UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: BRENDA A. OGDEN, Debtor.	Bankruptcy Case No. 11-19841 EEB Chapter 13

ORDER IMPOSING SANCTIONS FOR VIOLATIONS OF THE AUTOMATIC STAY

THIS MATTER is before the Court following two trials on the Debtor's claim that PNC Bank, N.A. (the "Bank") violated the automatic stay, the confirmation order, the Debtor's chapter 13 plan, and Fed. R. Bankr. P. 3002.1. At the first trial in Adversary Proceeding Number 13-1054 EEB (the "Adversary Proceeding"), the parties focused on the mortgage lender's accounting for payments received post-petition but before the completion of the Debtor's plan. In the course of that trial, however, the Court was made aware of two letters the Bank sent the Debtor threatening foreclosure, despite the Bank's clear knowledge of the Debtor's bankruptcy filing. The Debtor's testimony demonstrated significant emotional distress tied to these threats. As a result, the Court issued its first Order ruling on both the accounting issues and one of the threatening letters admitted into evidence. The Bank then sought reconsideration on the basis that the complaint had not specifically pled a stay violation based on any letters.

In ruling on the motion to alter or amend, the Court noted that the Bank had not objected to any of the evidence surrounding these letters, it cross examined the Debtor regarding them, and could not really demonstrate any prejudice related to the omission in the complaint itself. Nevertheless, in an abundance of caution, the Court issued an Amended Order which omitted any ruling on the letters and dismissed Debtor's stay violation claims without prejudice. The Court then issued its own Order to Show Cause in Debtor's main bankruptcy case requiring the Bank to show cause why it should not be liable for sanctions under 11 U.S.C. § 362(k) related to these letters.[1] The Court held an evidentiary hearing on the responses to the Order to Show Cause, as which both parties elected to present additional arguments and exhibits, including the transcript of the trial in the Adversary Proceeding, but no additional testimony. Thus, all of the testimony admitted at the original trial in the Adversary Proceeding, plus the additional exhibits and arguments, form the basis for this ruling.

I. BACKGROUND

The Debtor and the Bank have had a strained relationship. The Debtor has initiated suits against the Bank, alleging erroneous charges applied to her loan and misapplication of her mortgage payments. The Debtor testified that the Bank misapplied her October, 2010 mortgage

[1] References to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise.

payment to old, uncollectable charges, then declared her loan in default, and commenced foreclosure. She filed this bankruptcy case because she was unable to resolve these issues without court assistance. Post-petition, the Debtor filed a lawsuit against the Bank in federal district court, alleging violations under both the Real Estate Settlement Procedures Act of 1974 and the Truth in Lending Act. The parties settled that lawsuit in June 2012, resulting in the Bank paying $5,000 to Debtor, agreeing to reduce the principal balance of her loan by $12,500, and further agreeing to immediately apply any excess payments received from the Debtor toward principal reduction (the "Settlement"). The Settlement required the Bank to apply the $12,500 principal credit to the Debtor's mortgage no later than July 1, 2012, but the Bank did not process the reduction until January 2013, after the Debtor filed her Adversary Proceeding.[2] This history has engendered distrust and a profound breakdown in communication between these parties. The testimony of the Bank's representative at trial in the Adversary Proceeding evidenced actual ill will toward the Debtor.

At the time the Debtor filed her chapter 13 petition on April 28, 2011, she was seven months in arrears on her mortgage payments. The Bank, as the servicer for this loan, filed a proof of claim asserting pre-petition arrears due of $10,497.39, which included not only the missed payments, but also escrow advances made by the Bank and various foreclosure fees and costs. The Debtor's chapter 13 plan, confirmed on March 12, 2012, provided for the cure of the full amount of these arrears and charges, as well as continued monthly post-petition payments, which are to be paid directly to the Bank.

