IT IS ORDERED as set forth below:

Date: July 11, 2008

C. Ray Mullins

C. Ray Mullins
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
	:	
ALLIED HOLDINGS, INC. and	:	05-12515-CRM
RELATED DEBTORS,	:	through 05-12537-CRM
	:	
Debtors.	:	
_____	:	
	:	
ALLIED HOLDINGS, INC.,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 06-1013
v.	:	
	:	
VOLVO PARTS NORTH AMERICA,	:	
INC., dba Contact Center Solutions,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court are cross motions for summary judgment filed in the above-

captioned adversary proceeding. The motions arise in connection with a complaint for turnover of estate property and for damages arising from a violation of the automatic stay. Accordingly, this matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(A); (E); (O).

FINDINGS OF FACT AND PROCEDURAL HISTORY

The Debtors filed a complaint for turnover of estate property against Volvo Parts North America, Inc. (hereinafter "Volvo") in which the Debtors allege that Volvo violated the automatic stay by refusing to return overpayments made by the Debtors prepetition pursuant to a service agreement. In January 2004, the Debtors and Volvo entered into a service contract (the "Agreement"), under which Volvo agreed to render mechanical "break-down" assistance to the Debtors' drivers on an as-needed basis. Debtors' Statement of Undisputed Facts, ¶ 1; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 1. Pursuant to the Agreement, the Debtors were obligated to pay Volvo a $35 service fee for each time Volvo arranged for a subcontractor to make repairs to the Debtors' rig. Debtors' Statement of Undisputed Facts, ¶ 3; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 3. In turn, Volvo was required to pay the subcontractor for the repair and re-invoice the Debtors for the amount of the repair plus the $35 service fee. Debtors' Statement of Undisputed Facts, ¶ 4; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 4. The full amount was due upon the Debtors' receipt of an invoice,

but the Debtors were not charged a late fee if Volvo received the payment within fifteen days of the date the Debtors' received the invoice. Debtors' Statement of Undisputed Facts, ¶ 4; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 4.

The Debtors routinely made late payments under the Agreement and, by July 2005, the Debtors owed Volvo $859,339. Debtors' Statement of Undisputed Facts, ¶ 5; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 5. On or about July 14, 2005, Lyn Thomason, Volvo's controller, sent an e-mail to several Volvo employees suggesting that Volvo take a "more aggressive collections strategy" with regard to the Debtors' account. Debtors' Statement of Undisputed Facts, ¶ 6; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 6. On July 20, 2005, Thomason sent the Debtors a delinquency notice. Debtors' Statement of Undisputed Facts, ¶ 7; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 7. The notice stated that the Debtors owed Volvo $980,536, of which $598,855 was more than thirty days old, and that Volvo would place the Debtors on credit hold if the Debtors did not pay in full by 5:00 p.m on August 1, 2005 all invoices that were more than 60 days old. Debtors' Statement of Undisputed Facts, ¶ 7; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 7; Defendant's Statement of Undisputed Facts, ¶ 3; Debtors' Response to Defendant's Statement of Undisputed Facts, ¶ 3.

On or about July 28, 2005, Volvo began requiring the Debtors' drivers to pay in

advance using either a credit card or a Comchek. Debtors' Statement of Undisputed Facts, ¶ 9; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 9; Thomason Deposition at 4. The Debtors complied with this requirement by using a Comchek procedure to prepay for repairs. Debtors' Statement of Undisputed Facts, ¶ 9; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 9. In addition to requiring advanced payment, Volvo insisted that the Debtors pay a flat fee of $500 per call for regular service calls and $750 per call for after-hours/weekend service calls. Debtors' Statement of Undisputed Facts, ¶ 11; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 11. If the service call cost more than the flat fee, Volvo required the Debtors to pay that amount with an additional Comchek. Debtors' Statement of Undisputed Facts, ¶ 15; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 15; Thomason Deposition at 55. The parties operated under this advanced payment arrangement from July 28, 2005 until September 12, 2005. Debtors' Statement of Undisputed Facts, ¶ 12; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 12.

