No. 16-35991

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JONATHAN ELDON HUNSAKER
and CHERYL LYNN HUNSAKER,
Debtors.

JONATHAN ELDON HUNSAKER and CHERYL LYNN HUNSAKER,
Appellants,

– v. –

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Oregon
No. 16-386

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLANTS AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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May 23, 2017

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Hunsaker v. United States of America, No. 16-35991

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, and the National Association of Consumer Bankruptcy Attorneys make the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **K. Michael Fitzgerald, Chapter 13 Trustee**

This 23rd day of May, 2017.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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INTEREST OF AMICUS CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization whose members are attorneys across the country. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The result in the case at bar would have a negative effect on many individuals affected by arbitrary action on the part of the Internal Revenue Service ("IRS") and many other governmental units. Contrary to Congressional intent, the IRS would not be held accountable for its actions and would have no incentive to institute procedures that will save many of our fellow citizens from the anguish that so often accompanies its heavy-handed practices. The position advanced by the IRS would not only allow it to ignore the bankruptcy stay prohibiting the collection actions of

every other creditor but also provide it with an unconscionable advantage over other creditors when it seeks to collect prepetition debts free of the responsibilities imposed on all others.

CONSENT

The parties have consented to the filing of this brief.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

No party's counsel authored this Amicus Curiae Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amicus curiae, it members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The District Court, at the very outset of its opinion, found that the question before it was "whether the United States waived sovereign immunity for emotional distress damages under § 362(k)" of the Bankruptcy Code. (R.2) The Court answered this question in the negative, based principally on the following two propositions: (i) waivers of sovereign immunity must be clearly expressed, with any doubt resolved in favor of the government and against a waiver; and (ii) in the Court's words, "there are multiple plausible readings of § 362(k). Therefore, this Court must accept the reading most favorable to the federal government, which excludes emotional distress damages." (R.5)

We respectfully submit that the Court clearly erred. Section 362(k) provides an individual with "actual damages" for a willful violation of the bankruptcy automatic stay. In *Dawson v. Washington Mutual Bank, F.A.,* 390 F.3d 1139 (9th Cir. 2004), *cert. denied,* 546 U.S. 927 (2015), this Court held that "actual damages" under §362(k) include damages for emotional distress. *Dawson* is binding law in this Circuit, and contrary to the District Court's decision, it matters not whether the result in *Dawson* was a close one, or whether *Dawson* acknowledged that the term "actual damages" as used in section 362(k) is "ambiguous." The government's waiver of sovereign immunity in bankruptcy matters appears in an entirely separate section of the Bankruptcy Code, section 106, and section 106 is not ambiguous in the slightest in the

context of this case. That section, entitled "Wavier of sovereign immunity," provides that "the court may issue against a governmental unit … an order or judgment awarding a money recovery, but not including an award of punitive damages" with respect to violations of the automatic stay of section 362. The Bankruptcy Court awarded the Hunsakers a "money recovery" for violations of the stay that did not include punitive damages and that easily fits within the waiver in the statute.

The result in the Bankruptcy Court vindicates Congressional intent that individuals be able to obtain a money recovery against the government to the same extent as against private parties, with the exception of punitive damages. Congress undoubtedly expected that governmental units such as the IRS would thereby be encouraged to adopt procedures and practices that conform to the law, rather than continue to engage in arbitrary and unlawful conduct, free from concern that there may be monetary consequences. The continued existence of cases, like this one, involving wholly unnecessary governmental misconduct, and the government's ability to resist redress by invoking the sovereign immunity defense, testify to the need to hold the government accountable, as Congress directed. It is important that the decision below be reversed.

ARGUMENT

I. SECTION 106 OF THE BANKRUPTCY CODE CLEARLY AND UNEQUIVOCALLY WAIVES THE GOVERNMENT'S IMMUNITY FROM THE "MONEY RECOVERY" THE BANKRUPTCY COURT ORDERED TO REDRESS THE IRS'S WILLFUL VIOLATION OF THE AUTOMATIC STAY

The facts in this case are not complex. The Hunsakers filed a joint chapter 13 petition on November 5, 2012 (R.2). Thereafter, the IRS demanded that they pay more than $ 40,000.00 in back taxes by sending them four notices, each marked "Final Notice" and "Notice of Intent to Levy and Notice of Your Right to a Hearing." There is no dispute that, as the District Court found, "Each notice violated the automatic stay." (R.2).