Despite the fact that the Bank was bound to accept repayment of the arrears according to the Debtor's confirmed plan, the Bank sent the Debtor a letter, dated November 2, 2012, offering her a trial loan modification at a substantially reduced monthly payment. According to the Bank, it acts as the servicer for a number of Fannie Mae loans, including the Debtor's loan, and Fannie Mae requested that it identify loans in its portfolio that were suitable candidates for loan modifications. This November letter was a result of this effort. The Debtor had not requested a loan modification and in fact she did not need one because she had already effectively obtained one through the bankruptcy process. Although the Bank's trial offer would have further reduced the amount of her monthly payment, it would only do so by essentially making her loan an "interest only" loan for a period of time.

The November letter contained numerous references to foreclosure. One paragraph was entitled "To Suspend Foreclosure." It also stated, "If you contact us or make payment by November 16, 2012 to indicate your intent to accept this offer, we will not refer your loan to foreclosure or if your loan has been referred to foreclosure, we will suspend foreclosure. However, if you do not . . . foreclosure proceedings may continue." It repeated substantially this same warning in several other paragraphs of the November letter.

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[2] The Bank's representative testified that, although the required principal reduction was not processed until January 2013, it was applied effective as of December 2011. In January 2013, the Bank also backed out and re-applied all payments made on the Debtor's loan after December 2011, in order to adjust how much of each payment was applied to principal and interest due to the resulting lower principal balance of the loan. The Bank fails to appreciate, however, that it is not a sufficient response that it finally made the proper application. The Debtor has had to litigate with the Bank to get its compliance with the terms of the Settlement.

In December 2012, alarmed by these threats and confused as to why the Bank had sent her a notice that significantly decreased her monthly payment, the Debtor sent the Bank a letter requesting an explanation as well as a loan payment history, a reinstatement quote, and a payoff quote. Over the next two months, she received only form letters that provided no information other than a statement that the Bank was researching her loan.

Then on January 2, 2013, the Bank sent the Debtor a second letter. "We did not receive your scheduled plan payments as outlined in the agreement." This was a reference to the November letter's offer of a trial loan modification, not her confirmed chapter 13 plan. It continued, "Please note that the servicing of your loan will continue per the terms of your Note and Mortgage, including foreclosure proceedings and normal credit bureau reporting. If foreclosure activity was previously suspended on your loan, it has now resumed." Underneath the signature line of the letter, it added a postscript: "We understand that you have filed for bankruptcy and have not yet received a discharge. None of the information requested in this letter will be used for . . . purposes prohibited by the Bankruptcy Code . . . ." The letter then continued to explain that the requested information was necessary to consider a possible loan modification.

If the Bank had ever acknowledged that these form letters had been sent in error, these two trials would never have been necessary. The Debtor would have been reassured that she would not lose her home. Instead the Bank failed to communicate with her in anyway, until shortly before this adversary proceeding was filed on January 29, 2013. At about this time, the Bank sent the Debtor an escrow analysis increasing the amount of her monthly escrow payment by more than $140. As required by Rule 3002.1, the Bank filed its notice of the payment change on January 26, 2013 with the escrow analysis attached. But again, it provided the Debtor with no explanation for this.

During a deposition in the Adversary Proceeding, the Bank finally provided an August 15, 2013 reinstatement quote to the Debtor, but it included additional post-petition fees and corporate advances in excess of $5,500. At trial in the Adversary Proceeding, the Bank's representative, Dorothy Thomas, provided an explanation for these additional charges. She testified that this reinstatement quote was the amount necessary to bring the loan "contractually current." In other words, the reinstatement quote provided by the Bank essentially ignored the bankruptcy by providing numbers as if the Debtor were not curing the pre-petition arrears through her plan. Ms. Thomas stated that it was not a "final reinstatement quote" because it did not appear on the Bank's letterhead. She testified that the use of letterhead is significant because it means that it has been reviewed by the Bank's counsel to see if it includes anything that would not be collectable–such as fees and corporate advances. There was no indication, however, that the Bank shared this information with the Debtor prior to trial. No one from the Bank ever explained to the Debtor that she had to request an attorney review in order to obtain an accurate reinstatement quote.