The Debtors filed a voluntary petition under Chapter 11 of the Bankruptcy Code on July 31, 2005. Subsequently, the Debtors found another service provider and terminated the Agreement on September 12, 2005. Debtors' Statement of Undisputed Facts, ¶ 12; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 12. The Debtors requested invoices, an accounting, and a return of the postpetition overpayments on November 4, 2005. Debtors' Statement of Undisputed Facts, ¶ 26; Defendant's Response

to Debtors' Statement of Undisputed Facts, ¶ 26. On December 2, 2005, Volvo informed the Debtors that it had "recouped" the postpetition overpayments against its prepetition account balance. Debtors' Statement of Undisputed Facts, ¶ 27; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 27. When Volvo provided an accounting to the Debtors, the accounting indicated that the Debtors' postpetition payments exceeded Volvo's postpetition charges by $561,743.77. Debtors' Statement of Undisputed Facts, ¶ 29; Defendant's Response to Debtors' Statement of Undisputed Facts, ¶ 29.

Internally, Volvo maintained the postpetition overpayments as a miscellaneous credit on the Debtors' account. *See* Thomason Deposition at 91. Although Volvo created a bad debt reserve for the prepetition debt owed by the Debtors, the amount of the reserve was not reduced by the amount of the postpetition overpayments, and Volvo did not write off the prepetition debt as bad debt. *See id.* By November 4, 2005, when Volvo filed its proof of claim, however, Volvo reduced the prepetition claim by the amount of the postpetition overpayments to arrive at a net figure for its claim. *See id*. at 105-06; Proof of Claim Number 457 (Exhibit 22 to Thomason Deposition). Volvo refused the Debtors' demands to turn over the overpayments. *See id.* at 107. On December 2, 2005, Volvo's chief financial officer notified the Debtors via e-mail of its position that it had "properly recouped AAG's overpayments." *See* Exhibit 20 to Thomason Deposition. By letter dated December 22, 2005, Volvo again notified the Debtors that it "had recouped" the overpayments against the Debtors' account balance. *See* Thomason Affidavit, ¶ 8.

Through the complaint, the Debtors seek the return of the unearned deposits. The Debtors contend that the remaining deposits are property of the Debtors' bankruptcy estate and must be turned over pursuant to section 542. The Debtors also allege that Volvo has violated the automatic stay. Specifically, the Debtors argue that Volvo violated section 362(a)(3), which stays any act to obtain or exercise control over property of the estate, section 362(a)(6), which stays any act to collect, assess, or recover a claim against the Debtors, and section 362(a)(7), which prohibits a setoff of prepetition debts. The Debtors seek an order directing Volvo to turn over the remaining postpetition deposits and a judgment for pre-judgment interest. The Debtors also seek sanctions and damages, pursuant to section 105, for Volvo's alleged violation of the automatic stay.

On October 26, 2006, Volvo filed a motion for summary judgment. In its motion, Volvo argues that its retention of the overpayments constituted a recoupment, rather than a setoff, and that the automatic stay does not apply to a recoupment. Volvo has also argued that the overpayments did not constitute property of the Debtors' bankruptcy estate because the payments were authorized payments of its prepetition debt made pursuant to an order of this Court. On November 3, 2006, the Debtors filed a motion for partial summary judgment, in which they argue that summary judgment in their favor is appropriate on the turnover count and the stay violation counts. The Debtors seek a further hearing as to the correct amount to assess for sanctions and compensatory damages.

CONCLUSIONS OF LAW

A. *Summary Judgment Standard*

In accordance with Bankruptcy Rule 7056, the Court will grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gray v. Manklow* (*In re Optical Techs., Inc.*), 246 F.3d 1332, 1334 (11th Cir.2001). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats, Inc.,* 929 F.2d 604, 608 (11th Cir.1991); *Clark v. Union Mut. Life Ins. Co.,* 692 F.2d 1370, 1372 (11th Cir.1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.,* 766 F.2d 482, 484 (11th Cir.1985). The moving party has the burden to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986); *see also* Fed. R. Civ. P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex,* 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.,* 935 F.2d 235, 238 (11th

Cir.1991).

