No. _____

In The
Supreme Court of the United States

CATHY LYNN PRESCOTT, EXECUTOR
OF THE ESTATE OF DOROTHY R. DUBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

LYNNE F. RILEY
Counsel of Record
RILEY LAW GROUP LLC
100 Franklin Street
Boston, MA 02110
(617) 399-7300
(617) 399-7410 fax
riley@rileylawgroup.com

TERRIE HARMAN
HARMAN LAW OFFICES
59 Deer Street, Suite 1B
Portsmouth, NH 03801
(603) 431-0666
(603) 431-6579 fax
th@tharman.net

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether 11 U.S.C. § 106 abrogates sovereign immunity for claims of emotional distress damages against the government for violations of the automatic stay under 11 U.S.C. § 362, and the discharge injunction under 11 U.S.C. § 524.

PARTIES TO THE PROCEEDING

The original party, Dorothy R. Duby, passed away during the pendency of this appeal. The current parties are Cathy Lynn Prescott, Executor of the estate of Dorothy R. Duby, and the United States Department of Agriculture. For the sake of readability, we refer to the parties as Duby and the USDA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the First Circuit ("First Circuit").

OPINIONS BELOW

The judgment of the First Circuit is unreported and is reprinted in the Appendix to the Petition ("App.") at App. 1. The opinion of the United States Bankruptcy Appellate Panel for the First Circuit ("BAP") is reported at 451 B.R. 664 and is reprinted at App. 3. The opinion of the United States Bankruptcy Court for the District of New Hampshire is unreported and is reprinted at App. 33.

JURISDICTION

The First Circuit issued its judgment on April 17, 2012; it denied a motion to reconsider on May 10, 2012. App. 1, 47. On March 8, 2012, the First Circuit entered an order denying a petition for hearing *en banc*. App. 45. On June 25, 2012, this Court granted an extension of time for filing of the petition to and including September 14, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of 11 U.S.C. §§ 105, 106, 362, and 524 are reprinted at App. 48-52.

STATEMENT OF THE CASE

Section 106(a) of the United States Bankruptcy Code,[1] as amended in 1994, abrogates sovereign immunity as to all governmental units (including the United States) with regard to several Bankruptcy Code provisions, expressly including §§ 362 and 524. This waiver empowers bankruptcy courts to enter an "order, process, or judgment" against the United States under these sections, "including an order or judgment awarding a money recovery, but not including an award of punitive damages." 11 U.S.C. § 106(a)(3). The issue for which review is sought is whether § 106(a) abrogates the United States' sovereign immunity from an award of emotional distress damages based on violations of the automatic stay and discharge injunction.

The debtor, Dorothy R. Duby ("Duby"), filed for bankruptcy relief under Chapter 7 on October 14, 2003. At the time, Duby was over 80 years of age, vision-impaired, and lived alone in a mobile home in Raymond, New Hampshire. Duby's monthly income

[1] 11 U.S.C. § 101 et seq. (2006) (hereinafter, "Bankruptcy Code" or "Code"). All section references are to the Code unless otherwise noted.

was $691. Duby listed the United States Department of Agriculture ("USDA") as an unsecured creditor with a claim of approximately $1,800. Although the USDA received notice and recorded Duby's bankruptcy filing in its computer system, the USDA continued to send Duby monthly billing statements. Specifically, the USDA sent Duby a total of 8 billing statements between October 14, 2003, and July 14, 2004.

The bankruptcy court issued a discharge order on July 15, 2004. Undeterred, the USDA continued to send Duby monthly billing statements. Specifically, the USDA sent Duby 19 billing statements between August 13, 2004, and April 13, 2006. USDA employees persisted by calling Duby 28 times between March 7, 2006, and April 27, 2009. The USDA's collection tactics included threatening the loss of Duby's mobile home if she did not pay the debt. The USDA's aggressive and persistent efforts to collect its debt from Duby, both during her bankruptcy case and after her discharge order entered, frightened and upset her. Duby experienced loss of sleep, loss of appetite, vomiting and depression.

Duby sought relief in the bankruptcy court. The court held that the USDA's collection activities violated §§ 362 and 524, and awarded $11,848.50 in attorneys' fees and $3,000 as a sanction for violation of the discharge injunction. Duby had also sought emotional distress damages for the government's violations, but the bankruptcy court held that Duby was not entitled to such an award because of the First Circuit's precedent in *United States v. Rivera Torres (In re Rivera*

Torres), 432 F.3d 20, 23 (1st Cir. 2005) (hereinafter, "*Torres*").

Duby appealed to the BAP. The BAP affirmed the bankruptcy court's ruling regarding the unavailability of emotional distress damages (based on *Torres*), and reversed the bankruptcy court's award of sanctions, holding that § 106(a) expressly precluded an award of punitive damages against the government.

Duby appealed the BAP's decision to the First Circuit solely on the issue of her entitlement to emotional distress damages. The First Circuit affirmed the BAP's decision on the unavailability of emotional distress damages. The First Circuit held that Duby failed to establish an exception to the rule of *stare decisis*, and declined to revisit *Torres*. The court summarily applied *Torres* to Duby's claims, including her claim under § 362, despite the fact that *Torres* did not involve § 362, and despite the fact that the Eleventh Circuit Court of Appeals had squarely held that § 106(a), as amended, abrogated sovereign immunity with respect to all non-punitive damages awarded under Bankruptcy Code § 105 for governmental violations of the discharge injunction.

REASONS FOR GRANTING THE PETITION

A conflict exists between the First and Eleventh Circuit Courts of Appeals on the approach to interpreting the abrogation of sovereign immunity contained in Code § 106(a). In *Jove Eng'g, Inc. v. I.R.S.*,

92 F.3d 1539, 1553 (11th Cir. 1996) (hereinafter, "*Jove*"), the Eleventh Circuit held that § 106(a) unequivocally waives sovereign immunity for court-ordered money damages awarded under § 105, as long as the damages are not punitive. *Id.* at 1553; *see also Hardy v. I.R.S. (In re Hardy)*, 97 F.3d 1384 (11th Cir. 1996). The Eleventh Circuit is in accord with a vast majority of lower-court opinions holding that the plain text of § 106(a) unequivocally waives sovereign immunity regarding all non-punitive court-ordered money damages awarded under §§ 362 and 524 of the Bankruptcy Code.

The Report of the House Judiciary Committee regarding the 1994 amendment to § 106 confirms Congressional intent to overrule this Court's prior decisions in *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). The Report specifically states that the amendment was intended to "effectively overrule [*Nordic Village* and *Hoffman*]." H.R. Rep. No. 835, 103d Cong., 2d Sess. 42, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3350-51. The Report further states that Congress originally "intended to make the [government] subject to a money judgment," but the Supreme Court, employing "such a narrow construction," held to the contrary. *Id.*

In the present case (hereinafter, "*Duby*"), the First Circuit repeats this interpretive error, employing an exceedingly narrow construction of § 106(a) in contravention of the plain text of the 1994 amendment. The First Circuit's decision effectively immunizes

government officials and employees from violations of the automatic stay and discharge injunction, despite clear Congressional intent to hold the government accountable for such violations. Thus, this Court's intervention is necessary to address the circuit split, avoid further confusion in the lower courts, and ensure that lower courts have the ability to enforce fundamental debtor protections against the government for emotional damages caused by its infractions, as Congress intended.

I. The First Circuit's interpretation of § 106(a) conflicts with the holdings of the Eleventh Circuit and a majority of lower court decisions.

The First Circuit holds that the sovereign immunity waiver in § 106(a) is strictly limited to the "classic recovery of moneys already paid to the [government] that the [debtor's] estate wished to recover." *Torres*, 432 F.3d at 31. In stark contrast, the Eleventh Circuit holds that § 106 constitutes an unequivocal waiver of sovereign immunity for a money recovery awarded against the government, with the only limitations being that the damages may not be punitive, and must derive from one of the Code sections specifically enumerated in § 106. *Jove*, 92 F.3d at 1555; *cf. Chiang v. Neilson (In re Death Row Records)*, No. 06-11205, 2012 WL 952292 at *11 (9th Cir. BAP (Cal.) March 21, 2012) (damage claims for automatic stay violations are not barred by sovereign immunity).

The First Circuit has acknowledged the conflict, saying its temporal approach to construction of § 106(a) differs from the Eleventh Circuit's plain text approach in *Jove*. *Torres*, 432 F.3d at 27. In *Duby*, the BAP also acknowledged that

> the First Circuit's analysis differs from . . . the Eleventh Circuit, which held that 11 U.S.C. § 106)(a) unequivocally waives sovereign immunity for non-punitive court ordered money damages under 11 U.S.C. § 105 . . . but *In re Rivera Torres* is binding First Circuit precedent which the Panel . . . is bound to follow under the principles of *stare decisis*.

In re Duby, 451 B.R. 664, 672 (1st Cir. BAP 2011) (internal citations omitted), App. 17-18.