Ms. Thomas attempted to eliminate the confusion by explaining that the Bank keeps essentially two sets of books to reflect the Debtor's post-petition mortgage payments–one for bankruptcy purposes and one that accounts for the loan as if she had not filed for bankruptcy. For bankruptcy purposes, each post-petition payment is applied to the month and year in which the payment is actually received. For non-bankruptcy purposes, payments are applied to the oldest

outstanding payment due in accordance with the Debtor's deed of trust. Ms. Thomas testified that, while the Debtor is not "contractually current" on her loan because the pre-petition arrears have not yet been paid in full, she is and has always been "post-petition current"—meaning she has made all of her scheduled post-petition mortgage payments. The reason the Bank uses two forms of accounting is because, unless the Debtor completes her plan, she will remain subject to all of the terms of her promissory note and deed of trust, including the accrual of late fees and the like. According to Ms. Thomas, if the Debtor completes her plan, the Bank will "true up" the accounting for her loan, and it will be as if she had never been in default.

Ms. Thomas believes that there is no harm in continuing to account for the loan on a contractual basis because this form of accounting has never caused the Bank to send the Debtor any post-petition default notices, demand letters, or requests for payment. She failed, however, to acknowledge the November 2012 and January 2013 letters that disprove her beliefs. And the Bank has never acknowledged the harm it has caused this Debtor. Pre-petition, it made improper charges on her loan, misapplied her payments, and then initiated foreclosure on this basis. Post-petition, when faced with a lawsuit, it finally acknowledged these mistakes in the Settlement. But six months after the Debtor confirmed her chapter 13 plan to cure legitimate past due amounts, the Bank started once again to issue letters that both offered a loan modification that she had not requested and threatened continuation of the pending foreclosure proceedings.

The Debtor's testimony as to the emotional distress she suffered from the Bank's actions was very credible. She testified that the stress and fear she suffered was enormous. When she received these letters from the Bank, she flew into a panic. She saw the bank's agents coming by her home taking "inspection" photographs. As a very private person, she started spending all of her time in her bedroom, where they would not be able to photograph her. Within a couple of months with no resolution or communication from the Bank in response to her inquiries and only the receipt of the letters threatening foreclosure, she began losing weight as she was having great difficulty eating and sleeping. By March 2013, her hair was falling out in clumps. She was grinding her teeth when she was able to sleep.

The Bank suggested that her stress was the result of other events in her life or was tied to the fact that she was embroiled in litigation with the Bank. The Debtor, however, is a paralegal and is no stranger to the litigation process. She testified credibly that neither the litigation nor any other events contributed to her stress. It was the fear that the Bank was going to foreclose again. She could not document her emotional distress because she had not seen a doctor or a therapist and she was not on any medication related to the emotional distress. She explained that this was because she could not afford medical bills and did not have health insurance during this time. Despite the lack of corroborating medical testimony or documentation, the Court found her testimony quite compelling.

Listening to the testimony of the Bank's representative corroborated the Debtor's belief that she was being victimized by this Bank. The Bank's representative, Ms. Thomas, clearly held ill will toward the Debtor and did not believe that anyone should question this Bank. By its actions, it was clear that the Bank felt no duty to respond to a customer inquiry, at least not any inquiry from this customer. Having faced an improper foreclosure pre-petition, the Debtor had every reason to believe the Bank's threats of foreclosure in these two post-petition letters, despite the fact that she had a court order binding the Bank to her plan of reorganization. The pre-

petition foreclosure had not been dismissed. The scheduled sale date was merely postponed from week to week. Thus, the Bank was in a position to proceed very quickly to complete the sale. Faced with this dilemma, any reasonable person would have felt powerless, fearful, and victimized. The prolonged effect of this treatment would certainly take its toll on a person, especially when it pertained to something as important as the person's home.

II. DISCUSSION

A. Liability for the Bank's Letters Threatening Foreclosure

No reasonable person would deny that the Bank's November and January letters violated the automatic stay. Both letters threatened to resume foreclosure, despite the Bank's actual knowledge of the Debtor's bankruptcy filing. The second letter even acknowledged that the Debtor had a pending bankruptcy and she had not yet received a discharge. Nevertheless, the Bank cannot acknowledge the error of its ways. It has raised several frivolous defenses.