The Debtors argue that they are entitled to summary judgment because there are no material facts in dispute and it is clear from the undisputed facts that: 1) the postpetition funds paid to Volvo in excess of the postpetition services rendered are property of the bankruptcy estate and, accordingly, pursuant to section 542(a), Volvo is obligated to turn them over to the Debtors; 2) Volvo's refusal to return the overpayments constitutes an exercise of control over property of the estate, and, therefore, Volvo violated section 362(a)(3); 3) Volvo's refusal to return the overpayments was an attempt to collect a prepetition debt, and, therefore, Volvo violated section 362(a)(6); and 4) Volvo's actions in refusing to return the overpayments constitute a setoff in violation of section 362(a)(7). Additionally, the Debtors submit that summary judgment is appropriate as to their contention that Volvo should be sanctioned under section 105 for its willful violation of the automatic stay because the undisputed facts show that Volvo had knowledge of the existence of the automatic stay and intended to exert control over the overpayments.

B. *The Overpayments are Property of the Estate Subject to Turnover*

The commencement of a bankruptcy case, upon the filing of a voluntary petition, creates a bankruptcy estate. 11 U.S.C. §§ 541(a). Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The undisputed facts have established that the Debtors

paid the majority of the disputed amounts to Volvo after the filing of the bankruptcy case. Accordingly, there is no question that the funds overpaid to Volvo postpetition were property of the Debtors' bankruptcy estate. Unless Volvo had a valid right to recoup those funds against its prepetition debt, or the transfer of the funds was an authorized payment of Volvo's prepetition debt, the Debtors are entitled to have the funds returned to the estate. *See* 11 U.S.C. § 542(a) ("[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.").

Having considered the undisputed facts and the legal arguments of the parties, the Court concludes that Volvo did not have a right of recoupment. In determining whether a right of recoupment exists in a bankruptcy context, the court applies nonbankruptcy law. *See Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138 (2d Cir. 2002). Under Georgia law, "[r]ecoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the contract upon which suit is brought." O.C.G.A. § 13-7-2. Unlike a right of setoff, which can arise from any claim that the defendant might have against the plaintiff, "only a claim or demand arising out of the same transaction as that sued on by the plaintiff may be used as a recoupment." *Id*. § 13-7-3. "Recoupment lies for overpayments by the defendant or for payments by fraud, accident,

or mistake." *Id*. § 13-7-12. "Recoupment may be pleaded in all actions ex contractu where the plaintiff is liable to the defendant under the same contract." *Id*. § 13-7-13.

Volvo asserts that its prepetition claim against the Debtors arises from the same transaction as the Debtors' claim for the return of the overpayment. Volvo points to the fact that both claims stem from the parties' conduct pursuant to the same contract. The Debtors disagree, arguing that the fact that each repair call involved a different driver, a different rig, a different mechanical issue, and a different total charge rendered each service call a discrete, stand alone transaction, notwithstanding the existence of one Agreement governing the parties overall relationship. The Debtors also submit that, even if all of the service calls are seen as part of a common transaction, Volvo so unilaterally changed the terms of the Agreement immediately prior to the filing of the Debtors petition, that during the postpetition period, the parties were no longer operating under the same contract that created Volvo's prepetition claim.

The doctrine of recoupment is narrowly construed in a bankruptcy case because the doctrine represents an exception to the automatic stay and, accordingly, one of the primary purposes of the Bankruptcy Code – equal distribution to similarly situated creditors. *See In re Malinowski*, 156 F.3d 131 (2d Cir. 1998); *In re University Medical Ctr., Inc*., 973 F.2d 1065, 1081 (3d Cir. 1992) (for recoupment to apply in a bankruptcy case, "both debts must arise out of a single integrated transaction so that it would be inequitable for the debtor to enjoy the benefits of that transaction without also meeting its obligations. Use of this stricter

standard for delineating the bounds of a transaction in the context of recoupment is in accord with the principle that this doctrine, as a non-statutory, equitable exception to the automatic stay, should be narrowly construed."); *In reMcMahon*, 129 F.3d 93 (2d Cir. 1997) ("In light of the Bankruptcy Code's strong policy favoring equal treatment of creditors and bankruptcy court supervision over even secured creditors, the recoupment doctrine is a limited one and should be narrowly construed."). For this reason, recoupment is generally found applicable only when the situation involves a debit and credit arising from the same goods and services.