The vast majority of lower courts apply the plain text interpretation advanced by the Eleventh Circuit, holding that § 106(a) unequivocally waives sovereign immunity for emotional distress claims against the government under §§ 362 and 524. *See United States v. Flynn (In re Flynn)*, 185 B.R. 89, 94 (S.D. Ga. 1995) (affirming bankruptcy court's award of $5,000 for debtor's emotional distress as a result of IRS's violation of § 362); *In re Griffin*, 415 B.R. 64, 71 (Bankr. N.D.N.Y. 2009) (debtors entitled to seek actual damages, including damages for emotional distress, against the government for violation of § 362); *Distad v. United States (In re Distad)*, 392 B.R. 482, 490 (Bankr. D. Utah 2008) (debtor entitled to seek compensation against IRS for monetary losses including "costs arising from mental distress" as result of § 524 violation); *Rosas v. Monroe County Tax Claim Bureau*,

323 B.R. 893, 902 (Bankr. M.D. Pa. 2004) (debtors entitled to nominal damages for emotional distress resulting from county tax claim bureau's violation of § 362); *Atkins v. United States (In re Atkins)*, 279 B.R. 639, 649 (Bankr. N.D.N.Y. 2002) (awarding $30,000 against USDA for emotional distress caused by repeated violations of § 524); *Headrick v. Georgia Dep't of Revenue (In re Headrick)*, 285 B.R. 540, 550 (Bankr. S.D. Ga. 2001) (awarding nominal damages of $200 for emotional distress and lost pay caused by state department of revenue's violation of § 362); *Covington v. I.R.S. (In re Covington)*, 256 B.R. 463, 467 (Bankr. D. S.C. 2000) (debtors entitled to $1,000 in actual damages for emotional injury due to IRS's violation of § 362); *Holden v. I.R.S. (In re Holden)*, 226 B.R. 809, 812 (Bankr. D. Vt. 1998) (debtors entitled to assert claim for damages for emotional distress as a result of IRS's violation of § 362); *Boone v. FDIC (In re Boone)*, 235 B.R. 828, 838 (Bankr. D. S.C. 1998) (awarding damages of $5,000 for emotional distress caused by FDIC's violation of § 362); *Davis v. I.R.S. (In re Davis)*, 201 B.R. 835, 837-38 (Bankr. S.D. Ala. 1996) (awarding $300 for emotional distress resulting from IRS's violation of § 362); *Matthews v. United States (In re Matthews)*, 184 B.R. 594, 601-02 (Bankr. S.D. Ala. 1995) (awarding compensatory actual damages of $3,000 for "loss of use of funds and stress" caused by IRS's violations of §§ 362 and 524).[2]

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[2] Although there appeared to be no discussion regarding the issue of sovereign immunity, damages for emotional distress were also awarded against governmental units for violations of

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On the other hand, courts holding that § 106 bars emotional distress damage claims for violation of the automatic stay against the government are in the clear minority. *See United States v. Harchar*, 331 B.R. 720, 732-33 (N.D. Ohio 2005); *King v. United States (In re King)*, 396 B.R. 242, 251 (Bankr. D. Mass. 2008). Thus, the Eleventh Circuit and a majority of lower courts represent a clearly dominant position, holding that § 106(a) waives sovereign immunity as to non-punitive damage awards for violations of §§ 362 and 524 of the Bankruptcy Code. Nonetheless, the First Circuit has adopted a narrow interpretive approach, contrary to the statute's plain text, that bars debtors from bringing emotional distress damage claims against the government for its violations of these fundamental Code provisions.

II. The First Circuit's determination that § 106(a) does not encompass emotional distress damages conflicts with the plain text of the statute.

In *Torres*, and now in *Duby*, the First Circuit failed to recognize that the plain text of Code

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§ 362 in the following two cases within the First Circuit: *Bererhout v. City of Malden (In re Bererhout)*, No. 09-18956-JNF, 2011 WL 2119007 at *8 (Bankr. D. Mass. May 24, 2011) (awarding damages of $1,000 for emotional distress against City of Malden); and *In re Rosa*, 313 B.R. 1, 7 (Bankr. D. Mass. 2004) (awarding damages of $4,000 for emotional distress against City of Chicopee).

§ 106(a)(3) clearly and unequivocally waives sovereign immunity with respect to all non-punitive money recoveries against the government under specific Code sections, including §§ 362 and 524. It is evident that by making only one exception, for punitive damages, Congress intended that no other exception be read into the plain text of § 106(a)(3). The traditional tools of statutory construction dictate that in the absence of ambiguity, the plain text of the statute controls. This Court endorsed the plain text approach to interpreting the Bankruptcy Code in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). There, this Court stated: "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *U.S. v. Ron Pair Enterprises*, 489 U.S. at 242.

Here, the text is plain. Subsection (1) of § 106(a) sets forth the Code sections where sovereign immunity is abrogated, and these include the automatic stay of § 362, the discharge injunction of § 524, and the statutory contempt power of § 105. Subsection (2) broadly states that bankruptcy courts may hear "any issue arising with respect to the application of such sections to governmental units." Under subsection (3), courts may issue an order, process, or judgment against the government under these sections, "*including* an order or judgment awarding a *money recovery*, but not including punitive damages" (emphasis added). *See* 11 U.S.C. § 102(3) ("includes" and "including" are not limiting terms).

Thus, the text is clear and no further analysis is required. *See Jove*, 92 F.3d at 1553, 1555 (§ 106(a) constitutes unambiguous waiver of sovereign immunity for non-punitive damages awarded under §§ 524 and 105); 2 Collier Bankruptcy Practice Guide ¶ 106.04 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2011) ("[s]ection 106(a)(3) provides that the court may award money damages, but not punitive damages, against a governmental unit under the Code sections listed in section 106(a)(1)").[3]

While it is true that a waiver of sovereign immunity must be "unequivocally expressed in statutory text and any ambiguities in the statutory language are to be construed in favor of immunity," there is "no need [ ] to resort to the sovereign immunity canon [when] there is no ambiguity [ ] to construe." *See Federal Aviation Admin. v. Cooper*, ___ U.S. ___, 132 S.Ct. 1441, 1448 (2012); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). In *Torres*, adhered to in *Duby*, the First Circuit, relying on the sovereign immunity canon, applied an exacting interpretation premised on the notion that "the text of § 106(a) does

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[3] The issue of whether the term "actual damages" in § 362 includes emotional distress damages may constitute another circuit split. *Compare Young v. Repine (In re Repine)*, 536 F.3d 512, 521 (5th Cir. 2008) *and Dawson v. Wash. Mut. Bank, F.A. (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004) *and Fleet Mortg. Group v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999) (holding emotional damages allowed under § 362(k)) *with Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 879-80 (7th Cir. 2001) (holding opposite).

not specifically refer to emotional distress damages at all." *Torres*, 432 F.3d at 24. However, where there is a sovereign immunity waiver that includes all money recoveries and specifically excludes only punitive damages, the plain and obvious reading is that since emotional distress damages are not punitive, and they are monetary, they are allowed.

III. The context and purpose of § 106(a) further supports a waiver of sovereign immunity that encompasses awards for emotional distress damages.

The plain textual meaning of § 106 is corroborated by other interpretive tools, including examination of the context and purpose of the statute. The First Circuit's rationale for *Torres*, affirmed in this case, is not in accord with this Court's precedent regarding statutory interpretation, thus warranting review.

The Court's decision in *Cooper* provides guidance regarding the relevance of a statute's context when the scope of a sovereign immunity waiver is ambiguous. 132 S.Ct. at 1449-50. There, the Court determined that "actual damages" was a term of art with a "chameleon-like quality." *See id.* In some contexts, such as the Fair Housing Act or the Fair Credit Reporting Act, the term encompassed both pecuniary and non-pecuniary harm, but in other contexts, like the Federal Tort Claims Act or the Copyright Act, the term encompassed only pecuniary harm. *See id*. The

Court determined that a review of the specific statutory context was necessary in order to decide whether "actual damages," as used in the Privacy Act, included emotional distress damages. The Court directed that " . . . when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *Id.* at 1449 (internal quotation marks omitted). The Court held that in the context of the Privacy Act, the term "actual damages" could plausibly mean special damages, and thus there was no unequivocal waiver of sovereign immunity for emotional distress damages. *Id.*

This case is distinguishable from *Cooper*.[4] The term "money recovery" is not "chameleon-like" or susceptible to varying interpretations in different contexts.[5] Moreover, the context in which Congress

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[4] *Cooper* does not resolve the circuit split referenced in footnote 3 on the issue of whether "actual damages" under Code § 362(k) includes emotional distress damages. *Cooper*'s interpretation of the term "actual damages" depended on the context of the Privacy Act, 132 S.Ct. at 1450-52; whereas the circuit split regarding awards of "actual damages" under § 362 is dependent upon the context of the Bankruptcy Code. *See Dawson* at 1146. Moreover, *Cooper* is a sovereign immunity case and therefore a different analysis applies.

[5] The First Circuit's exceedingly limited interpretation of "money recovery" in context of amended § 106(a) runs afoul of another tenet of statutory construction: a court "must give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). This principle directs courts to "favor[ ] that interpretation which avoids surplusage." *Freeman v. Quicken Loans, Inc.*, ___ U.S. ___, 132 S.Ct. 2034, 2043 (2012);

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enacted § 106 establishes that the term "money recovery" carries a broad meaning. In *Nordic Village*, 503 U.S. at 32-39, this Court used the term "money recovery" interchangeably with the terms "monetary relief," "money damages," "monetary claims," and "monetary liability." *Nordic Village* was decided just two years before Congress amended § 106(a); indeed, Congress enacted § 106 with the specific intent of abrogating *Nordic Village*. Thus, Congress must have legislated with an awareness of the broad cluster of ideas attached to the term "money recovery" in this relevant body of learning when amending § 106 in 1994.

Torres, and therefore *Duby*, relies heavily on the asserted unavailability of emotional distress damages for violations of the discharge injunction in the background law as it was prior to the 1994 amendment. *Torres*, 432 F.3d at 27. The First Circuit disregards that the background law included numerous bankruptcy court decisions recognizing the availability of emotional distress damages for violations of the automatic stay. *See, e.g., Fisher v. Blackstone Fin. Servs., Inc. (In re Fisher)*, 144 B.R. 237, 239 (Bankr. D. R.I. 1992); *In re Flynn*, 143 B.R. 798, 803-04 (Bankr. D.

Williams v. Taylor, 529 U.S. 362 (2000). If the term "money recovery" is strictly limited to the classic return of monies already paid to the government that the bankruptcy estate seeks to recover, then there would be no need to exclude punitive damages since they would never be included in such a limited definition of the term. Thus, the First Circuit's interpretation of "money recovery" renders the phrase "not including punitive damages" mere surplusage.

R.I. 1992); *In re Carrigan*, 109 B.R. 167, 170 (Bankr. W.D.N.C. 1989); *In re Jacobs*, 100 B.R. 357, 360 (Bankr. S.D. Ohio 1989); *Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 905 (Bankr. E.D. Pa. 1987); *Mercer v. D.E.F., Inc.*, 48 B.R. 562, 565-66 (Bankr. D. Minn. 1985); *In re Pierson*, 33 B.R. 743, 745 (Bankr. W.D.N.Y. 1983); *In re Lohnes*, 26 B.R. 593, 596 (Bankr. D. Conn. 1983); *Lugo v. De Jesus (In re De Jesus Saez)*, 20 B.R. 19, 23 (Bankr. D. P.R. 1982); *In re Reed*, 11 B.R. 258, 277, 280 (Bankr. D. Utah 1981); *see also In re Briggs*, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992); *Crispell v. Landmark Bank (In re Crispell)*, 73 B.R. 375, 380 (Bankr. E.D. Mo. 1987).

The relevant background law also includes cases recognizing the availability of emotional distress damages under the court's § 105 contempt powers, including for violations of the discharge injunction. *See In re Roush*, 88 B.R. 163, 165 (Bankr. S.D. Ohio 1988); *see also Colon v. Hart (In re Colon)*, 114 B.R. 890, 898-99 (Bankr. E.D. Pa. 1990). Thus, the background law establishes that emotional distress damages were a well-known category of damages available for violations of §§ 362 and 524 as of 1994.

The purposes of §§ 362 and 524 provide further support for the plain text interpretation. The automatic stay of § 362 is "concerned not only with financial loss, but also [] with the emotional and psychological toll that a violation of a stay can exact from an individual." *Dawson*, 390 F.3d at 1148. Similarly, the purpose of the discharge injunction under

§ 524 is to stop "the kinds of harassment, threats and anxiety that debtors were suffering before they filed." *Gervin v. Cadles of Grassy Meadows II, LLC (In re Gervin)*, 337 B.R. 854, 863-64 (Bankr. W.D. Tex. 2005), *rev'd on other grounds*, 300 Fed. Appx. 293 (5th Cir. 2008); *see also In re Meyers*, 344 B.R. 61, 66-67 (Bankr. E.D. Pa. 2006) (discharge injunction intended "to prevent the emotionally harmful conduct associated with debt collection tactics)." Thus, the purposes of these protective Code provisions – ending abusive and harassing collection efforts – underscores the importance of awarding emotional distress damages when these provisions are violated.

Congress specifically extended the stay and discharge injunction to government creditors, providing debtors with the same protections against harassment as those afforded against general creditors. *See* §§ 106(a)(1), 105(a), 362(k), 524. The purpose of the 1994 amendments to § 106 was to "establish[ ] that the government cannot assert sovereign immunity as a shield to defend its actions in violating the automatic stay and discharge provisions of the Code, but instead must abide by the regular processes of the bankruptcy court applicable to all claimants." *See* 140 CONG. REC. H10, 772 (daily ed. Oct. 4, 1994) (statement of Rep. Berman). Moreover, Congress stated its intent to make the government "subject to a money judgment . . . this amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief." H.R.

Rep. No. 103-835 at 42, *reprinted in* 1994 U.S.C.C.A.N. 3340, 3350.

The purposes of Congress's enactment of Code §§ 362 and 524, coupled with its purpose in amending § 106(a)(1), demonstrate the intent for a broad waiver of sovereign immunity to ensure that critical debtor protections are enforced against the government. An award of emotional distress damages is a major enforcement mechanism for violation of these fundamental debtor protections, and Congress did not intend to render the government impervious to a bankruptcy court's authority to issue meaningful remedial orders against it.

IV. The government should not be immunized from awards of emotional distress damages for infractions of fundamental Code provisions.

The automatic stay and discharge injunction are cornerstones of bankruptcy law, and emotional distress is a common injury resulting from violations of these fundamental debtor protections. The government is a frequent creditor in bankruptcy cases, and instances of government violations of §§ 362 and 524 often occur. The government's authority and potential to intimidate present the heightened risk that governmental infractions will cause emotional distress to debtors.

Emotional distress is one of the most recurrent and frequently asserted categories of damages resulting

from illegal collection activity in violation of these crucial bankruptcy provisions. *In re Gervin*, 337 B.R. at 863-64 ("threats and harassment are the first and most effective collection devices most creditors employ . . . these methods work precisely because they inflict emotional distress on debtors"). Indeed, one of Congress's concerns in enacting the damages provision of the automatic stay was the psychological harm to debtors caused by stay violations. *See Dawson*, 390 F.3d at 1148. Similarly, the discharge injunction is intended "to prevent the emotionally harmful conduct associated with debt collection tactics." *See Meyers*, 344 B.R. at 66-67; *In re Gervin*, 337 B.R. at 863-64 (purpose of discharge injunction is to stop "the kinds of harassment, threats and anxiety that debtors were suffering before they filed"). Thus, the impact of emotional distress damages resulting from illegal collection activity is an important and pervasive problem which these statutes were designed to remedy.

The government is a common creditor in bankruptcy cases, and its extensive power and authority endow it with a unique ability to threaten and intimidate. There are numerous cases documenting unlawful collection activity by the government in bankruptcy proceedings, resulting in emotional distress to debtors. *I.R.S. v. Germaine (In re Germaine)*, 152 B.R. 619, 629 (9th Cir. BAP 1993) (court "disturbed" by repeated violations of discharge injunction); *Flynn v. I.R.S. (Matter of Flynn)*, 169 B.R. 1007, 1010 (S.D. Ga. 1994) (IRS levy of debtor's bank account in violation of the automatic stay caused debtor humiliation and

"extreme emotional distress"; debtor feared IRS was "above the law"); *In re Distad*, 392 B.R. at 490 (IRS garnishment of wages and filing of tax lien in violation of § 524 "damaged the debtor's quality of life in the form of emotional distress, mental anguish, and inability to sleep"); *Covington*, 256 B.R. at 467 (IRS violation of stay resulted in "profound" impact and trauma; court opined that "peace of mind is invaluable"); *Matthews*, 184 B.R. at 601 (IRS violations of automatic stay and discharge injunction over a period of two years caused emotional distress; husband vomited, wife resigned her job); *Abernathy v. United States (In re Abernathy)*, 150 B.R. 688, 696 & n.10 (Bankr. N.D. Ill. 1993) (discussing "egregious flaunting of the bankruptcy system by the IRS"); *Nichols v. I.R.S. (In re Nichols)*, 143 B.R. 104, 108 (Bankr. S.D. Ohio 1992) (IRS committed "[m]ultiple and egregious violations of the automatic stay").

The many cases documenting government violations represent the tip of the iceberg, since financially strapped debtors rarely have the ability to litigate automatic stay or discharge injunction violations. Thus, this Court's review is required because the issues raised in this case reoccur frequently. *See Matthews*, 184 B.R. at 598 (IRS agent stated, in testifying about an erroneous and unlawful IRS levy, that "it had happened before and will happen again").

Moreover, as one court observed, "actions taken by those in authority, particularly government agencies and [their] officials, can inflict severe angst on those living through those actions." *In re Holden*, 226

B.R. at 811. A debtor may easily ignore a harassing phone call from a credit card company, but a threatening collection call or letter from a government agency may have a far more serious psychological impact. For example, one case discussed a "large bureaucracy running amuck" that resulted in the debtor being "paralyzed with fear." *Atkins*, 279 B.R. at 645, 646. There, the government agency improperly seized tax refunds, threatened to report the debtor to the credit reporting agencies, and, in a remarkably egregious misuse of government power, improperly threatened to refer the matter to the United States Attorney and demanded that the debtor report to a government office. *Id.* at 646-47. Such actions by the government are highly likely to inflict severe emotional distress, underscoring the importance of the issues presented in this case.

The protections of the automatic stay and discharge provisions are meaningless unless they are enforced. *See In re Beckett*, 455 B.R. 9, 13-14 (Bankr. D. Mass. 2011); *McClure v. Bank of America (In re McClure)*, 420 B.R. 655, 664 (Bankr. N.D. Tex. 2009). Most debtors, like Duby, have limited means and are highly vulnerable. Thus, their ability to assert their legal rights is seriously compromised. Such debtors will be extremely reluctant to prosecute violations of the automatic stay and discharge injunction if they are unable to recover damages. *See McClure*, 420 B.R. at 664.

Conversely, government creditors will be more likely to violate the automatic stay and discharge

injunction with impunity in the absence of meaningful repercussions. *See id.* Awarding damages, including for emotional distress, discourages creditors from violating these provisions.[6] *See id.; In re Sullivan*, 367 B.R. 54, 65-66 (Bankr. N.D.N.Y. 2007). Otherwise, "creditors could believe that continuing their collection activities in the hopes of coercing payments would only be a 'technical' violation . . . for which they might not be held accountable." *See Jackson v. Dan Holiday Furniture, LLC (In re Jackson)*, 309 B.R. 33, 37-38 (Bankr. W.D. Mo. 2004).

Furthermore, holding the government accountable would incentivize the establishment of internal procedures to reduce the incidence of governmental violations. *See Jove*, 92 F.3d at 1543 (IRS's computer system failed to freeze collection activities); *In re Duby*, 451 B.R. at 667 (USDA internal error caused the debt to be miscategorized as secured), App. 5; *In re Griffin*, 415 B.R. at 65 (Social Security Administration's repeated violation of automatic stay resulted from three month long "processing delays" in handling notice of bankruptcy filing); *In re Solis*, 137 B.R. 121, 123 (Bankr. S.D.N.Y. 1992) (violation of automatic stay due to computer failure); *Cowart v. I.R.S. (Matter of Cowart)*, 128 B.R. 492 (Bankr. S.D.

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[6] Such sanctions, though they coerce the government to comply with the law, are not punitive and thus do not run afoul of § 106(a)(3). *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 443 (1986) (quoting *United States v. Mine Workers of Am.*, 330 U.S. 258, 302 (1947)).

Ga. 1990) (IRS wrongly withheld three years of debtor's tax refunds due to computer error); *Unroe v. United States (In re Unroe)*, 144 B.R. 85 (Bankr. S.D. Ind. 1992) (IRS violated automatic stay and collected debts already paid due to a computer problem).

Justice Stevens, dissenting from the Court's narrow construction of the former § 106 in *Nordic Village*, stated that, in light of the text and context of § 106 and the Court's seminal decision in *United States v. Whiting Pools* "there is no reason why the United States should be treated any differently from any other . . . creditor . . . its interests are adequately protected by specific statutory provisions governing discharges and priorities." *Nordic Village*, 503 U.S. at 43-44 & n.134 (Stevens, J., dissenting) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983)). Congress adopted Justice Stevens's view by its 1994 amendment to § 106.

Duby duplicates *Nordic Village*'s narrow construction of the earlier version of § 106 and the resultant undermining of Congressional intent. Unless corrected by this Court, it will cause injustice, create confusion, and may require Congress to revise § 106 yet again. *See Nordic Village*, 503 U.S. at 46 n.14 (Stevens, J., dissenting) ("That Congress had to pass the same statute three times to achieve its original goal is quite striking") (internal citation omitted).

The Court's intervention is essential to ensure that the plain meaning and clear purposes of these Bankruptcy Code provisions are applied in the lower

courts, and that they are not misled by the erroneous holding of the circuit court below.

CONCLUSION

For the above reasons, Petitioner respectfully requests that her petition be granted.

Respectfully submitted,

LYNNE F. RILEY
Counsel of Record,
RILEY LAW GROUP LLC
100 Franklin Street
Boston, MA 02110
(617) 399-7300

TERRIE HARMAN
HARMAN LAW OFFICES
59 Deer Street, Suite 1B
Portsmouth, NH 03801
(603) 431-0666

United States Court of Appeals
For the First Circuit

No. 11-9006

IN RE: DOROTHY R. DUBY

Debtor

DOROTHY R. DUBY

Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Appellee

Before

Boudin, Lipez and Howard,
Circuit Judges.

JUDGMENT

Entered: April 17, 2012

The judgment of the Bankruptcy Appellate Panel is summarily *affirmed* insofar as it held that the United States has not waived its sovereign immunity from appellant's emotional distress claims. We decline to "revisit" circuit precedent as requested because appellant has failed to establish an exception to the

rule of *stare decisis*. *See United States* v. *Rodriguez-Pacheco,* 475 F.3d 434, 441-42 (1st Cir. 2007).

Affirmed.

By the Court:

/s/ Margaret Carter, Clerk

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NOS. NH 10-052, NH 10-057

Bankruptcy Case No. 03-13502-JMD
Adversary Proceeding No. 08-01160-LHK

Dorothy R. DUBY,
Debtor.

DOROTHY R. DUBY,
Plaintiff-Appellant / Cross-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee / Cross-Appellant.

Appeal from the United States Bankruptcy Court for the District of New Hampshire (Hon. Mark W. Vaughn, U.S. Bankruptcy Judge)

Before
Hillman, Feeney, and Bailey,
United States Bankruptcy Appellate Panel Judges.

Terrie Harman, Esq., on brief, for Plaintiff-Appellant / Cross-Appellee.

Michael McCormack, Esq., on brief, for Defendant-Appellee / Cross-Appellant.

June 28, 2011

Hillman, U.S. Bankruptcy Appellate Panel Judge.

The plaintiff-appellant / cross-appellee, Dorothy R. Duby (the "Debtor"), and the defendant-appellee / cross-appellant, United States of America, Department of Agriculture (the "USDA"), appeal from the bankruptcy court's final judgment and order dated July 21, 2010, awarding the Debtor $11,848.50 for attorney's fees for a violation of the automatic stay and $3,000.00 as a sanction for a violation of the discharge injunction. The issues presented on appeal are: (1) whether the bankruptcy court erred, as a matter of law, in ruling that the Debtor was barred from recovering emotional distress damages for violations of the automatic stay and discharge injunction from the USDA; (2) whether the bankruptcy court erred when it concluded that the Debtor was entitled to recover attorney's fees despite not having incurred any other recoverable damages; and (3) whether, in light of the express prohibition of punitive damage awards against the United States under 11 U.S.C. § 106(a)(3), the bankruptcy court erred in awarding a $3,000.00 sanction. For the reasons set

forth below, we **AFFIRM IN PART** and **REVERSE IN PART.**

BACKGROUND

The facts necessary to decide this appeal are undisputed. The Debtor filed a voluntary Chapter 7 petition on October 14, 2003. On Schedule F – Creditors Holding Unsecured Nonpriority Claims ("Schedule F"), the Debtor listed the USDA as an unsecured nonpriority creditor in the amount of $1,800.00. Despite having received actual notice of the Debtor's bankruptcy petition and the automatic stay, the USDA sent her eight monthly billing statements that each reflected a payment due of $11.50 and a due date of February 26, 2006, while her case was pending. On July 15, 2004, the Debtor received a discharge.

The USDA received notice of the Debtor's discharge on July 30, 2004. Due to an internal error at the USDA, however, the Debtor's loan was incorrectly treated as if it were secured by a mortgage and had survived the discharge. As such, between July 15, 2004, and April 13, 2006, the USDA sent the Debtor an additional seventeen monthly statements reflecting a payment of $11.50 due February 28, 2006, one statement reflecting a payment of $23.46 due March 28, 2006, and one statement reflecting a payment of $35.42 due April 28, 2006. On March 29, 2006, the Debtor received a Notice of Payment Default, indicating that her account was in default, that the default had been reported to a credit reporting service, and

that she was at risk of losing her home. Additionally, the USDA repeatedly called the Debtor during the same post-discharge period seeking to collect the debt.

On April 26, 2006, Debtor's counsel contacted the USDA by telephone to discuss the post-discharge account statements and phone calls received by the Debtor. As a result of the call, the USDA immediately corrected its records to reflect that the debt was not secured, did not survive bankruptcy, and was discharged. Two days later, the USDA sent the Debtor a letter apologizing for the inconvenience, indicating that her loan would be cancelled and explaining that she would not receive any further calls regarding the matter. On June 27, 2006, the USDA sent a final letter stating that the cancellation of her loan was complete.

On June 2, 2006, the Debtor's counsel sent a letter to the USDA demanding attorney's fees of $1,365.00 and emotional distress damages in the amount of $5,000.00 resulting from the USDA's admitted violations of the automatic stay. In response, the USDA advised the Debtor to submit a tort claim and enclosed the requisite form. In the months that followed, the Debtor's counsel continued to send demand letters to the USDA, each time increasing the legal fees sought. On January 10, 2007, the USDA, through counsel, sent a letter to the Debtor's counsel asserting that she was not entitled to emotional distress damages in light of the decision of the United States Court of Appeals for the First Circuit

in *United States v. Rivera Torres (In re Rivera Torres),* 432 F.3d 20 (1st Cir. 2005), and that in the absence of a claim presented in accordance with the Federal Tort Claims Act, 28 U.S.C. § 2401(b), the USDA was unable to authorize payment of any claim she might have.

On December 3, 2008, the Debtor reopened her bankruptcy case and commenced an adversary proceeding in the bankruptcy court, alleging violations of both the automatic stay and the discharge injunction. In the fall of 2009, the Debtor moved for partial summary judgment on the issue of liability and the USDA filed a cross-motion seeking dismissal of the entire complaint. On February 22, 2010, the bankruptcy court issued a Memorandum Opinion (the "Liability Decision") and order granting each motion in part, finding that the USDA violated both the automatic stay and the discharge injunction, but concluding that 11 U.S.C. § 106(a)(3) and the First Circuit's *In re Rivera Torres* decision barred the Debtor's claims for punitive and emotional distress damages, respectively, against the USDA. The bankruptcy court scheduled a further hearing with respect to the Debtor's actual damages and attorney's fees, reserving the question of whether damages for a violation of the discharge injunction were appropriate in this case. The Debtor sought leave to appeal the Liability Decision, but the Panel denied her request and the appeal was dismissed as interlocutory on April 13, 2010.

On May 27, 2010, the bankruptcy court held an evidentiary hearing on damages, at which the Debtor and her counsel testified. The bankruptcy court took the matter under advisement and the parties filed post-trial briefs. On July 21, 2010, the bankruptcy court issued a Memorandum Opinion and order in which it awarded attorney's fees in the amount of $11,848.50 for the violation of the automatic stay and $3,000.00 as a sanction for the violation of the discharge injunction. While the bankruptcy court recognized that the Debtor did not provide evidence of any collectible damages other than attorney's fees, it held the Debtor was entitled to reasonable attorney's fees even in the absence of other damages, noting that "the [Debtor] in this case made an attempt to settle the issue without proceeding with litigation, but the USDA refused." Although the Debtor sought to recover $74,039.00 in attorney's fees for 448.20 hours, the bankruptcy court awarded fees limited to approximately 80 hours of work and applied the rate allowable under the Equal Access to Justice Act, 28 U.S.C. § 2412, adjusted for inflation. The bankruptcy court reasoned that the Debtor should be awarded $4,836.00 for 39.90 hours spent during the period in which settlement was offered and rejected, and an additional $7,012.50 for 40 hours spent filing and prosecuting the Debtor's complaint. With respect to the violation of the discharge injunction, the bankruptcy court held that a $3,000.00 sanction award was necessary "to prevent further violations."

The Debtor filed a timely Notice of Appeal on August 4, 2010, and the USDA filed a cross-appeal on August 17, 2010.

JURISDICTION

The Panel may hear appeals from "final judgments, orders and decrees" pursuant to 28 U.S.C. § 158(a)(1). *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.),* 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* at 646 (quoting *Catlin v. United States,* 324 U.S. 229, 233 (1945)). The Panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. *See Boylan v. George E. Bumpus, Jr. Constr. Co., Inc. (In re George E. Bumpus, Jr. Constr. Co., Inc.),* 226 B.R. 724 (B.A.P. 1st Cir. 1998). "Generally, orders finding violations of the automatic stay and imposing sanctions are final appealable orders." *Heghmann v. Indorf (In re Heghmann),* 316 B.R. 395, 400 (B.A.P. 1st Cir. 2004). Although the February 22, 2010 order establishing the USDA's liability for violations of the automatic stay and discharge injunction was not final when it was entered, it became final upon the entry of the July 21, 2010 order when the bankruptcy court awarded damages for those violations because all outstanding issues were resolved.