First, it claims that these letters could not violate the stay because they never used the word "default." According to the Bank, if the letters did not state the Debtor was in default, then they cannot be construed as an attempt to collect on a pre-petition debt. Actually, the Bank argues that they do not evidence its "intent" to declare a default. The Bank's intent is irrelevant to determining whether a stay violation has occurred. A stay violation exists if there is an occurrence of an act, or failure to act to maintain the status quo, that falls within the parameters of prohibited conduct under § 362(a), regardless of whether the actor intended to violate the stay. For example, when parties fail to inform the state court of a bankruptcy filing and the state court enters an order that upsets the status quo in the litigation, that order violates the stay and is rendered *void ab initio* by the automatic stay.

Whether damages must be imposed under § 362(k) depends on whether the violation was "willful." But a finding of willfulness does not rest on whether the actor intended to violate the stay. Violations are "willful" if the party knew of the automatic stay and intended to take the actions that violated the stay. *Diviney v. Nationsbank of Tex., N.A. (In re Diviney)*, 225 B.R. 762, 774 (10th Cir. BAP 1998); *see also*, *Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989); *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1104-05 (2d Cir. 1990); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 293 (4th Cir. 1986). In effect, the term "willful" refers to the deliberateness of the conduct, coupled with knowledge of the filing. It does not require any intent to violate a court order or a statute. In this case, there can be no doubt that the Bank's actions were willful. The January 2, 2013 letter itself acknowledges the bankruptcy filing and the contents of both letters evidence clear violations.

Similarly, the Bank claims that the letters did not include any language as to the amount due, the deadline to pay it, or where to send payments and, therefore, their purpose was not to collect a debt. They merely included "foreclosure avoidance" language, without "pay up" language. This is not accurate. The November letter stated that the Debtor must pay the Bank $709.11 by December 1, 2012, January 1, 2012, and February 1, 2012. The Bank then argues that these are future payments and not a demand for past due payments. But the letters make a

demand for payments to be made on a pre-petition debt. These arguments are wholly without merit.

In addition, the Bank believes that threatening foreclosure without actually resuming the foreclosure process is insufficient to state a claim for a stay violation. Admittedly, § 362(a) speaks in terms of the "commencement or continuation" of a proceeding, the "enforcement" of a lien, or an "act" to collect a debt or to exercise control over property of the estate. It does not expressly mention threats to take these actions.

Making a threat, however, is an "act" in furtherance of collection activity that violates § 362(a)(6). The threat is intended to compel the debtor to respond in a certain way. This is especially true when the context and the immediateness of the threatened action demonstrate that the threat is not an empty one. In *In re Diamond*, 346 F.3d 224 (1st Cir. 2003), the court reversed the district court that had affirmed the bankruptcy court's dismissal of a complaint based on a creditor's threat to file an administrative action to revoke the debtor's real estate license (which would impact his livelihood) during the course of settlement negotiations over a pending discharge action. Even though the revocation action had not yet been filed and would take time to reach a resolution, the First Circuit nevertheless held that the threat was "as immediate as possible, and sufficiently imminent to be potentially coercive." *Id.* at 228. *See also In re Layton*, 220 B.R. 508, 516-517 (Bankr. N.D.N.Y. 1998).

This case is far more egregious than the *Diamond* case. Here the threats were not made by a creditor's attorney to the debtor's attorney during the course of settlement discussions. They were made in formal letters sent from the Bank directly to the Debtor. While we all know that sometimes banks spit out computer letters in error, this Bank would not and has never acknowledged its error or offered the Debtor any reassurances. Moreover, the context here is significant. The foreclosure sale date was merely continued from week to week such that resuming foreclosure would require very little and the actual sale could take place within one week's time. Moreover, the Debtor had already experienced pre-petition a foreclosure that had been commenced based on erroneous accounting for her payments and she was powerless to stop it without filing bankruptcy. In this context, no reasonable person would construe these as empty threats. It was as coercive as it could possibly be.