In this case, the undisputed facts demonstrate that the prepetition transactions between the Debtors and Volvo bear little resemblance to what occurred between the parties after Volvo stopped extending credit to the Debtors. First, at that point, the parties were no longer dealing under the terms of the Agreement. Volvo imposed new payment terms that were completely different from those in existence under the Agreement. Second, the services rendered by Volvo on a credit basis were completed transactions, wholly separate from the service calls performed by Volvo on an advanced-payment basis. The fact that Volvo holds overpayments does not arise from or depend in any way upon the services rendered prepetition. While there may be a logical relationship between the credit-based service calls and the advanced-payment service calls because they were arranged by Volvo and performed for the Debtors' benefit, these service calls were not part of a single integrated transaction. For these reasons, the Court concludes that Volvo had no right of

recoupment with regard to the overpayments.

This conclusion is consonant with the primary function and purpose of the Bankruptcy Code and respects the fact that recoupment is an equitable defense. The purpose of recoupment is to avoid the unjust enrichment that may arise from forcing one party to a contract to perform an obligation while another party has not performed its obligations under the same contract. Recoupment permits the court to net all obligations and claims for damages and breach arising from a single contract, even in a bankruptcy context. *See In re Metropolitan Hosp*., 110 B.R. 731, 736 (Bankr. E.D. Pa. 1990) ("Recoupment . . . allows the creditor to assert that certain mutual claims extinguish one another in bankruptcy, in spite of the fact that they could not be "setoff" under 11 U.S.C. § 553."). In this case, however, it is not simply a matter of stating that, because the Debtors failed to pay according to the terms of the Agreement for prepetition services and Volvo did perform by providing the services, Volvo should be permitted to charge the Debtors more for ongoing postpetition services in order to recapture some of its prepetition losses. This is a bankruptcy case. This "is what happens in bankruptcy every day. Debtors enter into contracts for the purchase of goods, fail to pay for them, file bankruptcy, never pay the creditor, and keep the goods." *In re Izaguirre*, 166 B.R. 484 (Bankr. N.D. Ga. 1994) (Massey, J.). If the terms of the Agreement had not changed, the surplus arising from the overpayments would never have arisen, and Volvo would not be holding funds against which it could recoup it prepetition losses. It would be illogical to construe the credit-based

and advanced-payment based transactions at issue here as one transaction or to be part of the performance of the same contract.[1]

In addition to its assertion that it was entitled to recoup the overpayments, Volvo now argues that the overpayments were authorized postpetition transfers. Specifically, Volvo contends that the Debtors intended the postpetition overpayments to be made pursuant to an order entered by the Court in the Debtors' main bankruptcy proceeding that authorized the Debtors to pay certain prepetition claims of creditors identified by the Debtors as "critical vendors."

On August 1, 2005, the Court entered an order authorizing, but not requiring, the Debtors "to pay those critical prepetition obligations described in the Motion to suppliers of goods and services to the Debtors (collectively, the "Critical Vendors"), in an aggregate

