the \$1,074,581.50 in actual damages, the Sundquists are
14 enjoined to deliver to their attorney, Dennise Henderson,
15 \$70,000.00 (less sums previously paid to her for this adversary
16 proceeding) on account of attorneys' fees and costs that comprise
17 an item in the actual damages award.

18 The appropriate amount of § 362(k)(1) punitive damages to be
19 awarded to the Sundquists is \$45,000,000.00.

20 Of the \$45,000,000.00 in punitive damages, the Sundquists
21 are enjoined to deliver to:

22 National Consumer Law Center \$10,000,000.00 (minus all
23 taxes, if any, the Sundquists must pay on account of that sum);

1 on account of that sum);

2 University of California-Davis, School of Law, \$4,000,000.00
3 (minus all taxes, if any, the Sundquists must pay on account of
4 that sum);

5 University of California, Hastings College of the Law,
6 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
7 on account of that sum);

8 University of California-Irvine, School of Law,
9 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
10 on account of that sum);

11 University of California-Los Angeles, School of Law,
12 \$4,000,000.00 (minus all taxes, if any, the Sundquists must pay
13 on account of that sum).

14 It is the intention of this court that the six designated
15 entities shall have standing to participate in requests for post-
16 trial relief in this court and to participate in any appeal from
17 the judgment in this adversary proceeding.

18 There shall be a remittitur of the § 362(k)(1) punitive
19 damages to \$5,000,000.00 if, and only if, Bank of America
20 contributes: \$7,500,000.00 to National Consumer Law Center;
21 \$7,500,000.00 to National Consumer Bankruptcy Rights Center;
22 \$3,000,000.00 to University of California, Berkeley School of
23 Law; \$3,000,000.00 to University of California-Davis, School of

1 in matters of consumer law and be subject to no other condition
2 imposed by Bank of America.

3 As intended beneficiaries of the punitive damages award, the
4 National Consumer Law Center, National Consumer Bankruptcy Rights
5 Center, and the five University of California law schools have
6 standing to appear and participate in all post-judgment
7 proceedings and appeals.

8

9

IX

10 Finally, there is the question of the Sundquist mortgage,
11 which Bank of America admits that it holds for its own account.
12 The principal balance due is \$584,893.97, with interest accruing
13 from February 1, 2009,¹⁰⁹ at the contract rate of 6 percent.¹¹⁰

14 Throughout, the Sundquists have maintained that they are
15 prepared to honor their legitimate mortgage obligation, but only
16 after the correct amount is determined. Bank of America's
17 intransigence in seeking reimbursement of expenses incurred by
18 Bank of America, such as HOA fees and penalties, during the time
19 that Bank of America held title and the Sundquists were ousted
20 from possession has been the impediment to moving forward.

21 It is now appropriate definitively to state the remaining
22 amount due on the mortgage and additional charges amounts that
23 may be included.

1 by California law, justice requires disapproving all charges and
2 penalties other than interest at the contract rate of 6 percent
3 and reimbursement of taxes actually paid by Bank of America by
4 way of escrow advance.

5 The mortgage is reinstated with the debt fixed at the
6 \$584,893.97 owed as of February 1, 2009, plus interest at 6
7 percent simple interest since February 1, 2009, plus
8 reimbursement of property taxes actually paid by Bank of America
9 since February 1, 2009.

10 The court does not regard this measure as inequitable
11 towards Bank of America. The default occurred solely because
12 Bank of America induced the initial mortgage default as a
13 precondition to discussing mortgage modification. It ignored
14 information that Renée Sundquist's mother was on the sidelines to
15 provide funds to cure any default upon mortgage modification.
16 Thereafter, Bank of America had no compunction about aggressively
17 pursuing foreclosure and unlawful detainer in willful disregard of
18 the automatic stay. It led the Sundquists on a not-very-merry
19 chase by inviting and entertaining mortgage modification
20 applications that it had no intention of granting.

21 When the Bank of America Chief Executive Officer's office
22 became involved, the misconduct strayed across the civil-criminal
23 frontier when the office of the CEO falsely reported to the

1 In contrast, the Sundquists have clean hands and are not
2 free riders seeking free lodging.

3 Despite all of Bank of America's bad behavior, it is winding
4 up with the benefit of its mortgage bargain. The mortgage is
5 reinstated with its above-current-marker interest rate. The
6 secular rise in real estate values in the Sacramento area since
7 2009 assures that Bank of America is not under-collateralized.
8 There is no reason to expect the mortgage will not be paid.

9 The history of Bank of America's dealings with the
10 Sundquists suggests that it might aggressively seek to collect
11 the mortgage debt and miss no opportunity to declare a default,
12 while simultaneously resisting paying any of the damages awarded
13 in this case until every avenue of appeal is exhausted. That
14 nontrivial possibility warrants supervision by this court of
15 payment of the mortgage until this case ends.

16 Bank of America will be enjoined from requiring payments
17 from the Sundquists (who may make voluntary payments), and
18 enjoined from declaring a default, until 60 days after Bank of
19 America pays the Sundquists the full amount of the actual and
20 punitive damages here awarded.

21 For purposes of enforcing the awards made here, this court
22 retains jurisdiction over the mortgage and related obligations.

1 residence from looting, refusing to pay for Sundquist property
2 lost, and subjecting the Sundquists to a mortgage modification
3 charade. Pursuant to § 362(k)(1), Bank of America is liable for
4 all damages incurred between the initial violation of the
5 automatic stay and the time the stay violation is fully remedied
6 (which remedy comes in this decision and accompanying judgment).

7 The actual § 362(k)(1) damages are \$1,074,581.50. The
8 appropriate § 362(k)(1) punitive damages are \$45,000,000.00.

9 The Sundquists are enjoined to deliver \$40,000,000.00 (minus
10 applicable taxes) to public service entities that are important
11 in education in consumer law and delivery of legal services to
12 consumers: National Consumer Law Center (\$10,000,000.00),
13 National Consumer Bankruptcy Rights Center (\$10,000,000.00), and
14 the five public law schools of the University of California
15 System (\$4,000,000.00).

16 Bank of America may have a remittitur of \$40,000,000.00 of
17 the punitive damages if, and only if, it contributes a total of
18 \$30,000,000.00 (to be used only for education in consumer law and
19 delivery of legal services to consumers and be subject to no
20 other condition imposed by Bank of America) to National Consumer
21 Law Center (\$7,500,000.00), National Consumer Bankruptcy Rights
22 Center (\$7,500,000.00), and the five public law schools of the
23 University of California System (\$3,000,000.00 each).

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Erik J. Sundquist
Renee Sundquist
1321 Feliz Way
Lincoln CA 96548

Dennise S. Henderson
1903 21st St
Sacramento CA 95811

Jonathan R. Doolittle
101 2nd St #1800
San Francisco CA 94105

John Siamas
101 2nd St #1800
San Francisco CA 94105

Justin E. McGuirk
101 2nd St #1800
San Francisco CA 94105

Le T. Duong
101 2nd St #1800
San Francisco CA 94105

National Consumer Law Center
John Rao, Esq.
7 Winthrop Square
Boston, MA 02110-1245

National Consumer Bankruptcy Rights Center

Dean
Berkeley Law, University of California
225 Boalt Hall
Berkeley, CA 94720-7200

Dean
University of California, Davis
School of Law
King Hall
400 Mrak Hall Drive
Davis, CA 95616-5201

Dean
University of California Hastings
College of the Law
200 McAllister Street
San Francisco, CA 94102

Dean
University of California
Irvine School of Law
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697-8000

Dean
University of California, Los Angeles
School of Law
385 Charles E. Young Drive East
1242 Law Building
Los Angeles, CA 90095