One of the primary interests that the automatic stay seeks to protect is reflected in that statute's legislative history.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97 (capitalization altered). Making threats to foreclose robbed the Debtor of the temporary breathing space that Congress intended her to have, free from collection efforts and harassment.

Next the Bank offers two defenses that bring to mind the comedic genius of Flip Wilson in the 1970s, whose character often attempted to justify his improper actions by saying "the Devil made me do it." In this case, the Bank says either "Fannie Mae made me do it" or "the computer made me do it." First, the Bank claims it was under compulsion to offer a loan modification to the Debtor because Fannie Mae regulations required it to identify suitable candidates in its pool of loans and to make these offers. It could not, however, point the Court to any regulations that required it to threaten foreclosure to a debtor in bankruptcy in order to offer a loan modification. Even if such a regulation existed, it could not trump the supremacy of a Congressional statute to the contrary. Through the testimony of Ms. Thomas, the Bank also claimed that the Debtor had requested this loan modification. The Court found this testimony to be incredible. The Debtor had already obtained a loan modification in her confirmed plan of reorganization. She had no need for temporary relief with "interest only" payments. Certainly, the Bank cannot credibly claim that the Debtor was asking to receive threats of foreclosure.

Second, the Bank attempted to hide behind the old defense that "the computer made me do it." Although these letters may have been automatically generated by the Bank's computer system, this does not excuse the Bank from liability. The Bank is free to continue to account for her loan "on a contractual basis" until the Debtor satisfies her plan obligations, but if it chooses to do so, it must then put into place sufficient safeguards to prevent the Bank's computer system from spitting out letters with threats of foreclosure. Ms. Thomas testified that part of the problem is attributable to the fact that the Bank accounts for bankruptcy loans using different reports and systems that are not integrated with one another and are even accessed from different computer terminals. It is the Bank's choice to handle bankruptcy loans in this manner. In doing so, it ran the risk that its inadequate safeguards would lead to a stay violation.

B. Damages Attributable to the Letters

Section 362(k) makes an award of actual damages attributable to a willful stay violation mandatory, including but not limited to costs and attorney fees. Punitive damages may also be awarded in "appropriate circumstances." In this case, the Debtor seeks actual damages for her emotional distress in the amount of $25,000 and her attorney fees and costs. She also seeks punitive damages in the amount of $100,000.

In its first Order, the Court denied any damages to the Debtor based on the emotional distress she suffered. This Court has always had a somewhat knee jerk reaction against awarding emotional distress damages without corroborating medical testimony or other evidence. *See In re Gagliardi*, 290 B.R. 808, 819 (Bankr. D. Colo. 2003). This has been the case because often the testimony of the debtor at best describes fleeting emotional distress and the level of distress claimed bears little relationship to the nature of the violation. In addition, often the amount of attorney fees incurred seems to this Court to be a sufficient amount to punish the offender. The Court does not know, but has always assumed that these fees will be shared with the debtor since it seems highly likely that the debtor's attorney pursued the matter on a contingency basis.

Revisiting this case for a second time has caused this Court to reconsider this aspect of its first Order. As previously stated, this Court found the Debtor's testimony regarding her emotional distress to be very compelling. Moreover, the length of time that the Debtor had to suffer the uncertainty of whether the Bank was going to foreclose on her home on one week's

notice would cause any reasonable person to undergo enormous stress, which would be highly likely to result in some negative effect on her physical wellbeing.

The Bank argued that her claims of emotional distress are exaggerated because she did not even mention the letters in her complaint and she never attempted to contact the Bank after receiving them. It is true that they were not specifically mentioned in the complaint, but it is not true that she did not attempt to communicate with the Bank. The Bank's own log notes show telephone calls by the Debtor and the fact that a Bank representative told her that they could not communicate with her while she was in bankruptcy. As a result, the Debtor sent letters to the Bank, by certified mail, attempting to obtain an explanation. She received no response.