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[1] The Court's conclusion supports the bankruptcy goal of equal distribution to similarly situated creditors. Permitting a creditor to increase the costs of services and goods provided postpetition to create a right of recoupment that did not exist on the petition date against which it is permitted to recoup prepetition losses would undermine the bankruptcy system. Creditors are assured *full* payment for postpetition goods and services, in the form of an administrative expense, as a means of encouraging them to do business with the insolvent debtor. Allowing a creditor more than the value of such goods or services could encourage creditors to seek an improvement in their prepetition status to the detriment of other unsecured creditors. While the Court makes no findings with regard to Volvo's motives in this case and does not find motive to be relevant or dispostive, the Debtors have pointed to evidence to suggest that this may be exactly what occurred in this case. *See* Thomason Deposition at 61-62 ("I was communicating that that credit could be used to recoup for invoices that had been previously billed."); E-mail from Lyn Thomason to Tom White, dated August 1, 2005, Exhibit P-13 to Thomason Deposition ("We have Allied on credit hold and they are paying us by comcheck in advance. This gives us a chance to recoup at least some of the money because we require a $500 or $750 deposit before we start work. We are not refunding the difference if the invoice is less than the comcheck. In some cases, we are only charging a case fee ($35) which gives us a chance to 'grab' some money. They are literally paying us thousands of dollars a day by comcheck. Before we shut them down, we need to consider if this is a way to recover some of the losses.").

amount of no more than $2 million, under the following conditions: (a) the Debtors will mail a copy of this Order to each Critical Vendor that is paid under the terms of this Order; (b) the Critical Vendor accepting payment shall be deemed to have agreed to maintain or reinstate customary trade terms during the pendency of these Chapter 11 cases; (c) the Critical Vendor accepting payment shall be deemed to have accepted the terms of this Order, and if the Critical Vendor does not thereafter provide the Debtors with customary trade terms during the pendency of these Chapter 11 cases, any payments of prepetition claims made after the Petition Date shall be deemed to be an unauthorized postpetition transfer and shall be recoverable by the Debtors; and (d) the Debtors shall be authorized but not required to obtain written verification of the terms to be supplied by the Critical Vendors paid under this Order." *Allied Holdings, Inc.*, *et al.*, 05-12515-CRM, Docket Number 60 (Aug. 1, 2005). In support of the right to pay critical vendors, the Debtors asserted that either the Debtors believed that they had no other alternative source for the goods or services provided by that particular vendor or that the vendor might otherwise go out of business if the Debtors did not pay the prepetition claim. *Allied Holdings, Inc.*, *et al.*, 05-12515-CRM, Docket Number 29 (Aug. 1, 2005).

Volvo's argument is not supported by the undisputed facts of this case. First, the Debtors have submitted evidence that the Debtors did not intend the overpayments as payments being made pursuant to the Critical Vendor order. *See* Deposition of Thomas H. King at 23-24; Ferrell Deposition, at 22; 41 ("I rejected paying for prepetition claims with

Volvo, yes."). Volvo has pointed to no evidence to call this conclusion into doubt. Additionally, there is no evidence in the record that the Debtors mailed a copy of the Critical Vendor order to Volvo along with any of the overpayments thereby indicating their intent to pay Volvo's prepetition claim pursuant to that order. Finally, the undisputed facts establish that Volvo did not maintain or restore customary credit terms to the Debtors following its receipt of the overpayments. Accordingly, even if the Debtors had intended to treat Volvo as a Critical Vendor, Volvo never complied with the terms of the Critical Vendor order and, accordingly, any payments received pursuant to that order would have become "an unauthorized postpetition transfer" and would be "recoverable by the Debtors."

B. *Volvo Violated the Automatic Stay*

The commencement of a bankruptcy case triggers an automatic stay that prevents creditors from taking "any action to obtain possession of property of the estate . . . or to exercise control over property of the estate." Section 542(a) "creates an affirmative obligation on the part of the party holding estate property to turn the property over, and that obligation is not dependent upon the holding of a hearing or the entry of an order by the bankruptcy court."[2] *Id.* at 892; *see also In re Yates*, 332 B.R. 1 (10th Cir. BAP 2005); *In re Sharon*, 234 B.R. 676 (6th Cir. 1999). A creditor's failure to return property of the estate

