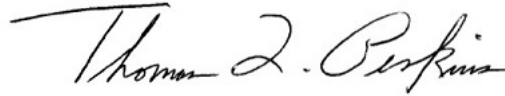


**SIGNED THIS: November 19, 2018**



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**Thomas L. Perkins**  
**United States Bankruptcy Judge**

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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS**

<b>IN RE:</b>	)	
	)	
<b>HENRY N. CLARK,</b>	)	<b>Case No. 15-81376</b>
	)	
<b>Debtor.</b>	)	
<hr/>	)	
<b>HENRY N. CLARK,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Adv. No. 16-8006</b>
	)	
<b>JOHN E. SHAVERS, individually, JESCO</b>	)	
<b>CONSTRUCTION CORPORATION, and</b>	)	
<b>R.E. HUBER, individually,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OF DECISION**

This adversary proceeding came before the Court for trial on November 6, 2018. Attorney Joseph A. Denson from Meridian, Mississippi, appeared on behalf of the plaintiff, Henry N Clark. Attorney Gary M. Riebschlager from Houston, Texas, appeared on behalf of the defendants, John E. Shavers and JESCO Construction Corporation (JESCO). John E. Shavers did

not appear in person. Neither did the defendant, R.E. Huber, appear at trial, nor did any attorney appear on his behalf.

On November 5, 2018, at 2:03 p.m., the afternoon on the day before the scheduled trial, Attorney Riebschlager filed a suggestion of bankruptcy asserting that JESCO had filed a petition under Chapter 7 of the Bankruptcy Code earlier that day in the United States Bankruptcy Court for the Southern District of Mississippi. At 3:30 p.m. on November 5, 2018, this Court entered an order providing that the bankruptcy filing of JESCO operated to stay the proceeding as to that defendant only, and that the trial would proceed as scheduled as to the individual defendants.

On September 8, 2015, the defendants, Shavers, Huber and JESCO, commenced a bankruptcy proceeding against the plaintiff, Clark, by filing an involuntary Chapter 7 petition pursuant to 11 U.S.C. §303(b)(1). Clark, acting through his bankruptcy attorney, Dale G. Haake, timely controverted the matter by filing a motion to dismiss the involuntary petition. Shavers and JESCO initially contested the dismissal by retaining a bankruptcy attorney, John Vandavelde, who filed a response in opposition to the motion to dismiss. Before a hearing on the merits could be conducted, attorney Vandavelde moved and was allowed to withdraw from his representation of Shavers and JESCO. Those parties did not retain another bankruptcy attorney and did nothing further to contest the dismissal of the involuntary petition, which was dismissed by order entered December 8, 2015. Apart from signing the involuntary petition, Huber never appeared in the case.

The dismissal order expressly preserved Clark's right to seek damages against the involuntary petitioners under 11 U.S.C. §303(i) by filing an adversary proceeding. Clark filed his adversary complaint on February 3, 2016, seeking damages against Shavers, JESCO and Huber for wrongfully filing the involuntary bankruptcy petition, alleging that none of them was the

holder of a claim against Clark that was not contingent as to liability or the subject of a bona fide dispute as to liability or amount, so that they lacked standing to file an involuntary petition. The adversary complaint further alleges that the involuntary bankruptcy petition was filed in bad faith, in that its purpose was to interfere with the progress of litigation between Clark and Shavers and several JESCO-related entities owned or controlled by Shavers then pending before the United States District Court for the Central District of Illinois (the CDIL litigation) in which a jury trial was scheduled to begin in January, 2016.