Placing a dollar figure on this form of damages, however, is always very difficult. Juries can award monetary damages for personal injuries such as "pain and suffering" without having to justify the number they select. This Court does not have that luxury. When there are no medical bills or prescription costs, there is nothing concrete on which to base the award. How do we value a person's peace of mind, especially when there was no permanent damage done? (This is another reason this Court has been hesitant to make these awards in the past.) Fortunately, the Debtor has selected an amount, which gives the Court a ceiling. She has requested $25,000 for her emotional distress. This Court could certainly justify an award in this amount, but in exercising its discretion the Court will award only $10,000. This is admittedly a very arbitrary figure. In awarding this amount, the Court acknowledges that the Debtor's suffering was very real and very prolonged. Fortunately, she is young and healthy enough to bounce back from this terrible experience.

This brings the Court to the question of the proper amount of attorney fees to award. The parties stipulated before the rehearing that the Debtor's attorney would submit an updated fee affidavit and the Bank would lodge any objections to fees that it had. Their stipulation specifically mentioned that, if the Bank wanted an evidentiary hearing on fees, it would request it. The Bank lodged general objections, but made no request for an evidentiary hearing. The Debtor's fee affidavit does not provide a total figure for the fees and costs, but states that the Debtor incurred 88.4 hours of Mr. Osborne's services at $250 per hour, 7.0 hours of paralegal time at $95 per hour, and actual costs of $1,639.57. If the Court has done the math correctly, the total amount sought is $24,404.57.

In its objections, the Bank asserts that the first hearing was focused solely on the Bank's accounting practices and, therefore, those fees should not be awarded as damages attributable to the two letters. In fact, a significant portion of the first trial was related to the letters. In addition, the testimony regarding the Bank's accounting practices was also relevant to the letters because it was the Bank's choice to maintain two sets of records, with no safeguards to prevent foreclosure letters issuing from the "contractual" records, which caused these violations.

Second, the Bank asserts that the time entries lack sufficient description to determine whether the fees related to the letters. First of all, the Court reiterates its prior finding that even the accounting issues related to the reason for the issuance of the letters and demonstrated the Bank's reckless disregard as to whether its actions violated the automatic stay. Thus, all fees incurred were related to both the accounting practices and the letters. Debtor's attorney did not perform any other services for the Debtor other than the prosecution of this action. Another

attorney filed the Debtor's chapter 13 case and obtained confirmation of her plan. In addition, the Court finds the time entries are sufficiently detailed. The time entries before the first trial were very descriptive. The time entries in preparation for the rehearing were less so. The only details omitted were counsel's description of why he was communicating with his client. But the communications related only to the adversary proceeding and the show cause order. It was not necessary for counsel to describe privileged communications on these issues. If counsel would have been performing numerous other services, then the Court would have required greater specificity.

Admittedly, the amount of fees and costs are higher than this Court usually sees for stay violation hearings. As the Debtor's Motion for Fees and Costs details, the fees and costs were higher primarily due to the Bank's lack of cooperation, its obstruction of the discovery process, and its frivolous defenses. The costs were primarily incurred because the Bank's Rule 30(b)(6) witness refused to travel to Denver. As the court stated in *McGowan v. King, Inc.*, 661 F.2d 48, 51 (5th Cir. 1982), the debtor's counsel:

> did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertions required of their opponents and thus, if unsuccessful, be required to bear that cost.

Consequently, the Court awards all of the requested fees and costs to the Debtor.

This brings the Court to the request for punitive damages. In determining the amount of punitive damages, the Court must consider what amount would properly serve the purposes of punishment and deterrence. The five primary factors to be considered include: the nature of the creditor's conduct; the creditor's ability to pay damages; the level of sophistication of the creditor; the creditor's motives; and any provocation by the debtor. *In re Gagliardi*, 290 B.R. at 820.