STANDARD OF REVIEW

On appeal, the bankruptcy court's findings of fact are reviewed pursuant to the clearly erroneous standard, and its conclusions of law *de novo. See Lessard v. Wilton-Lyndeborough Coop. School Dist.,* 592 F.3d 267, 269 (1st Cir. 2010). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Padilla-Mangual v. Pavía Hosp.,* 516 F.3d 29, 31 (1st Cir. 2008) (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985)) (internal quotation marks omitted); *Melendez-Garcia v. Sanchez,* 629 F.3d 25, 41 (1st Cir. 2010). "[A] bankruptcy court's assessment of damages for violations of the automatic stay is reviewed for an abuse of discretion." *In re Heghmann,* 316 B.R. at 400; *see also Varela v. Ocasio (In re Ocasio),* 272 B.R. 815, 822 (B.A.P. 1st Cir. 2002). This Bankruptcy Appellate Panel has previously characterized the "abuse of discretion" standard as follows:

> Judicial discretion is necessarily broad – but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

In re Ocasio, 272 B.R. at 828 n.12 (quoting *Perry v. Warner (In re Warner),* 247 B.R. 24, 25 (B.A.P. 1st Cir. 2000)).

DISCUSSION

I. Applicable Law

Section 362(a)(6) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). Similarly, 11 U.S.C. § 524(a)(2) states that "a discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ." 11 U.S.C. § 524(a)(2). In the present case, the bankruptcy court found that the USDA violated both the automatic stay and discharge injunction. The USDA does not appeal those findings.

Once a court determines that the automatic stay has been violated, 11 U.S.C. § 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). "Courts within the First Circuit have concluded that the words 'shall recover' indicate that 'Congress intended that the award of actual damages, costs and attorney's fees be **mandatory** upon a finding of a willful violation of the stay.'" *Vázquez Laboy v. Doral Mortgage Corp. (In*

re Vázquez Laboy), 416 B.R. 325, 332 (B.A.P. 1st Cir. 2009) (quoting *In re Heghmann,* 316 B.R. at 405 n.9) (emphasis in original), *rev'd in part and vacated in part,* No. 09-9022, 2011 WL 2119316 (1st Cir. May 27, 2011). It is the Debtor's burden to establish by a preponderance of the evidence that he or she suffered actual damages as a result of the stay violation. *In re Vázquez Laboy,* 416 B.R. at 332; *In re Heghmann,* 316 B.R. at 403-404.

Unlike 11 U.S.C. § 362, no specific provision exists in the Bankruptcy Code to provide redress for violations of the discharge injunction. Nonetheless, "'[a] bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages for the [debtor] . . . if the merits so require.'" *Pratt v. Gen. Motors Acceptance Corp. (In re Pratt),* 462 F.3d 14, 17 (1st Cir. 2006) (quoting *Bessette v. Avco Fin. Servs., Inc.,* 230 F.3d 439, 445 (1st Cir. 2000)); *see also Lumb v. Cimenian (In re Lumb),* 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009). "Section 105(a) confers 'statutory contempt powers' which 'inherently include the ability to sanction a party.'" *Fatsis v. Braunstein (In re Fatsis),* 405 B.R. 1, 7 (B.A.P. 1st Cir. 2009) (quoting *Ameriquest Mortgage Co. v. Nosek (In re Nosek),* 544 F.3d 34, 43-44 (1st Cir. 2008)).

Courts have recognized two types of sanctions. Civil contempt sanctions are designed to coerce the contemnor into compliance with a court order or to compensate a harmed party for losses sustained. *See United States v. United Mine Workers of Am.,* 330

U.S. 258, 303-304 (1947); *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 442 (1911); *Ingalls v. Thompson (In re Bradley),* 588 F.3d 254 (5th Cir. 2009); *Eck v. Dodge Chemical Co. (In re Power Recovery Sys., Inc.),* 950 F.2d 798 (1st Cir. 1991). In contrast, criminal contempt sanctions are punitive in nature and are imposed for the purpose of vindicating the authority of the court. *See id.* Where a contempt sanction is not compensatory, it is civil, and therefore non-punitive, only if the contemnor is afforded some opportunity to purge the contempt. *See Int'l Union v. Bagwell,* 512 U.S. 821, 829 (1994); *Penfield Co. of Cal. v. SEC,* 330 U.S. 585, 590 (1947).

Notwithstanding the bankruptcy court's power to award damages under 11 U.S.C. § 362(k)(1) and its statutory contempt powers under 11 U.S.C. § 105(a), a court may not award damages against the United States unless sovereign immunity has been expressly and unequivocally waived. *See United States v. Nordic Village, Inc.,* 503 U.S. 30, 33 (1992) (quoting *Irwin v. Dept. of Veterans Affairs,* 498 U.S. 89, 95 (1990)) ("Waivers of the Government's sovereign immunity . . . must be 'unequivocally expressed' . . . [and] are not generally to be 'liberally construed.'"). Section 106(a) of the Bankruptcy Code is such a waiver, but it is not absolute. It provides, in relevant part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105 . . . 362 . . . [and] 524 . . . of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. § 106(a). Notably, punitive damages are expressly excepted from the waiver of sovereign immunity. 11 U.S.C. § 106(a)(3). As such, "[the] distinction between coercive and punitive sanctions, which serves to distinguish between civil and criminal contempt, is particularly important in this case where Congress expressly declines to waive sovereign immunity for punitive damages." *Jove Eng'g, Inc. v. I.R.S.,* 92 F.3d 1539, 1558 (11th Cir. 1996).

In *In re Rivera Torres,* a case involving a violation of the discharge injunction, the First Circuit held that "Congress has not 'definitely and unequivocally' waived sovereign immunity under § 106 of the Bankruptcy Code for emotional damages. We must assume that had Congress meant to waive sovereign immunity for all forms of 'monetary relief' or 'money damages' specifically, it could have done so." 432 F.3d at 34 (internal citation omitted). Performing a temporal analysis by which the First Circuit looked to the congressional understanding of the enumerated section at the time of its amendment, it reasoned that when Congress amended 11 U.S.C. § 106(a) in 1994, there was no consensus in the background law as to whether emotional distress damages were "actual damages," so reference to 11 U.S.C. §§ 105 and 524, or by analogy, 11 U.S.C. § 362, did not "clearly establish [] the availability, even against private parties, of an award of emotional distress damages." *Id.* at

28-29.[1] Moreover, relying on *Bowen v. Massachusetts,* 487 U.S. 879, 895 (1988), the First Circuit concluded that the waiver contained in 11 U.S.C. § 106(a)(3) for a "money recovery" was not equivalent to "money damages," and therefore could not have included emotional distress damages. *Id.* at 29. Accordingly, under established First Circuit precedent, emotional distress damages are unavailable against the United States.

With this statutory framework in mind, we address the issues presented by the parties *seriatim.*

II. Emotional Distress Damages Against the Federal Government

The main purpose of the Debtor's appeal is to seek the reversal of *In re Rivera Torres,* which she contends was wrongly decided. The Debtor argues that the First Circuit erroneously relied on legislative history to analyze 11 U.S.C. § 106 rather than the plain text of the statute, contradicting well-settled principles of statutory construction. She asserts that this caused the First Circuit to ignore the Bankruptcy Code's internal rules of construction which require the word "including," as it appears in 11 U.S.C.

[1] The First Circuit nonetheless noted the existence of dicta in a prior decision of the First Circuit in *Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d 265 (1st Cir. 1999), suggesting that emotional distress damages may be available as "actual damages" for violations of the automatic stay. *In re Rivera Torres,* 432 F.3d at 29.

§ 106(a)(3), to be read in a non-limiting manner. *See* 11 U.S.C. § 102(3) ("In this title . . . 'includes' and 'including' are not limiting"). Alternatively, even had Congress intended "money recovery" to be a limited term, she contends that it must at least mean compensatory damages, which, according to First Circuit precedent, include emotional distress damages. *See Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d at 269. Moreover, the Debtor asserts that the specific exclusion of punitive damages in 11 U.S.C. § 106(a)(3) should have raised an inference that Congress waived sovereign immunity for all other types of remedies under the maxim of *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of other things. *See, e.g., United States v. Hernandez-Ferrer,* 599 F.3d 63, 67-68 (1st Cir. 2010). With these considerations in mind, she argues that reference to 11 U.S.C. § 105 in 11 U.S.C. § 106(a)(1) indicates Congress' intent to waive sovereign immunity with respect to the "broad authority" 11 U.S.C. § 105 confers upon the bankruptcy court. Finally, the Debtor asserts that the holding of *In re Rivera Torres* is contrary to the purpose of the Bankruptcy Code and undermines the bankruptcy court's ability to control proceedings to prevent governmental creditors from "harass[ing] debtors to the brink of insanity."

We acknowledge that the First Circuit's analysis differs from that of the United States Court of Appeals for the Eleventh Circuit, which held that 11 U.S.C. § 106(a) unequivocally waives sovereign immunity for non-punitive court ordered money

damages under 11 U.S.C. § 105 so long as they are necessary and appropriate, *see Jove Engineering, Inc. v. I.R.S.,* 92 F.3d at 1555 and *Hardy v. United States (In re Hardy),* 97 F.3d 1384 (11th Cir. 1996), but *In re Rivera Torres* is binding First Circuit precedent which the Panel, as well as the bankruptcy court, is bound to follow under the principles of *stare decisis.* The Debtor concedes as much.[2] Therefore, the bankruptcy court did not err finding that emotional distress damages for violations of the discharge injunction were unavailable against the USDA.

Nonetheless, the Debtor argues the bankruptcy court erred in finding that *In re Rivera Torres* bars emotional distress damages for violations of the automatic stay against the federal government because that case only involved a violation of the discharge injunction. She contends that the First Circuit's discussion of 11 U.S.C. § 362, was not essential to its holding and, therefore, is non-binding dicta. Indeed, she asserts there is cause to distinguish the two because 11 U.S.C. § 362(k)(1) expressly provides for the recovery of "actual damages," which, based upon the First Circuit's decision in *Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d at 269, includes damages for emotional distress. Moreover, while admitting that the law governing the recoverability of emotional distress damages for violations of the

[2] We further note that the Eleventh Circuit cases pre-date *In re Rivera Torres* and were discussed by the First Circuit in its decision. 432 F.3d at 27-28.

automatic stay and discharge injunction is unsettled, the Debtor cites a number of cases that she believes indicate a trend towards allowing such damages against the federal government. *See, e.g., In re Griffin,* 415 B.R. 64 (Bankr. N.D.N.Y. 2009) (holding emotional distress damages for a willful violation of the automatic stay were recoverable against the Social Security Administration); *Atkins v. United States (In re Atkins),* 279 B.R. 639 (Bankr. N.D.N.Y. 2002) (awarding the debtor $30,000.00 as compensation for mental anguish and sleeplessness due to the federal government's repeated violations of the discharge injunction over a fourteen-year period); *Covington v. Internal Revenue Serv. (In re Covington),* 256 B.R. 463 (Bankr. D.S.C. 2000) (finding debtors were entitled to $1,000.00 in damages for emotional distress resulting from the IRS's willful stay violation); *Davis v. United States (In re Davis),* 201 B.R. 835 (Bankr. S.D. Ala. 1996) (deciding the IRS's willful violation of the automatic stay warranted compensatory damages in the amount of $300.00 for embarrassment and inconvenience); *Matthews v. United States (In re Matthews),* 184 B.R. 594 (Bankr. S.D. Ala. 1995) (awarding the debtors $3,000.00 for mental anguish caused by the IRS's violations of the automatic stay and discharge injunction).