It bears noting that the IRS's violation of the stay continued, time and again, even after the Hunsakers' counsel had contacted the IRS and reminded it of his clients' bankruptcy filing and the requirements of the automatic stay. The District Court expressed skepticism about the damages for emotional distress that these notices caused the Hunsakers, but the Bankruptcy Court, which heard the testimony, found that "The notices continued notwithstanding their attorney's efforts to stop them, and it is not unreasonable that they were concerned that the Government might take the action threatened notwithstanding their attorney's assurances." (R.12). The Bankruptcy Court found that the evidence in the case was clear and convincing that the Hunsakers had suffered harm, and it awarded damages in the aggregate amount of $4000.

In any event, the issue on appeal and in this amicus brief is not whether damages may be awarded for emotional distress under section 362(k) of the Bankruptcy Code. Section 362(k), as applicable in this case, 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." There is no dispute that the IRS willfully and repeatedly violated the automatic stay of section 362. There is also no question in this Circuit that damages for emotional distress are "actual damages" within the meaning of section 362(k). In *Dawson v. Washington Mutual Bank, F.A., supra,* this Court exhaustively examined the purpose and history of section 362(k) and held that emotional distress damages are "actual damages" within the meaning of the statute.[1] It stated:

> "Through the automatic stay, Congress was furthering more than one goal. We have explained that '[t]he purpose of the automatic stay provision is two-fold. By halting all collection efforts, it gives the debtor a breathing spell from his creditors during which the debtor can try to reorganize. By preventing creditors from pursuing, to the detriment of others, their own remedies against the debtor's property the stay protects creditors.' *United States v. Dos Cabezas Corp.,* 995 F.2d 1486, 1491 (9th Cir. 1993) (alteration and internal quotation marks omitted)."

Dawson, 390 F.3d at 1147. It continued:

> "Reading the legislative history as a whole, we are convinced that Congress was concerned not only with financial loss, but also – at least in part – with the emotional and psychological toll that a violation of the

[1] When *Dawson* was decided, the provision was codified as section 362(h). In 2005 it was moved to section 362(k) but was otherwise unchanged.

> stay can exact from an individual. Because Congress meant for the automatic stay to protect more than financial interests, it makes sense to conclude that harm done to those non-financial interests by a violation are cognizable as 'actual damages.' We conclude, then, that the 'actual damages' that may be recovered by an individual who is injured by a willful violation of the automatic stay, 11 U.S.C. §362(h), include damages for emotional distress. In so holding, we join an emerging consensus recognizing the availability of damages for emotional distress that results specifically from a willful violation of the automatic stay." 390 F.3d at 1148 (citations and footnote omitted).

Dawson is binding authority in this Circuit.

The District Court refused to apply *Dawson* in this case because the court found the term "actual damages" to be ambiguous and its construction to require recourse to legislative history. Relying on the Supreme Court's decision in *F.A.A. v. Cooper,* 132 S. Ct. 1441 (2012), the District Court found that the term "actual damages" has a "chameleon-like quality" depending on the specific waiver of sovereign immunity in which it is found and that "there are multiple plausible readings of § 362(k)." The District Court concluded: "Therefore, this Court must accept the reading most favorable to the federal government, which excludes emotional distress damages." (R.5).

We submit that the District Court's reliance on *Cooper* was misplaced and that it had no basis for ignoring the holding of *Dawson* on the ground that there are "multiple plausible readings of § 362(k)". In *Cooper* the Supreme Court canvassed Congress' use of the term "actual damages" in several statutes, each of which was a waiver of sovereign immunity. The *Cooper* Court concluded, "Because the term 'actual

damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears." 586 U.S. at 294. *Cooper* also applied the principle that any ambiguity as to the extent of the government's waiver of sovereign immunity must be resolved in favor of the government. But *Cooper* did not suggest, much less hold, that the government could claim that its sovereign immunity was not waived because there might be two ways to read a statutory provision—like section 362—even though the statute that actually waived the immunity—here, section 106—is clear on its face.