At the trial, testimony was given by Clark and by Earl Payson, an Iowa attorney who represented Clark in the CDIL litigation. Clark testified about the nature and terms of his business relationship with JESCO. After meeting Shavers in 2008, Clark entered into an oral employment contract negotiated by Shavers on behalf of JESCO, to represent JESCO with respect to a flood remediation project in Henderson County, Illinois. Clark testified that JESCO was to pay him \$150,000 per year, plus provide Clark with the use of a company car, and that Clark was to receive additional compensation of 3.2% of any contracts that he obtained for JESCO. Two contracts were subsequently obtained for JESCO to provide flood remediation services to the Village of Gulfport, Illinois, and to Henderson County, Illinois. Thereafter, in 2009, JESCO, through Shavers, terminated Clark's employment, disputed the terms of Clark's compensation and litigation ensued.

On July 21, 2010, Clark commenced the CDIL litigation by filing a complaint in the United States District Court for the Central District of Illinois against Shavers and several JESCO entities for damages for breach of the oral employment contract. Clark was represented by attorneys Earl Payson and Daniel Bernstein. In the complaint, Clark sought itemized damages of \$1,020,642.30, representing 3.2% of the gross amount billed by the JESCO entities to the

Village of Gulfport and Henderson County. The complaint alleged that Shavers told Clark he was fired on September 21, 2009.

On August 19, 2010, one month after Clark filed his complaint, JESCO Construction of Delaware, Inc., filed a complaint against Clark in the Circuit Court of Stone County, Mississippi. The complaint alleged that the plaintiff loaned Clark \$125,000 between June 2008 and February 2010 and sought judgment against Clark for that sum. The complaint also sought a declaratory judgment that the terms of Clark's compensation with respect to the flood remediation contracts in Henderson County, Illinois, were 3% (not 3.2%) of the contract amount and, significantly, that Clark's compensation was not due and payable until the payments from the contracting parties (the Village and the County, who were, in fact, disputing the amounts due JESCO) were received by JESCO's construction company. According to Payson, the Stone County, Mississippi lawsuit was subsequently removed to the Federal District Court in Mississippi and ultimately transferred and consolidated with Clark's complaint pending in the Federal District Court for the Central District of Illinois.

At the trial held by this Court, Payson testified that R.E. Huber was a friend of Shavers and a subcontractor of JESCO. Clark denied owing any money to Shavers or any of the JESCO entities or to R.E. Huber. Payson testified that in the CDIL litigation, several depositions were scheduled to be conducted in Gulfport, Mississippi on September 10, 2015. On September 8, 2015, two days prior to the scheduled depositions, the involuntary bankruptcy petition was filed against Clark, in which the petitioners asserted that Shavers held a claim against Clark in the amount of \$9,150, that JESCO held a claim against him in the amount of \$127,000 and that R.E. Huber held a claim against him in the amount of \$1,000.

Under section 303(b)(1) of the Bankruptcy Code, eligibility to file an involuntary petition is restricted to one who holds a claim, meaning “right to payment” per section 101(5), against the putative debtor that is not “the subject of a bona fide dispute as to liability or amount.” A bona fide dispute exists if there is an objective basis for either a factual or legal dispute as to the validity of the alleged debt. *In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987).

Clark’s motion to dismiss the involuntary petition asserted that none of the petitioners met the eligibility requirement of section 303(b)(1) and that their purpose in commencing an involuntary bankruptcy proceeding against Clark, resulting in an automatic stay, was to effect a last-minute cancellation of the depositions scheduled in Gulfport, Mississippi, which had been scheduled to comply with the discovery deadline of September 15, 2015 set by the district court in the CDIL litigation. The depositions were, in fact, cancelled at some expense to Clark’s attorneys who cancelled their airline flights. After the petitioners failed to appear at a hearing scheduled by this Court on Clark’s motion to dismiss the involuntary petition, this Court entered an order on December 8, 2015, granting the motion and dismissing the petition.

Neither Shavers, JESCO nor Huber filed an answer to Clark’s adversary complaint. An Order of Default was entered against Huber on May 25, 2016, reserving the issue of damages. On June 1, 2016, Shavers and JESCO, through attorney Riebschlager, filed a motion conceding the entry of a default judgment against them as to liability only and stating an intention to limit the disputed issues to Clark’s damages under section 303(i), which motion was granted by Order of June 27, 2016. The motion contains the representations that the CDIL litigation had been settled and that “Shavers/JESCO requested this Bankruptcy be included in the Settlement but Clark and his lawyers refused.” Payson testified that the CDIL litigation had been settled with all claims and counterclaims dismissed and a judgment entered against JESCO in favor of Clark in

the amount of \$600,000. Payson stated that the judgment was later satisfied through an Assignment to Clark of JESCO's rights, in the amount of \$600,000, against BP asserted in certain multidistrict litigation. The Assignment, which is part of the record, is dated April 18, 2016, and is not signed by Clark or his attorneys, makes no reference to the involuntary bankruptcy proceeding commenced against Clark or Clark's claim for damages under section 303(i). Neither does it contain a "release of claims" provision. Based upon the Assignment, attorney Riebschlager's representations in his June 1, 2016 motion, and Payson's testimony, the Court concludes that the settlement of the CDIL litigation did not include a release by Clark of his claim for damages under section 303(i).

Under section 303(i), after a dismissal of an involuntary petition other than by consent of all petitioners and the debtor, and where the debtor does not waive the right to judgment, the court may grant judgment against the petitioners and in favor of the debtor for a reasonable attorney's fee and costs, and against any petitioner that filed the petition in bad faith, for any damages proximately caused by such filing and for punitive damages. 11 U.S.C. §303(i)(1) and (2). Upon the default of a defendant, the factual allegations of a complaint relating to liability are taken as true, while those allegations relating to the amount of damages suffered are ordinarily not. *Dundee Cement Co. v. Howard Pipe & Concrete Products, Inc.* 722 F.2d 1319, 1323 (7th Cir. 1983).

While damages under section 303(i) are discretionary, the statutory provision of additional remedies under section 303(i)(2) when an involuntary petition is filed in bad faith, likely reflects a congressional intent that a filing made in bad faith is sufficiently offensive so as to ordinarily warrant the additional recovery of actual and punitive damages, absent unusual circumstances that would justify withholding such an award. *In re Reid*, 854 F.2d 156, 160 (7th

Cir. 1988). The presence and extent of bad faith should inform the exercise of the court's discretion under that section. *Id.* Punitive damages are awarded not to compensate for injury but to punish reprehensible conduct and to deter its future occurrence. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 504 (2008); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor J., concurring); *Beard v. Wexford Health Sources, Inc.*, 900 F.3d 951, 953 (7th Cir. 2018). The policy behind punitive damages applicable in the context of section 303(i)(2) is not only to punish the wrongdoer and deter him from repeating his misdeeds, but also to set an example so that others will be dissuaded from engaging in similar misconduct. *In re Fox Island Square Partnership*, 106 B.R. 962, 968 (Bankr. N.D. Ill. 1989); *In re Cannon Express Corp.*, 280 B.R. 450, 462 (Bankr. W.D. Ark. 2002) (awarding punitive damages of \$15,000 each against two involuntary petitioners who exhibited ill will, malice and an intent to harass the debtor).

The Court has no difficulty determining that Shavers and Huber acted in bad faith when they filed the involuntary bankruptcy petition. Clark denied being indebted to Huber and stated that he never had any contractual relationship or business dealings with Huber. Clark's testimony was credible and unrebutted. Clark also denied being indebted to Shavers. Clark testified that he had been employed by JESCO and had no debtor-creditor relationship or contractual dealings with Shavers, personally. Shavers failed to appear at trial and there was no evidence introduced to substantiate that he ever personally loaned any money to Clark or that he loaned him a vehicle. Clark testified that he was employed by JESCO, receiving a salary of \$150,000 per year and the use of a vehicle. There was no evidence that Clark failed to promptly return the vehicle after his employment was terminated by JESCO.