As explained above, in *In re Rivera Torres,* the First Circuit held that "Congress has not 'definitely and unequivocally' waived sovereign immunity under § 106 of the Bankruptcy Code for emotional damages," after determining through a temporal analysis that the

background law at the time Congress amended 11 U.S.C. § 106 did not support a reading that emotional distress damages were available as "actual damages" or a remedy for civil contempt. 432 F.3d at 26. While consideration of 11 U.S.C. § 362 was not essential to that holding, the First Circuit's conclusion that a temporal analysis is necessary to define the scope of the waiver contained within 11 U.S.C. § 106 is binding. As such, the Panel is not free to adopt the Debtor's construction of the statute simply because that case involved a violation of the discharge injunction rather than a stay violation. Moreover, she has not offered any persuasive reason why the Panel, using the temporal analysis mandated by *In re Rivera Torres,* would find emotional distress damages are available under 11 U.S.C. § 362(k)(1) particularly where the First Circuit, albeit in dicta, noted the contrary. *Id.* at 28-29. Accordingly, the bankruptcy court did not err in finding that emotional distress damages for violations of the automatic stay were also unavailable against the USDA.

Ultimately, to the extent that the Debtor seeks reversal of binding precedent, reconsideration of *In re Rivera Torres,* if appropriate, must be left to the First Circuit.

III. Attorney's Fees Awarded under 11 U.S.C. § 362(k)

From the outset, we recognize that, while the bankruptcy court awarded attorney's fees under 11

U.S.C. § 362(k)(1), the facts of this case are such that the USDA's collection efforts began as a violation of the automatic stay, but ultimately became a violation of the discharge injunction upon the termination of the automatic stay once the Debtor received her discharge. The USDA notes as much, seemingly to refute the idea that any fees are warranted under 11 U.S.C. § 362(k) because the automatic stay was no longer in effect by the time Debtor's counsel contacted the USDA. We find, however, that this is a distinction without a difference as attorney's fees would otherwise have been available as compensatory damages under 11 U.S.C. § 105(a) for the USDA's violation of the discharge injunction and would be analyzed under the same standard. *See, e.g., In re Pratt,* 462 F.3d at 17 (holding debtors are entitled to establish and recover their compensatory damages under 11 U.S.C. § 105(a) for violations of the discharge injunction); *Bessette v. Avco Fin. Servs., Inc.,* 230 F.3d at 445 (recognizing bankruptcy courts may appropriately use their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and punitive damages, when creditors have engaged in conduct that violates 11 U.S.C. § 524).

That being said, the USDA asserts that the bankruptcy court's award of attorney's fees is erroneous in three respects. First, contrary to the bankruptcy court's findings, the USDA argues that an adversary proceeding was unnecessary because the Debtor suffered no recoverable actual damages and therefore there was no legitimate basis for the USDA to reach a

monetary settlement. Second, even if the Debtor were entitled to attorney's fees accrued prior to the cessation of the USDA's collection activities as actual damages, which it contends she is not, the USDA, relying on *Sternberg v. Johnston,* 595 F.3d 937 (9th Cir. 2010), *cert. denied,* 131 S. Ct. 102 (2010), asserts that the vast majority of fees awarded are not available as a matter of law because they were incurred through litigation to collect the alleged actual damages. Third, the USDA argues that even assuming that such fees are recoverable, they were grossly excessive. Generally speaking, the USDA's argument implicitly characterizes attorney's fees as something other than actual damages, asserting that 11 U.S.C. § 362(k)(1) should be read to require that an individual suffer an "injury" other than attorney's fees before any entitlement to attorney's fees arises. *See* 11 U.S.C. § 362(k)(1) ("[A]n individual *injured* by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees. . . .") (emphasis added). This interpretation ignores the plain language of the statute which expressly states that attorney's fees *are* actual damages under 11 U.S.C. § 362(k)(1). *Id.* ("actual damages, *including costs and attorneys' fees . . .* ") (emphasis added); *see also In re Vázquez Laboy,* 2011 WL 2119316, at *7 ("The Debtors claim injury: they have expended court costs and attorneys' fees in order to vindicate the automatic stay, and the statute mandates that they may recover both as actual damages."). By requiring a debtor to incur an injury other than attorney's fees before such fees are recoverable, the

USDA effectively strikes the word "including" from the statute. Moreover, it fails to recognize that ending a stay violation, such as the one here, often requires intervention by legal counsel who should not be expected to perform services without payment. Therefore, to the extent that the Debtor incurred legal fees of $1,365.00 to stop the USDA's willful violation of the automatic stay, she suffered actual damages and was "injured" within the meaning of the statute.

Having determined that the Debtor suffered actual damages, we turn to the question of whether the adversary proceeding was necessary. The bankruptcy court concluded that it was because the USDA rebuffed the Debtor's settlement attempts. The USDA disagrees, arguing that settlement was unwarranted under existing law because emotional distress damages are not recoverable against the federal government under *In re Rivera Torres.* The USDA concedes, however, that it made no counter-offer with respect to the Debtor's recoverable actual damages, namely, her attorney's fees. Accordingly, we agree with the bankruptcy court that an adversary proceeding was necessary to vindicate the Debtor's rights.

Nonetheless, the USDA urges the Panel to adopt the holding of *Sternberg v. Johnston,* 595 F.3d at 940, and find that attorney's fees incurred in pursuit of an award of actual damages long after the cessation of conduct that violates the automatic stay are not recoverable under 11 U.S.C. § 362(k). In *Sternberg,* the United States Court of Appeals for the Ninth Circuit, recognizing that "Congress legislates against

the back-drop of the 'American Rule,'" whereby parties generally bear their own legal expenses, concluded that "actual damages" is an ambiguous phrase. 595 F.3d at 946-47. Looking to the dictionary, the Ninth Circuit determined that the plain meaning of "actual damages" was "an amount awarded . . . to compensate for a proven injury or loss," *id.* at 947 (quoting *Black's Law Dictionary* 416 (8th ed. 2004)), and that, in the context of a stay violation, proven injuries are related to the stay violation itself and cannot include fees incurred to correct the legal injury. *Id.* The Ninth Circuit reasoned that this view was supported by both the "financial and non-financial goals" of the automatic stay because the automatic stay is "not a sword" with which to pursue creditors who violate the stay to the advantage of the debtor. *Id.* at 948. The Ninth Circuit concluded an action for damages for a violation of the automatic stay was akin to an ordinary damages action. *Id.* Notably, the Ninth Circuit's ruling in *Sternberg* created a split among the circuits as the United States Court of Appeals for the Fifth Circuit previously held that fees incurred prosecuting a claim for a violation of the automatic stay are recoverable. *See Young v. Repine (In re Repine),* 536 F.3d 512, 522 (5th Cir.2008). Because the Fifth Circuit did not discuss the issue in depth and merely adopted the view of the lower courts, *id.*, the Ninth Circuit stated that "[w]ithout more, [it was] hard-pressed to find th[at] decision persuasive." *Sternberg,* 595 F.3d at 948.

The decision in *Sternberg* has been sharply criticized. For example, in *Grine v. Chambers (In re Grine),* 439 B.R. 461 (Bankr. N.D. Ohio 2010), the court stated:

> This court disagrees with the holding and the unpersuasive reasoning in *Sternberg.* The Ninth Circuit dubiously found that the straightforward language of § 362(k) is ambiguous, then looked for guidance to a law dictionary and examples of state law malpractice and bad faith causes of action not created by any federal statute. This court does not find the language of the statute ambiguous or in need of odd parsing of simple language or resort to a dictionary or the guidance of Tennessee, California or Colorado state common law to inform the intent of Congress in § 362(k). Significantly, this specific provision of § 362, and indeed § 362 extensively in general, was materially amended by Congress in 2005 in respects not relevant to this case but in ways that can fairly be characterized as creditor-friendly. By that time, there was substantial established precedent, including Ninth Circuit and Ninth Circuit Bankruptcy Appellate Panel cases, *see, e.g., In re Dawson,* 390 F.3d 1139 (9th Cir. 2004); *Havelock v. Taxel (In re Pace),* 159 B.R. 890, 900 (9th Cir. BAP 1993), awarding fees for prosecuting then § 362(h) claims and adversary proceedings as "actual damages" against creditor defendants for violation of the automatic stay. If in 2005 Congress thought that established case law and

such fee awards misconstrued the plain meaning of its statute, and improperly penalized creditors for actions in disregard of § 362(a), it had the opportunity to fix the problem by amending § 362(h) to remove any ambiguity in and the misconception by many courts of its expressed intent. It did not. Moreover, the Ninth Circuit itself in the case *Orange Blossom Limited Partnership v. Southern California Sunbelt Developers, Inc. (In re Southern California Sunbelt Developers, Inc.),* 608 F.3d 456 (9th Cir.2010), has since resorted equally unpersuasively to hyper-technical legal gymnastics to distinguish *Sternberg* in the context of applying § 303(i) of the Bankruptcy Code, which permits a judgment for attorney's fees upon dismissal of an involuntary petition. 11 U.S.C. § 303(i).