[2] Section 542(a) provides an exception, not relevant to this case, which excuses turn over of property of the estate when such property is "of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

upon the demand of the trustee or the debtor in possession, even when the creditor's initial receipt of the property occurred prepetition and was not a violation of the automatic stay, is a violation of section 362(a)(3). *See In re Rutherford*, 329 B.R. 886 (Bankr. N.D. Ga. 2005) (Drake, J.) (holding that creditor who validly repossessed debtor's vehicle prepetition violated automatic stay by refusing to return the vehicle upon the Chapter 13 debtor's request and by failing to move immediately for relief from the stay). Accordingly, refusal to turn over property of the estate without seeking relief from the stay constitutes the exercise of control over property of the estate and violates section 362(a)(3).[3]

Volvo held property of the Debtors' bankruptcy estate and exercised control over it by refusing to turn over the overpayments to the Debtors. Accordingly, the Court concludes that Volvo violated section 362(a)(3) of the Bankruptcy Code.

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[3] In furtherance of preserving a right of setoff until relief from the stay can be obtained, a creditor with a valid right of setoff may temporarily refuse to pay a debt owed to the debtor without violating section 362(a)(7). *See Strumpf,* 516 U.S. at 16-18. Even in this instance, however, the refusal to pay a debt owed to the estate must not amount to a permanent refusal to pay without seeking relief from the automatic stay. *See Town of Hempstead Employees Federal Credit Union v. Wicks*, 215 B.R. 316 (E.D.N.Y. 1997). In this case, Volvo's refusal to turn over the overpayments cannot be excused as a temporary freeze. First, Volvo did not have a valid setoff right that could have been exercised postpetition, as the overpayments were property of the Debtors' bankruptcy estate, and Volvo did not actually owe the Debtors a debt. Second, even if the Court were to find that Volvo owed the Debtors a debt in the amount of the overpayments, this debt would not have existed prior to the petition date, and section 553 would not have permitted the exercise of any setoff right in this case. *See In re Moore*, 376 B.R. 704 (Bankr. D. Ark. 2007) (credit union could not set off prepetition debt against funds deposited by debtor postpetition). Finally, a temporary freeze in furtherance of the preservation of a setoff right requires the creditor to immediately seek relief from the stay, and Volvo never sought relief from the stay to permit it to perform a setoff.

C. *The Debtors are Entitled to Damages*

Pursuant to section 362(h), an "individual" may seek damages arising from harm caused by a willful violation of the automatic stay. *See* 11 U.S.C. § 362(h).[4] However, a corporate debtor is not an "individual" within the meaning of section 362(h). *See In re Jove Engineering, Inc.*, 92 F.3d 1539, 1550 (11th Cir. 1996). Section 105(a), which provides a bankruptcy court with the authority to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions," may support an award of damages to a non-individual that is harmed by a willful violation of the automatic stay. *See* 11 U.S.C. § 105(a); *In re Jove Engineering, Inc.*, 92 F.3d at 1554. A violation of the automatic stay is "willful" if the party "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay." *Id*. The fact that the party did not intend to violate the automatic stay and acted without malice does not preclude a finding of contempt and an assessment of appropriate sanctions. *Id.; see also In re Radcliffe*, 372 B.R. 401, 420 (Bankr. N.D. Ind. 2007) ("Willfulness can be found even if the creditor believed himself justified in taking the actions found to violate the stay."). Damages arising from contempt of the automatic stay assessed under section 105(a) can include damages designed to compensate the complainant for actual losses or to coerce compliance with the automatic stay. *See id*.

The undisputed facts demonstrate that Volvo was aware of the existence of the

[4] Following the amendments made to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act, former section 362(h) is now found in section 362(k).

automatic stay and intended to retain the overpayments. These facts support the conclusion that Volvo's violation was willful. Additionally, the Debtors have demonstrated that they were harmed by Volvo's retention of over $500,000 of estate funds for almost the entire duration of this bankruptcy case. The Debtors are entitled to an award of damages in an amount to be proven at a later hearing.

CONCLUSION

For the reasons stated above, Volvo's Motion for Summary Judgment is **DENIED**. The Debtor's Motion for Partial Summary Judgment is **GRANTED**. Volvo is hereby **DIRECTED** to turn over $561,743.77 to the Debtors.

END OF DOCUMENT

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