Indeed the Supreme Court has consistently rejected the proposition that the statutory construction maxim that waivers of sovereign immunity must be construed strictly in favor of the government also requires that statutes mandating liability must be construed in the same manner. For example, in *United States v. Mitchell,* 463 U.S. 206, 218-19 (1983), the Supreme Court considered the Tucker Act's consent to suit for "claims founded upon statutes and regulations that create substantive rights to money damages." The Court continued: "Because the Tucker Act supplies a waiver of immunity to claims of this nature, the separate statutes and regulations need not provide a second waiver, nor need they be construed in the manner appropriate to waivers of sovereign immunity." 463 U.S. at 218-19, citing *U.S. v. Emery, Bird, Thayer Realty Co.,* 237 U.S. 28, 32 (1915) and *U.S. v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949), where the Court also observed, quoting Judge Cardozo in *Anderson v. John L. Hayes Constr. Co.,* 243 N.Y. 140, 147 (1926): "The exemption of the sovereign from

suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." See also *Gomez-Perez v. Potter,* 553 U.S. 474, 493 (2008); *U.S. v. White Mountain Apache Tribe,* 537 U.S. 465, 472-73 (2003).

In this case, the government's consent to suit is found not in section 362(k) but in section 106 of the Bankruptcy Code. Section 106, entitled "Waiver of sovereign immunity," provides in subsection (a)(1) that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to … [section] 362" and in subsection (a)(3) that the waiver extends to "an order or judgment awarding a money recovery, but not including an award of punitive damages." This language was added by Congress in the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, to overrule two Supreme Court decisions that had narrowly read the sovereign immunity waiver in the 1978 original version of the Bankruptcy Code. *Hoffman v. Connecticut Dept. of Income Maintenance,* 492 U.S. 96 (1989), and *United States v. Nordic Village, Inc.,* 503 U.S. 30 (1992).

Congress' use of the term "money recovery" indicates its intent that except for punitive damages, any order or judgment directing the payment of money would be sufficient. We have not found another Federal statute that uses the term "money recovery" but the plain meaning of the words indicates Congressional intent to make the waiver as broad as possible, arguably even broader than the more common term, "money damages." The IRS argued in the District Court that the term "money

recovery" in section 106(a)(3) does not include damages for emotional distress (Br. On Appeal to the District Court, p. 13), but we submit that simply turns the English language on its head. The Hunsakers were awarded a "money recovery" to compensate them for the emotional distress the IRS had caused. Indeed, the fact that Congress used a broad term, "money damages," in section 106(a)(3) and coupled it with an express exclusion of punitive damages is further indication that the only type of damages to be excluded was punitives, by virtue of the statutory construction maxim of *expressio unius est exclusion alterius. Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 168-69 (2003).

In the Court below, the IRS relied on the First Circuit's decision in *United States v. Rivera Torres (In re Rivera Torres),* 432 F.3d 20 (1st Cir. 2005). The issue there was whether the IRS could be liable for emotional distress damages for violation of the bankruptcy discharge injunction, and section 362 was not directly implicated. Nevertheless, in holding for the government and against the imposition of damages for emotional distress, the panel distinguished between the words "monetary recovery" in section 106 and "monetary damages" and, without explaining why, concluded that "monetary recovery" is narrower and does not include a recovery of money damages for emotional distress.

The Court's reasoning in *Rivera Torres* is convoluted and, we submit, in error. It said that Congress' intent in the 1994 amendments that adopted the "monetary recovery" term was to overrule cases like *Hoffman* and *Nordic Village* that did not

involve the issue of damages for emotional distress, and it acknowledged that "If the legislative history showed that the clear intent of Congress in enacting § 106 was to overrule cases holding that no emotional distress damages were available, that would be significant. But the legislative history shows no such thing. Indeed, it works against finding a waiver of immunity." 432 F.3d at 30. It ultimately concluded, "In the end it is clear that Congress has not 'definitely and unequivocally' waived sovereign immunity under §106(a) of the Bankruptcy Code for emotional damages awards in circumstances such as these." 432 F.2d at 31 (footnote omitted).[2]

The First Circuit clearly erred. It is not necessary for a waiver of immunity to specifically mention every possible form of relief in order to be valid and sufficiently "unequivocal." Section 106 is more than clear in its waiver of immunity with respect to a "money recovery," other than one for punitive damages, under section 362(k), among others. In its decision in *Rivera Torres,* the Court took note of decisions of the Eleventh Circuit that had held that the waiver of sovereign immunity in section 106 for "money recovery" was equivalent to "court-ordered monetary damages." See *Jove Engineering Inc. v. IRS,* 92 F.3d 1539, 1555 (11thCir. 1996); see also *Hardy v. United States (In re Hardy),* 97 F.3d 1384 (11th Cir. 1996). Whether or not the terms are

[2] The Circuit Court later summarily affirmed, on stare decisis grounds, a second decision that immunized the government from damages for emotional distress for a direct violation of the automatic stay under §362(k). *In re Duby,* 2012 WL 12552111 (1st Cir. Apr. 17, 2012), *affirming* 451 B.R. 664 (B.A.P. 1st Cir. 2011), cert denied, 133 S. Ct. 841 (Jan. 7, 2013). The litigants there sought unsuccessfully to overrule *Rivera Torres.*

coextensive, *Rivera Torres* never explains why "money recovery" is not at least as broad as "monetary damages" or broader – by its plain terms it encompasses not only damages but any form of monetary relief. Indeed, the *Rivera Torres* decision uses the term "monetary recovery" to describe the holding in *Hoffman v. Connecticut Dept. of Income Maintenance. Rivera Torres,* 432 F.3d at 31. Congress used a broad term to establish a clear and unequivocal waiver and to avoid another round of judicial decisions that would fail to carry out its mandate.[3]

It is worth noting that Congress has time and again sought to restrain the arbitrary and unlawful activities of government agents, particularly those of the Internal Revenue Service. For example, in 1988 Congress gave taxpayers an express remedy to be awarded "damages" for IRS violations of law in connection with the collection of taxes. P.L. 100-647, Title VI, § 6241, Nov. 10, 1988. The original provisions were subject to certain limitations and constraints, however, and in 1996 Congress increased the damages limit from $100,000 to $1,000,000. P.L. 104-168, Title VII, § 801(a), 802(a), July 30, 1996. More relevant to the instant case, in 1998 Congress added 26 U.S.C. § 7433(e), providing that actions for damages for violation

[3] The Court in *Rivera Torres* also found support for its decision in *Bowen v. Massachusetts,* 487 U.S. 879 (1988), but it is difficult to discern why. In that case the Supreme Court considered the difference between "money damages" and "monetary relief," noting that certain relief may include the payment of money (e.g., an order for specific performance) that did not represent the payment of "damages." 487 U.S. at 895. All of this is true but it only underscores the fact that Congress did not use the term "money damages" but an even broader term, "money recovery," in the waiver in §106.

of the automatic stay under section 362 would not be subject to the limitations in the tax code but would be enforceable directly under section 362.[4]

Congress was right to direct that the IRS should be subject to civil damages if its agents violate the law. Granting the government and its agents immunity from the consequences of their actions only encourages continued violation of law and gives the government an edge over all other creditors, who also suffer the consequences of their wrongdoing. The decision of the Eleventh Circuit in *Jove Engineering* is

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[4] 26 U.S.C. § 7433(e) provides as follows:

(e) Actions for violations of certain bankruptcy procedures.--
(1) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362(relating to automatic stay) or 524 (relating to effect of discharge) of Title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.
(2) Remedy to be exclusive.--
(A) In general.--Except as provided in subparagraph (B), notwithstanding section 105 of such Title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.
(B) Certain other actions permitted.--Subparagraph (A) shall not apply to an action under section 362(h) of such Title 11 for a violation of a stay provided by section 362 of such title; except that--
(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and
(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.
(Added Pub.L. 105-206, Title III, § 3102(a), (c), July 22, 1998, 112 Stat. 730.)

instructive. There the Court referred to the "IRS's frequent violations" of the automatic stay and noted that the IRS had established a hotline which citizens could access to report IRS violations of the stay. It correctly concluded: "This attempt to burden debtors with policing IRS's misconduct is a complete derogation of the law." 92 F.3d at 1357.

As the facts in this case bear out, the same practices that the *Jove Engineering* Court condemned in 1996 are continuing. *See*, *e.g.,* 117 A.L.R. Fed 1 (1994 and supp.) (analyzing scores of cases involving alleged government violations of the automatic stay); *see also* Amadi, *Too Indebted to be Stressed: Refining the Standards of Proof Required to Award Damages for Emotional Injuries under § 362(h),* 26 Emory Bankr. Dev. J. 417 (2010). Obviously, the government did not lose all of the cases reported, but it is equally obvious that the problem has not been solved or even ameliorated. If the government is immunized from the consequences of its misconduct and allowed to rely on sovereign immunity where Congress has expressly directed that the doctrine be curtailed, it will have no incentive to improve its practices and procedures, and there will be no change.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amici hereby states that there are no related cases in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Local Rule 29(d) because this brief contains 3,581 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 23, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
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