This court also disagrees with the policy analysis advanced by the Ninth Circuit in support of its holding in *Sternberg.* The Ninth Circuit's statement that "[p]ermitting a debtor to collect attorney fees incurred in prosecuting a damages action would further neither the financial nor the non-financial goals of the automatic stay," *Sternberg,* 595 F.3d at 948, is simply wrong. The automatic stay and the breathing room it affords from creditor collection activities play a vital and fundamental role in bankruptcy. *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection,* 474 U.S. 494, 503, 106 S.Ct. 755, 88 L.Ed.2d 859 (1986). The fee shifting provision in § 362 serves to protect rights belonging to persons in difficult circumstances that

are not necessarily measured by money alone. *Cf. City of Riverside v. Rivera,* 477 U.S. 561, 577-78, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986). Without such a provision, individual debtors' attorneys would be less likely to pursue vindication of the stay and their clients' rights thereunder, both because their bankrupt clients lack the money to pay hourly fees and because of the oftentimes relatively small amount of probable damages, as in this case, making a contingency fee wholly impractical. The *Sternberg* holding that the right to fees under § 362(k) stops at the courthouse door gives creditors free shots at continuing pre-petition collection activity with little practical fear of financial accountability for their actions and hence little incentive to stop it. Under the Ninth Circuit analysis, a debtor who sustains injury from and seeks the help of counsel to stop automatic stay violations is effectively powerless to make a creditor pay the damages and fees incurred. Whether conduct constitutes a violation is also oftentimes reasonably disputed by the parties, giving debtors' counsel little incentive to litigate the contours of § 362(a) in close cases for the benefit both of any particular debtor as well as for the bankruptcy system as a whole. As one bankruptcy judge in the Ninth Circuit rhetorically asks in likewise noting that "*Sternberg* weakens substantially the effectiveness of the automatic stay," "[w]hat good is it to be entitled to damages and attorneys' fees for a violation of the automatic stay if it costs a debtor

> much more in unrecoverable fees to recover such damages and recoverable attorneys fees? In many, if not most, cases that will likely be the situation." *Bertuccio v. Cal. State Contrs. License Bd. (In re Bertuccio),* Case No. 04-56255, 2009 Bankr. LEXIS 3302 *22-23 n. 7, 2009 WL 3380605 *7 n. 7 (Bankr. N.D. Cal. Oct. 15, 2009).

439 B.R. at 470-471. We find this criticism unassailable and adopt it as our own.

If the purpose of the automatic stay is, as the Ninth Circuit recognized, to preserve the status quo, *see Sternberg,* 595 F.3d at 948; *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n,* 997 F.2d 581, 585 (9th Cir. 1993), then the mechanism by which stay violations are remedied must necessarily return the debtor to the status quo in order to serve that purpose. A contrary rule would, as it did here, discourage creditors who concede liability from settling with the debtor, particularly where punitive damages are unavailable. Moreover, this rule would often harm the other creditors of the estate because the debtor, who likely lacks the means to fund litigation in the first place, would be forced to choose between suffering a loss as a result of the stay violation or incurring a loss attempting to remedy it. Such a result, specifically one arising from conduct which violates the most fundamental protection offered by the Bankruptcy Code, is incompatible with its spirit and purpose. *See Soares v. Brockton Credit Union (In re Soares),* 107 F.3d 969, 975 (1st Cir. 1997) ("The automatic stay is

among the most basic of debtor protections under bankruptcy law.").

Finally, the USDA argues that the attorney's fees awarded are "grossly excessive" because they are nearly ten times the Debtor's "pre-litigation actual damages." Notably, the USDA only challenges the amount of fees awarded, not the methodology employed by the bankruptcy court to determine that amount. The USDA reasons that because $1,365.00 was the most the Debtor could have recovered under prevailing law, she should not be rewarded for choosing to "run up a large legal bill in an effort to recover the unrecoverable" instead of offering a settlement in that amount. The USDA asserts that "[t]his is precisely the kind of wasteful litigation that *French* discourages. Yet, the bankruptcy court's decision to award the plaintiff attorney's fees in an amount ten times greater than her potential best case result leads to just the opposite incentive of encouraging this kind of long-shot litigation instead of making reasonable pre-litigation settlement offers." *See French v. Corporate Receivables, Inc.,* 489 F.3d 402 (1st Cir. 2007).

The USDA's reasoning and arguments are flawed and lack merit. The USDA refused the Debtor's pre-litigation offer of settlement. Regardless of whether that settlement offer included a demand for unrecoverable emotional distress damages, the attorney's fees were recoverable and the USDA made no counter-offer in response to the demand. Indeed, the USDA did not even address the issue of attorney's fees

incurred to stop the impermissible collection efforts in its letter to the Debtor's counsel. Apparently, the USDA took the erroneous position that attorney's fees, absent some other injury, are unrecoverable under 11 U.S.C. § 362(k)(1). Proven wrong, the USDA cannot now complain that its own intransigence forced the Debtor to incur additional legal fees to recover her actual damages.[3] In sum, the litigation was neither wasteful nor a "long-shot," particularly where liability was already conceded.

The bankruptcy court calculated the award of attorney's fees based upon rates allowable under the Equal Access to Justice Act, 28 U.S.C. § 2412, adjusted for inflation, and concluded that a reasonable amount of time spent on this case was 39.90 hours during the period in which settlement was offered and rejected, and an additional 40 hours to file and prosecute the adversary proceeding. This yielded a total amount of $11,848.50, which is approximately 16 percent of the amount requested by the Debtor.[4] The bankruptcy court's methodology was sound and we find no abuse of discretion.

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[3] Had the Debtor refused a reasonable counter-offer of settlement regarding the attorney's fees to stop the USDA's violation of the automatic stay, perhaps this argument would carry more weight.

[4] Given the bankruptcy court's substantial reduction of the Debtor's fee request, there can be no real argument that the USDA is funding her attempt to reverse First Circuit precedent.

IV. The $3,000.00 Sanction Awarded under 11 U.S.C. § 105(a)

The USDA argues that the $3,000.00 sanction for the violation of the discharge injunction to "prevent further violations" was an impermissible punitive sanction because it was afforded no opportunity to purge its contempt. Indeed, the adversary proceeding was not even commenced until long after the violations of the discharge injunction had ceased. As explained above, the ability to purge one's contempt is a pre-requisite for a non-compensatory coercive civil contempt sanction, failing which, the sanction is punitive in nature. *See Int'l Union, United Mine Workers of America v. Bagwell,* 512 U.S. at 829; *Penfield Co. of Cal. v. SEC,* 330 U.S. at 590. Although the Debtor grudgingly conceded at oral argument that the sanction was at least partially coercive in nature, she suggests it was nonetheless compensatory because she suffered injuries as a result of those violations. The Debtor's reasoning is flawed for two reasons. First, the bankruptcy court indicated that the sanction was to "prevent further violations," evidencing a clear intent to deter future violations. Second, the Debtor did not suffer any compensable damage other than attorney's fees for which she was already compensated under 11 U.S.C. § 362(k)(1). Therefore, given that the violation had ceased long before the sanction entered, the Debtor incurred no actual damages as a result of the violation, and the absence of an ability to purge the contempt, the "prevent further violations" language of the order

serves only the purpose of vindicating the bankruptcy court's authority. As such, the bankruptcy court erred by awarding a punitive sanction barred by 11 U.S.C. § 106(a)(3).

CONCLUSION

For the reasons stated above, we conclude that the bankruptcy court correctly found that the First Circuit's decision in *In re Rivera Torres* bars awards of emotional distress damages against the federal government for violations of the automatic stay and discharge injunction and did not abuse its discretion by awarding the Debtor attorney's fees in the amount of $11,848.50 for the USDA's violation of the automatic stay. Nevertheless, the bankruptcy court erred as a matter of law by awarding $3,000.00 punitive sanction against the federal government. Therefore, we **AFFIRM IN PART** and **REVERSE IN PART.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:	Bk. No. 03-13502-MWV
Dorothy R. Duby,	Chapter 7
Debtor	Adv. No. 08-1160-MWV
Dorothy R. Duby,	
Plaintiff	
v.	
United States of America, Department of Agriculture,	
Defendant	

Terrie Harman, Esq.
LAW OFFICE OF TERRIE HARMAN
Attorney for Dorothy R. Duby

Michael T. McCormack, Esq.
U.S. ATTORNEY'S OFFICE
Attorney for United States of America Department of Agriculture

MEMORANDUM OPINION

This matter comes before the Court on a motion for partial summary judgment filed by Dorothy R. Duby (the "Plaintiff") (Ct. Doc. No. 24) and a cross-motion for summary judgment filed by the United States of America Department of Agriculture (the "USDA") (Ct. Doc. No. 30). The Plaintiff's motion for summary judgment pertains only to the liability of Counts I and II of the complaint, whereas the USDA's

motion for summary judgment is against the complaint in its entirety. Count I of the complaint asserts violation of the discharge injunction under 11 U.S.C. § 524(a)(2);[1] and Count II asserts violation of the automatic stay pursuant to 11 U.S.C. § 362(a)(6). Both motions have been brought under Federal Rule of Civil Procedure 56, made applicable to the instant case under Federal Rule of Bankruptcy Procedure 7056. Beginning January 25, 2010, the Court held a hearing and took the motions under advisement.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

BACKGROUND

The facts are largely undisputed. The Plaintiff filed her Chapter 7 bankruptcy petition on October 14, 2003. The USDA was scheduled as an unsecured

[1] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

creditor on the Plaintiff's petition and received notice of the Plaintiff's bankruptcy. Through an internal error at the USDA, the Plaintiff's bankruptcy filing was not reflected on her account. As a result, the USDA automatically sent eight monthly billing statements to the Plaintiff while her bankruptcy was pending. On July 15, 2004, the Plaintiff received her discharge. At that time, her personal obligation to the USDA was also discharged. The USDA received notice of the Plaintiff's discharge on July 30, 2004. However, due to another internal error, the USDA incorrectly treated the Plaintiff's claim as though it was a secured loan. Consequently, between July 30, 2004, and February 13, 2006, the USDA sent the Plaintiff seventeen monthly billing statements regarding her discharged personal obligation. Additionally, during the same period, the USDA made repeated phone calls to the Plaintiff and reported her account to the credit bureau. On December 3, 2008, the Plaintiff filed a complaint alleging violations of both the automatic stay under § 362(a)(6) and the discharge injunction under § 524(a)(2). Subsequently, the Plaintiff moved for partial summary judgment on the issue of liability. The Defendant brought a cross-motion for summary judgment to dismiss the entire complaint.

DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a

summary judgment motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Rodriquez-Pinto v. Tirado-Delgado,* 982 F.2d 34, 38 (1st Cir. 1993) (quoting *United States v. One Parcel of Real Prop.,* 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c)) means that the fact has "the potential to affect the outcome of the suit under the applicable law." *Nereida-Gonzalez v. Tirado-Delgado,* 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the "record in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." *Maldonado-Denis v. Castillo-Rodriquez,* 23 F.3d 576, 581 (1st Cir. 1994).

I. Liability

In her complaint, the Plaintiff alleges that the Defendant violated both the discharge injunction and the automatic stay. Though the Plaintiff seeks damages for both violations, she asserts that summary judgment is appropriate only as to liability on her claims.

A. 11 U.S.C. § 362(a)(6): Violation of the Automatic Stay

The automatic stay, § 362(a)(6) provides, in relevant part, that:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

11 U.S.C. § 362(a)(6). There can be no dispute over whether a violation occurred. In fact, the USDA admits that it violated the automatic stay when it sent the Plaintiff eight monthly billing statements while her bankruptcy case was pending. The USDA only argues that its actions were not "willful" within the meaning of 11 U.S.C. § 362(k)(1), because a computer glitch caused the violation to occur. A determination that a violation of the automatic stay was "willful" speaks to the issue of damages. Therefore, it will be discussed more fully, *infra*. Accordingly, the Court finds that the USDA violated the automatic stay when it sent the Plaintiff billing statements despite receiving notice of her bankruptcy filing.

B. 11 U.S.C. § 524(a)(2): Violation of the Discharge Injunction

The discharge injunction, § 524(a)(2), provides that:

> A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . .

11 U.S.C. § 524(a)(2). The USDA admits that it received notice of the Plaintiff's discharge. Further, the USDA admits that it contacted the Plaintiff post-discharge regarding its claim. However, since the USDA's computer mistakenly treated the Plaintiff's debt as one secured by a mortgage and not a personal liability of the debtor, the USDA contends that it cannot be held in violation of § 524(a)(2). "A creditor violates the discharge injunction . . . when it (1) has notice of the debtor's discharge . . . ; (2) intended the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor." *Lumb v. Cimenian (In re Lumb),* 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009) (citing *Pratt v. General Motors Acceptance Corp.,* 462 F.3d 14, 19 (1st Cir. 2006)). The test to determine liability for a violation of the discharge injunction is an objective one. *In re Lumb,* 401 B.R. at 6. Courts must look at the specific facts and determine whether a creditor's actions were threatening or "exercised in a coercive manner [that] might

impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a 'fresh start' and are not unfairly coerced into repaying discharged prepetition debts." *Pratt*, 426 F.3d at 19.

The undisputed facts before the Court reveal that the USDA: (1) received notice of the Plaintiff's discharge, (2) continued to treat the Plaintiff's discharged liability as active, (3) reported the Plaintiff to the credit bureau, (4) sent seventeen monthly billing statements until notified by the Plaintiff's attorney of the Plaintiff's bankruptcy, and (5) made several telephone calls to the Plaintiff regarding her discharged obligation. The USDA made it appear that the Plaintiff's obligation was active after her discharge even though that was not the case. All of the USDA's actions had the effect of unfairly coercing or harassing the Plaintiff. The USDA argues that it should not be held in violation of the discharge injunction, because its loan processor mistakenly treated the Plaintiff's account as though it was secured by a loan. Further, the USDA reasons that letters sent to the Plaintiff informed her, albeit erroneously, that she was not personally liable for the debt. That the USDA incorrectly noted the Plaintiff's loan as secured is of no consequence to its liability for violation of the discharge injunction.

Section 524(a)(2)'s inclusion of the words "personal liability of the debtor" is meant to exclude the discharge injunction from applying to creditors who have a valid secured claim that survives a debtor's

bankruptcy. *See Arruda v. Sears, Roebuck & Co.,* 310 F.3d 13, 21 (1st Cir. 2002) ("It is hornbook law that a valid lien survives a discharge in bankruptcy unless it is avoidable and the debtor takes the proper steps to avoid it."). Those are not the facts before this Court. In the instant proceeding, the USDA did not have a valid lien, and the Plaintiff's personal obligation to the USDA was discharged. *See Winslow v. Salem Five Mortgage Co., LLC (In re Winslow),* 391 B.R. 212 (Bankr. D. Me. 2008) (holding that a mortgage lender's acts were in violation of the discharge injunction where default notices were sent to debtor in mistaken belief that she was liable for secured loan though her personal liability was extinguished in bankruptcy); *see also In re Curtis,* 359 B.R. 356 (B.A.P. 1st Cir. 2007) (factual background of *In re Winslow* provided in more detail). Therefore, the actions of the USDA were in violation of the discharge injunction because it impinged on the Bankruptcy Code's aim to provide the Plaintiff with a fresh start.

II. Damages

The USDA moves for summary judgment because, it argues, regardless of the Court's finding on liability under either § 362 or § 524, the Plaintiff has not suffered any recoverable damages. The damages requested by the Plaintiff include attorneys' fees, actual damages, punitive damages, and damages for emotional distress. As a threshold matter, sovereign immunity precludes the Court from awarding certain damages in cases against the United States. Section

106 explicitly prohibits the Court from awarding punitive damages in any action against a governmental unit. 11 U.S.C. § 106(a)(3). Despite the Plaintiff's arguments to the contrary, First Circuit law unequivocally bars awards for emotional distress damages against the federal government for any violation of the discharge injunction. *United States of America v. Torres (In re Rivera Torres),* 432 F.3d 20 (1st Cir. 2005). The Court in *Torres,* also indicated that emotional distress damages were barred in § 362 actions as well. *Id.* at 29. Consequently, the Court will only address the merits of the remaining damage claims.

A. Damages for Violation of the Automatic Stay

The Plaintiff asserts that the USDA's violation was willful and requests actual damages and attorneys' fees. The USDA, however, argues that its actions were not "willful," because the violation was not deliberate but rather caused through inadvertence. Section 362(k) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees. . . ." 11 U.S.C. § 362(k)(1). The First Circuit has held that violation of the stay is willful "if there is knowledge of the stay and the defendant intended the actions which constituted the violation." *Fleet Mortg. Group, Inc. v. Kaneb,* 196 F.3d 265, 269 (1st Cir. 1999). "In cases where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate." *Id; see*

also In re Pratt, 462 F.3d at 21 ("We rejected the proposition that a stay violation could not be actionable (*viz.,* "willful") if the creditor had made a good faith mistake, and we held that 'the standard for willful violation of the automatic stay under [§ 362(k)] is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation.'" (internal citations omitted)). The USDA admits that it received notice of the Plaintiff's bankruptcy. Moreover, the USDA intended to send the monthly billing statements that constituted violation of the automatic stay. As such, the Plaintiff is entitled to actual damages and attorneys' fees, but there remains a genuine issue of material fact as to the amount of actual damages and attorneys' fees the Plaintiff is entitled to receive. *See Heghmann v. Hafiani (In re Heghmann),* 316 B.R. 395, 404-05 (B.A.P. 1st Cir. 2004) ("The burden is on the debtor to prove by a preponderance of the evidence that she suffered damages as a result of the stay violation.").

B. Damages for Violation of the Discharge Injunction

The Plaintiff similarly seeks actual damages and attorneys' fees for the USDA's violation of the discharge injunction. The USDA claims that the Plaintiff did not suffer any damages, and attorneys' fees could have been avoided if the Plaintiff contacted the USDA to correct the error. While § 362 provides for an automatic award of actual damages and reasonable attorneys' fees upon the Court finding that the

defendant willfully violated the automatic stay, a like provision does not exist for violations of the discharge injunction. Instead, "[a] bankruptcy court may invoke § 105 to enforce the discharge injunction . . . and order damages if the circumstances so require." *In re Lumb,* 401 B.R. at 6. The contempt standard for awarding damages where there is a violation of the discharge injunction requires a specific factual determination to be made on a case-by-case basis. It is a higher standard where the Court may consider "good faith mistakes" and other actions of the parties. Accordingly, there remains a genuine issue of material fact as to whether the Plaintiff is entitled to damages for the discharge injunction.

CONCLUSION

For the reasons set out herein, the Court grants the Plaintiff's motion for summary judgment and finds that the USDA violated both the automatic stay and the discharge injunction. Additionally, the Court grants the USDA's motion for summary judgment in part and finds that the Plaintiff is barred from an award of punitive damages and emotional distress damages for her claims. The issues remaining for hearing include the amount of actual damages and reasonable attorneys' fees for the automatic stay violation, and whether recoverable damages are appropriate for violation of the discharge injunction. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of

Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 22nd day of February 2010, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge

United States Court of Appeals
For the First Circuit

No. 11-9006

IN RE: DOROTHY R. DUBY

Debtor

DOROTHY R. DUBY

Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Appellee

Before

Lynch, *Chief Judge*
Torruella, Boudin, Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: March 8, 2012

Appellant's petition for hearing en banc is denied.

By the Court:

/s/ Margaret Carter, Clerk

United States Court of Appeals
For the First Circuit

No. 11-9006

IN RE: DOROTHY R. DUBY

Debtor

DOROTHY R. DUBY

Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Appellee

Before

Lynch, *Chief Judge*
Torruella, Boudin, Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: April 12, 2012

The motion for reconsideration of order denying hearing en banc is *denied*.

By the Court:

/s/ Margaret Carter, Clerk

United States Court of Appeals
For the First Circuit

No. 11-9006

IN RE: DOROTHY R. DUBY

Debtor

DOROTHY R. DUBY

Appellant

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

Appellee

Before

Boudin, Lipez and Howard,
Circuit Judges.

Entered: May 10, 2012

The Motion for Reconsideration is *denied*.

By the Court:

/s/ Margaret Carter, Clerk

Selected Bankruptcy Statutes

11 U.S.C. § 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * *

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11 U.S.C. § 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

* * *

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11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a

taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

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(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

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11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of

process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

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