The Bank contends that punitive damages are not appropriate because the letters evidence the Bank's intention to help the Debtor by offering her lower payments. This is not credible. The truth is that some Bank employee ran a search for all loans that fit certain criteria for a loan modification and then issued form letters with payment terms and standard "foreclosure avoidance" language. The Bank made no attempt to screen these loans for bankruptcy filings. It relied only on its "contractual" records. While the nature of the Bank's conduct is not as egregious as some stay violation matters that the Court has presided over, nevertheless the Bank has acted recklessly by not placing sufficient safeguards in place. The Bank's recklessness undoubtedly has the potential of affecting many other debtors as well.

Additionally, as a banking institution, the Bank is a sophisticated creditor. It is well aware of the automatic stay and the actions that it prohibits. Moreover, the uncooperative testimony of Ms. Thomas and the actions of the Bank have so exacerbated matters in this proceeding that it has caused the Court to form the impression that the Bank bears actual ill will towards this Debtor. For example, it ignored the Debtor's letters and then supplied her with inaccurate information, without telling her that to receive accurate information she would have to request an "attorney review." It failed and/or refused to effectuate the principal reduction that

was required by the Settlement until after the Debtor filed this litigation. Perhaps this ill will is the result of the district court litigation. Regardless, the Bank's motivation in this matter appears to this Court to be to a driving factor. Its representatives do not want to communicate with or assist the Debtor in any way. If they had, then they could have quickly and easily reassured her that the letters had been sent in error, well before it was necessary for the Debtor to file this adversary proceeding, and before the parties had incurred significant attorney fees and costs. But the Bank has no interest in allaying the Debtor's fears regarding either foreclosure or proper accounting for her payments. The testimony and conduct of the Bank convey the message that it believes it is above reproach. The Court received no evidence of acts of provocation by the Debtor to justify this attitude.

Finally, the Court finds the Debtor's argument well founded that, when a creditor raises frivolous defenses to an obvious stay violation, it further justifies the imposition of punitive damages. The Debtor relies on *In re* Curtis, 322 B.R. 470 (Bankr. D. Mass. 2005) for this proposition. Faced with meritless defenses and "arrogant defiance of the Bankruptcy Code," the *Curtis* court found punitive damages "most appropriate." *Id*. at 486. In regard to the frivolous defenses, the court acknowledged that it could impose sanctions under Rule 9011, but held that there was a "larger point to be made." *Id*.

> When an institutional creditor responds to an obvious violation of the automatic stay or discharge injunction against a consumer debtor by employing its superior resources to make frivolous responses that tax the resources of that debtor, those responses should be viewed as nothing more than an abusive continuation of the original improper conduct being complained of. It is the most appropriate occasion for imposition of punitive damages.

Id. at 486-487.

The amount of punitive damages necessary to serve the twin goals of punishment and deterrence is a subjective inquiry committed to the Court's discretion. "Punitive damages must be tailored not only based on the egregiousness of the violation, but also based upon the particular creditor in violation." *Id.* at 487. "What would be sufficient to deter one creditor may not even be sufficient to gain notice from another." *Id.*

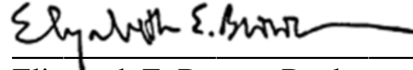
At the first trial, the Court received no evidence as to the Bank's financial condition and, therefore, it awarded a nominal amount of $5,000. At rehearing, the Debtor introduced evidence of the Bank's financial statement, which indicated it had over $316 million in assets and a net worth of over $89 million. Given this net worth, it would take a significant award to deter this creditor. As previously stated, this Bank has yet to admit to its errors. It has persisted in frivolous defenses. Its actions, or rather its inaction in failing to institute sufficient safeguards, has the potential to affect many other debtors as well. For all of these reasons, the Court finds that an award of $35,000, which is roughly equal to the amount of actual damages, should be imposed as punitive damages.

III. CONCLUSION

Accordingly, it is hereby ORDERED that judgment shall enter in favor of the Debtor and against the Bank on the stay violations evidenced by the two letters in the aggregate amount of $69,404.57, representing $10,000 for emotional distress damages, $24,404.57 in attorney fees and costs, and $35,000 in punitive damages.

Dated this 1st day of June, 2015.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge