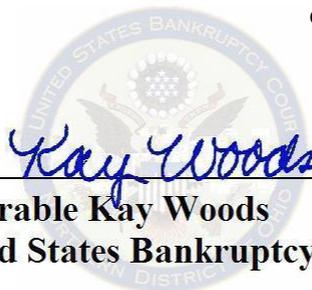


IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
WILFRED IRIZARRY,	*	CASE NUMBER 02-41616
	*	
Debtor.	*	
	*	
*****	*	
WILFRED IRIZARRY,	*	ADVERSARY NUMBER 08-04121
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
AFNI, INC.	*	CHAPTER 13
	*	
and	*	
	*	
ALLTEL COMMUNICATIONS, LLC,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

\*\*\*\*\*

M E M O R A N D U M    O P I N I O N

Not Intended for National Publication

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The following memorandum opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than [www.ohnbuscourts.gov](http://www.ohnbuscourts.gov) is not the result of direct submission by this Court. The opinion is available through electronic citation at

www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Alltel Communications, Inc.'s Motion to Dismiss ("Motion to Dismiss") this adversary proceeding filed by Defendant Alltel Communications, Inc. ("Alltel") on August 6, 2008 (Doc. # 7). Plaintiff Debtor Wilfred Irizarry ("Debtor") commenced this Adversary Proceeding on July 3, 2008, by filing Complaint (Doc. # 1). On August 26, 2008, Debtor filed (i) First Amended Complaint ("Complaint") (Doc. # 9); (ii) Plaintiff's Motion for Extension of Time to Respond to Motion to Dismiss ("Motion to Extend") (Doc. # 10); and (iii) Memorandum in Support of Plaintiffs [sic] Motion for Extension of Time (Doc. # 11). The Court granted the Motion to Extend by Order dated August 28, 2008 (Doc. # 12). On September 2, 2008, Debtor filed Plaintiff's Response Memorandum to Defendant Alltel's Motion to Dismiss (Doc. # 14).

As set forth below, dismissal of Alltel at this juncture is not appropriate.

This Court has jurisdiction<sup>1</sup> pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A) and (O). The following constitutes the Court's findings of fact

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<sup>1</sup>This Court's jurisdiction extends to Debtor's underlying chapter 13 case, as well as this adversary proceeding.

and conclusions of law pursuant to FED. R. BANKR. P. 7052.

**I. STANDARD FOR REVIEW**

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint. To withstand dismissal, the complaint must (i) provide a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

FED. R. CIV. P. 12(b)(6), which is applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Referring to *Twombly*, the Court of Appeals for the Sixth Circuit noted that

[t]he Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. . . . The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

*Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (second alteration in original). See also, *Nicholson v. Countrywide Home Loans*, No. 1:07-CV-3288, 2008 U.S. Dist. LEXIS 20714, \*7 (N.D. Ohio March 17, 2008) ("Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable." (citing *Twombly*, 127 S. Ct. at 1974)); and *Reid v. Purkey*, No. 2:06-CV-40, 2007 U.S. Dist. LEXIS 42761, \*4-5 (E.D. Tenn. June 11, 2007) ("While a complain[t] need not contain detailed factual allegations, a pleader has a duty . . . to supply, at a minimum, the necessary facts and grounds which will support his right to relief." (citing *Twombly*, 127 S. Ct. at 1964-65)).

In determining the sufficiency of a complaint, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under FED. R. CIV. P. 12(e) for a more definite statement is the proper avenue rather than under FED. R. CIV. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003) (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990)). However, "[t]he court need not accept legal conclusions or unwarranted factual inferences as true." *Power & Tel. Supply Co., Inc. v. Suntrust Banks, Inc.*, 447

F.3d 923, 930 (6th Cir. 2006).

## II. FACTUAL AND PROCEDURAL BACKGROUND

Debtor filed a voluntary petition pursuant to chapter 13 of title 11 on April 17, 2002 (Main Case, Doc. # 1). Debtor's Schedules listed Alltel as a creditor, but Alltel did not file a proof of claim. (Compl. ¶ 11.) An order granting Debtor a discharge of his debts was entered on August 16, 2006 (Main Case, Doc. # 30). The case was closed, and final decree entered, on January 9, 2007 (Main Case, Doc. # 33).

The Complaint alleges that Alltel and Defendant AFNI, Inc. ("AFNI") (collectively, "Defendants") have violated the discharge injunction of § 524 of the Bankruptcy Code. For purposes of this Opinion, the Court accepts the Complaint's allegations as true. Specifically, Debtor alleges Alltel "sold and/or transferred [Debtor's discharged] debt to Defendant AFNI" without notifying AFNI that the debt had been discharged. (Compl. ¶ 14.) Debtor further asserts that, at the time Alltel transferred the debt, Alltel (i) "had actual knowledge of the discharge" and (ii) "knew or should have known that AFNI intended on trying to collect this discharged debt." (*Id.*)

Debtor's case was reopened by order on January 29, 2008 (Main Case, Doc. # 35). Upon Motion by Debtor (Main Case, Doc. # 37), the Court issued Order to Appear and Show Cause ("OSC") (Main Case, Doc. # 38) on February 5, 2008, which required AFNI to appear at a hearing on February 21, 2008, and show cause concerning

the alleged willful violation of the discharge injunction. After AFNI failed to appear at the OSC hearing, on February 28, 2008, the Court issued an Order (Main Case, Doc. # 42) finding AFNI to be in contempt.

Debtor subsequently commenced this Adversary Proceeding against both AFNI and Alltel.<sup>2</sup> Debtor's sole claim against Alltel is for wilful violation of the § 524 discharge injunction. Specifically, Debtor asks the Court to find Alltel in contempt of court for "knowingly selling a discharged debt with knowledge that the debt would be collected on and failing to notate [sic] or otherwise inform the collector that the debt was discharged in bankruptcy." (Compl. ¶ 27.)

### III. LAW

A discharge entered in a chapter 13 case "discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 . . . ." 11 U.S.C. § 1328(c) (West 2002).<sup>3</sup> Section 524 of the Bankruptcy Code provides that a discharge operates as an injunction against any act to collect a debt as a personal liability of the debtor. Specifically, subsections (a)(1) and (a)(2) state, in pertinent part:

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<sup>2</sup>Alltel filed Alltel Communications, Inc's Answer to Plaintiff's Amended Complaint ("Alltel's Answer") (Doc. # 15) on September 8, 2008. AFNI has failed to answer the Complaint.

<sup>3</sup>This case was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") which became effective on October 17, 2005. Consequently, this decision is governed by the pre-BAPCPA Bankruptcy Code. All citations to the Bankruptcy Code are, accordingly, to the 2002 Code.

(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 . . . 1328 of this title, whether or not discharge of such debt is waived; [and]

(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; . . . .

11 U.S.C. § 524 (West 2002). The purpose of the discharge injunction in § 524 is to effectuate the post-discharge "fresh start" intended by Congress in enacting the Bankruptcy Code. *Laws v. First Nat'l Bank of Marin (In re Laws)*, No. 06-3121, 2007 Bankr. LEXIS 1352, \*8-9 (Bankr. N.D. Ohio April 11, 2007).

#### **IV. ANALYSIS**

The Motion to Dismiss asserts two grounds for dismissal. Alltel argues that Debtor has failed to state a claim upon which relief can be granted because (i) there is no private cause of action for violation of the § 524 injunction; and/or (ii) sale of a discharged debt is not, as a matter of law, a violation of § 524. Neither of these arguments is persuasive.

##### **A. Cause of Action**

Alltel first asserts that Debtor's claim against it fails as a matter of law because "no private right of action exists for violations of a discharge injunction" in the Sixth Circuit. (Mot. to Dismiss at 3.) This Court recently analyzed this issue at

length in *Motichko v. Premium Asset Recovery Corp (In re Motichko)*, 2008 Bankr. LEXIS 2420 (Bankr. N.D. Ohio June 27, 2008). A similar analysis applies to the instant case.

Alltel cites *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) in support of its argument. *Pertuso* does, indeed, establish that § 524 provides no private cause of action in the Sixth Circuit. However, this rule does not prohibit Debtor from bringing the instant adversary proceeding.<sup>4</sup> "Generally, unless debtors are able to bring violations of the injunction to the court's attention, the court is unable to exercise its inherent and statutory powers under 11 U.S.C. § 105(a) to enforce its orders and remedy transgressions of the court's authority." *Laws*, 2007 Bankr. LEXIS 1352 at \*9.

Although no private right of action exists within the statute, the Sixth Circuit Court of Appeals and a majority of other circuits have held that violations of § 524 are punishable by sanctions for contempt of court. *Pertuso*, 233 F.3d at 421-23. "In the Sixth Circuit there is no statutory private right of action for damages under 11 U.S.C. § 524 . . . . However, violation of the discharge injunction does expose a creditor to potential contempt of court. . . . If the contempt is established, the injured party

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<sup>4</sup>Alltel also asserts that "[t]he proper remedy for an alleged violation of a discharge injunction is a motion to show cause." (Mot. to Dismiss at 3, n. 2.) While a motion to show cause is the traditional way to bring such actions before the Court, bankruptcy courts also hear contempt actions brought as adversary proceedings. To dismiss on such procedural grounds alone would elevate form over substance. See *Motichko*, 2008 Bankr. LEXIS 2420 at \*18-20, for a complete analysis of this issue.

may be able to recover damages as a sanction for the contempt."  
*Lohmeyer v. Alvin's Jewelers (In re Lohmeyer)*, 365 B.R. 746, 749-50  
(Bankr. N.D. Ohio 2007) (internal citations omitted) (emphasis  
added).

Neither of the cases cited by Alltel advances its argument. Dismissal of alleged § 524 violations based on no private cause of action generally involve jurisdictional issues. In such cases, debtors sought relief outside the bankruptcy court where their discharges were granted. For example, *Pertuso* was originally a "purported class action" brought in the United States District Court for the Eastern District of Michigan, whereas the discharge injunction was issued by the United States Bankruptcy Court for the District of Rhode Island. *Pertuso*, 233 F.3d at 420. One of the cases cited by Alltel, *Torrance v. Select Portfolio Servicing, Inc.*, 2007 U.S. Dist. LEXIS 29363 (S.D. Ohio 2007), falls within this category.<sup>5</sup> The District Court dismissed *Torrance*, in part, because "a debtor [can] only enforce an alleged violation [of § 524] in a contempt proceeding in the underlying bankruptcy action[.]" *Id.* at \*5.

Such is not the case here. Debtor commenced the instant adversary proceeding in the same Court that issued his discharge. Count I of the Complaint expressly seeks to have Alltel held in

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<sup>5</sup>In the other case cited by Alltel, *Lover v. Rossman (In re Lover)*, 337 B.R. 633 (Bankr. N.D. Ohio 2005), the court granted a Motion for Summary Judgment when the plaintiff failed to meet her burden of setting forth specific facts alleging that the creditor had committed any act in violation of the discharge injunction. *Id.* at 635. In the instant case, Alltel has conceded that it sold the discharged debt to AFNI. (Alltel's Answer ¶ 14.)

contempt. (Compl. ¶ 27.) Therefore, to complete its analysis, the Court turns its attention to the specific elements of a § 524 violation of discharge.

**B. Violation of 12 U.S.C. § 524**

In order to survive the Motion to Dismiss, the Complaint must contain facts alleging each material element of violation of the discharge injunction in 11 U.S.C. § 524, *i.e.*, contempt of court. *In re Perviz*, 302 B.R. 357, 370 (Bankr. N.D. Ohio 2003). Accordingly, in ruling on the Motion to Dismiss, this Court must examine the Complaint to determine whether it avers that (i) Debtor received a discharge; (ii) Alltel received notice of the discharge; and (iii) Alltel intended the acts that violated the discharge injunction.<sup>6</sup> In addition, the Complaint must include facts alleging the harm suffered by Debtor in order to establish his standing to bring the action. *Lohmeyer*, 365 B.R. at 754. For purposes of this Opinion only, the Court assumes all factual allegations contained in the Complaint are true.

The Complaint contains sufficient allegations to withstand the Motion to Dismiss. First, the Complaint establishes that Debtor received a discharge in his underlying chapter 13 case on August 16, 2006. (Compl. ¶ 12.) Second, the Complaint alleges that Alltel received actual notice of the discharge on August 16,

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<sup>6</sup>There is no uniformity about whether a creditor must have intended that its act violate the discharge injunction, or if it is sufficient that such creditor intended to do the act that violated § 524. This Court agrees with the reasoning expressed in *In re Hill*, 222 B.R. 119, 122-23 (Bankr. N.D. Ohio 1998), that the creditor need only to have intended to commit the act that violates the discharge injunction.

2006. (Compl. ¶ 13.) Third, the Complaint specifically alleges that, even after receiving notice of Debtor's discharge, Alltel sold the "discharged debt with knowledge that the debt would be collected on and fail[ed] to notate [sic] or otherwise inform the collector that the debt was discharged in bankruptcy." (Compl. ¶ 27.)

Alltel concedes that it sold the debt to AFNI. (Alltel's Answer ¶ 14.) However, the Motion to Dismiss asserts that Debtor's Complaint fails to properly allege the third element because "[a]s a matter of law, the sale of a debt is not an effort to collect on that debt for purposes of 12 [sic] U.S.C. § 524(a)(2)." (Mot. to Dismiss at 4.) There is, however, no binding precedent on this point. The single case in the Sixth Circuit to squarely address this issue, *In re Lafferty*, 229 B.R. 707 (Bankr. N.D. Ohio 1998), held that "[t]he selling of accounts is a deliberate act to collect on a discharged debt."<sup>7</sup> (*Id.* at 714 (emphasis added).) Alltel cites *Finnie v. First Union Nat'l Bank*, 275 B.R. 743 (E.D. Va. 2002), which notes but declines to follow *Lafferty*.<sup>8</sup> Although the *Finnie* court disagrees with *Lafferty*, *Finnie* is not binding on this court and presents only an alternate position regarding this issue. Therefore, this Court cannot say, as a matter of law, that Alltel's

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<sup>7</sup>Two other cases from the Sixth Circuit, *Gunter v. O'Brien & Associates (In re Gunter)*, 389 B.R. 67, 73 (Bankr. S.D. Ohio 2008), and *In re Franks*, 363 B.R. 839, 844 (Bankr. N.D. Ohio 2006), both note the *Lafferty* position approvingly, but only in dictum.

<sup>8</sup>None of the other cases cited by Alltel directly address the question of whether sale of discharged debt is a violation of the discharge injunction.

sale of Debtor's account to AFNI was not a violation of the discharge injunction.

Finally, Debtor has also established standing sufficient to survive the Motion to Dismiss. While Debtor has not detailed his damages, he has alleged that Defendants' actions caused him both economic and noneconomic harm. Specifically, Debtor asserts that Defendants "have caused [Debtor] economic damages in the form of costs and fees in having to enforce his fresh start[,] as well as "significant noneconomic damages in the form of frustration, aggravation, loss of privacy, loss of time and inconvenience, strain on his personal relationships and loss of enjoyment of the value of life." (Compl. ¶ 24.)

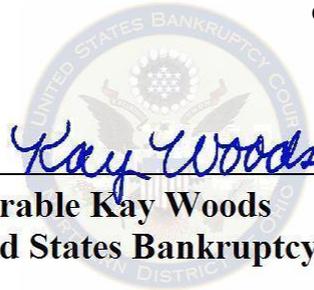
Accordingly, the Court finds the Complaint has sufficiently averred, for the purpose of surviving the Motion to Dismiss, that Alltel acted intentionally to violate the discharge injunction in § 524.

#### **IV. CONCLUSION**

For the reasons given above, the Motion to Dismiss is not well taken. The Court finds that the Complaint alleges sufficient facts to assert a claim against Alltel for violation of the discharge injunction in 11 U.S.C. § 524. An appropriate order will follow, denying the Motion to Dismiss.

# # #

IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
WILFRED IRIZARRY,	*	CASE NUMBER 02-41616
	*	
Debtor.	*	
	*	
*****	*	
WILFRED IRIZARRY,	*	ADVERSARY NUMBER 08-04121
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
AFNI, INC.	*	CHAPTER 13
	*	
and	*	
	*	
ALLTEL COMMUNICATIONS, LLC,	*	
	*	HONORABLE KAY WOODS
Defendants.	*	
	*	

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ORDER DENYING MOTION TO DISMISS  
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For the reasons set forth in this Court's Memorandum  
Opinion entered on this date, the Court hereby denies Defendant's  
Motion to Dismiss.

# # #