Based upon the evidence in the record, the Court determines that neither Huber nor Shavers was a creditor of Clark when the involuntary petition was filed. Alternatively, any

alleged indebtedness was the subject of a bona fide dispute. Accordingly, neither Huber nor Shavers was eligible to be an involuntary petitioner under section 303(b)(1). This determination is consistent with Shavers confessing liability on the adversary complaint.

Section 303(i)(1) permits an award of a reasonable attorney's fee and costs against the petitioners. The evidence in the record indicates that Payson agreed to advance Haake's fees on behalf of Clark, who could not afford to pay Haake. Eleven checks from Payson to Haake or his firm were introduced into evidence totaling \$21,350.20. Shavers does not dispute that these fees were incurred and paid by Payson for Haake's representation of Clark in the bankruptcy case and this adversary proceeding. Neither does Shavers contest the reasonableness of the fees. Accordingly, Clark is entitled to an award of a reasonable attorney's fee of \$21,350.20 under section 303(i)(1). Liability for these fees will be joint and several as between Huber and Shavers.

Section 303(i)(2) permits the Court, in its discretion, to assess against any petitioner that files an involuntary petition in bad faith the damages proximately caused by such filing and punitive damages. Clark testified to suffering mental anguish and the exacerbation of several physical maladies as a result of the involuntary petition but presented no medical evidence. He admitted never having seen a physician to address these problems. Clark testified that he talked to a trained counselor, his niece, on several occasions about the stress and the mental and emotional difficulties he was experiencing.

Without supporting medical evidence, the Court is not willing to presume that any physical problems were caused by the involuntary bankruptcy case, which was dismissed three months after it was filed. The Court credits Clark's testimony that he suffered mental and emotional stress and that he sought informal counseling from his niece. It appears from his testimony, however, that his mental and emotional suffering was experienced over a long period



of time, likely beginning when he was terminated by JESCO and lasting throughout the entire period of litigation concerning his attempts to collect what he felt he was owed by JESCO, and continuing through the period of this bankruptcy litigation. Under these circumstances, the Court can only conclude that a relatively small amount of damages for mental anguish and emotional distress was proximately caused by the involuntary bankruptcy filing, determined to be the sum of \$3,000.

Finally, with respect to punitive damages, in addition to the determination that Shavers and Huber acted in bad faith by filing the involuntary filing against Clark, the Court concludes that they did so without just cause and with the intent to cause harm to Clark. Neither Huber nor Shavers was a creditor of Clark and they each falsely asserted their status as such when they signed the involuntary petition. In addition, the involuntary petition was clearly filed for an improper, nonbankruptcy purpose, that being to gain a perceived advantage, or at least a delay, in the prosecution of the CDIL litigation. They may have thought that the involuntary petition would cause Clark to lose standing to prosecute his complaint against Shavers and JESCO, or they may have wanted to disrupt the CDIL litigation in a way that would appear to put Clark at fault. Either way, the purpose was improper and amounts to a willful abuse of the bankruptcy process.

Even without his testimony at trial, it seems likely that Shavers, as Clark's opposing party in the CDIL litigation, engineered the involuntary filing. Huber, however, aided and abetted the scheme as a necessary participant, since the petition could not have been filed without a third creditor. While Shavers may have been the mastermind, Huber is equally culpable and complicit in a willful abuse of the bankruptcy system. In this Court's view, punitive damages are warranted in the amount of \$15,000 each, severally and not jointly, as to Shavers and Huber.

Because of JESCO's Mississippi bankruptcy filing, this Court makes no adjudication of JESCO's liability under section 303(i), which remains pending subject to modification or termination of the automatic stay. The Court also reserved ruling on several motions and oral requests for sanctions due to alleged discovery violations. In the Court's view, none of the alleged violations materially affected the parties' ability to prosecute and/or defend the claims at issue. All motions related to discovery and sanctions for alleged noncompliance will be denied.

This Memorandum of Decision is issued in accordance with Fed.R.Bankr.Pro. 7052. A separate judgment order will be entered.

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