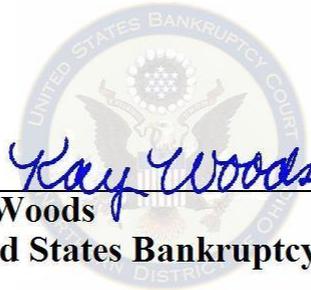


**IT IS SO ORDERED.**



**Dated: August 04, 2010  
04:43:58 PM**

**Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

<b>IN RE:</b>	*	
	*	<b>CASE NUMBER 10-41948</b>
<b>GARY JOSEPH ZUPP and</b>	*	
<b>MARLENE ANN ZUPP,</b>	*	<b>CHAPTER 13</b>
	*	
<b>Debtors.</b>	*	<b>HONORABLE KAY WOODS</b>

\*\*\*\*\*  
**MEMORANDUM OPINION REGARDING DAMAGES  
FOR WILLFUL VIOLATION OF STAY**  
\*\*\*\*\*

On July 2, 2010, this Court entered Order (i) Granting Motion for Turnover, and (ii) Setting Briefing Schedule ("Turnover Order") (Doc. # 41), which granted Motion to Enforce Automatic Stay & for Turnover Pursuant to the Provisions of the Bankruptcy Code ("Debtors' Motion") (Doc. # 31) filed by Debtors Gary Joseph Zupp and Marlene Ann Zupp on June 23, 2010. In the Turnover Order, this Court ordered TEBO Financial Services, Inc. ("TEBO") to return to Debtors a 2001 Oldsmobile Alero ("Vehicle"). In addition, the Court ordered the parties to brief the issue of damages to which the Debtors may be entitled as a result of TEBO's violation of the

automatic stay.

This Court has jurisdiction 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. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on May 24, 2010 ("Petition Date"). Prior to the Petition Date, on or about May 10, 2010, TEBO took possession of the Vehicle from the Debtors. Following the Petition Date, the Debtors repeatedly demanded that TEBO return the Vehicle, but TEBO failed to do so. TEBO received notice of the Debtors' bankruptcy proceeding and was, in fact, aware of the Debtors' bankruptcy proceeding on May 26, 2010, when TEBO filed Objection to Confirmation (Doc. # 12).

Section 362 of the Bankruptcy Code imposes an automatic stay, which prohibits creditors from taking or maintaining certain actions.

- (a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of --

\* \* \*

- (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.

11 U.S.C. § 362 (West 2009).

The Court set the Debtors' Motion for an expedited hearing on July 1, 2010. After hearing the arguments of counsel for the Debtors and TEBO, this Court determined that TEBO had "exercise[d] control over property of the estate" in violation of the automatic stay in section 362 by refusing to return the Vehicle to the Debtors upon being informed of the Debtors' chapter 13 filing. The Court entered the Turnover Order, which required TEBO to return the Vehicle to the Debtors by July 1, 2010.

In addition to ordering TEBO to return the Vehicle to the Debtors, the Court retained jurisdiction to determine what damages, if any, the Debtors had suffered as a result of TEBO's violation of the stay. The Court ordered (i) the Debtors to file a memorandum detailing their damages on or before July 12, 2010; and (ii) TEBO to file its response, if any, on or before July 22, 2010. On July 12, 2010, Debtors timely filed Memorandum in Support of Damages ("Damages Memo") (Doc. # 45), to which three affidavits were attached as exhibits. TEBO failed to respond to the Damages Memo.

## **II. THE DEBTORS' ALLEGED DAMAGES**

The Debtors request damages in the following amounts:

	\$ 568.14	- economic damages
	\$ 2,863.75	- attorney's fees
	\$ 2,000.00	- noneconomic damages
	<u>\$10,500.00</u>	- punitive damages
TOTAL	\$15,931.89	

The Court will deal with each category of damages separately.

Section 362(k) provides:

(k) (1) Except as provide 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.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

11 U.S.C. § 362 (West 2009). On the Petition Date, counsel for the Debtors contacted TEBO and requested release of the Vehicle. (See Affidavit of Sarah Twyford ¶¶ 2 - 8, attached as an exhibit to the Debtors' Memo.) Despite actual knowledge of Debtors' bankruptcy, TEBO failed and refused to return the Vehicle to Debtors. Because TEBO refused to release the Vehicle despite having actual knowledge of the Debtors' bankruptcy filing, TEBO's violation of the stay was demonstrably willful. Accordingly, the Debtors are entitled to an award of their actual damages, pursuant to 11 U.S.C. § 362(k)(1).

**A. Actual Economic Damages**

The Debtors seek damages for (i) being deprived of their Vehicle for 38 days (May 24, 2010, through July 1, 2010) after the Petition Date; and (ii) attorney's fees they incurred as a result of TEBO's violation of the stay. The Debtors claim that being deprived of their Vehicle caused them damages in the amount of \$568.14. They calculate these damages by: (1) taking the value of the Vehicle on TEBO's proof of claim in the amount of \$5,457.36; (2) dividing by 365 (evidently based on the number of days in a year);

(3) arriving at "\$14.95 per day;" and (4) multiplying by 38 days. The Court has no quarrel with the Debtors' math; however, there is no rationale for using this method to calculate economic damages based on not having use of the Vehicle. Debtors' calculation appears to be pulled from thin air. There is no reason to divide the alleged fair market value of the Vehicle by the number of days in the year to arrive at a "daily" value for the Vehicle. Although the Vehicle is ten years old, there is no evidence that the remaining useful life of the Vehicle is one year. Even if the remaining useful life of the Vehicle was determined to be one year, there is no basis to assign a monetary daily value to the use of the Vehicle.

A better way to calculate the economic damages from TEBO's retention of the Vehicle for 38 days post petition would be to estimate the replacement value of obtaining a second vehicle. It is not clear, however, how such value should be calculated since the Debtors did not, in fact, replace the Vehicle. There is no evidence that the Debtors' rented, leased, borrowed, or otherwise obtained a car to replace the Vehicle (most likely because the Debtors could not afford to do so) or that the Debtors and/or their dependents were forced to take public transportation or taxi cabs because they did not have use of the Vehicle. As a consequence, the Court cannot award Debtors the asserted \$568.14 in economic damages for the deprivation of their Vehicle.

The Debtors have attached an itemized statement of the

attorney's fees they claim as damages. The statement is for 12.45 hours at the rate of \$225.00 per hour, for a total of \$2,863.75. The Court finds that the hourly rate and the number of hours are reasonable. Accordingly, the Court will award the Debtors economic damages in the amount of \$2,863.75 for attorney's fees.

**B. Non-economic Damages**

The Debtors acknowledge there is a split of authority regarding the propriety of awarding damages for emotional distress for violations of the automatic stay. The Sixth Circuit Court of Appeals has not weighed in on this issue, to date. At least one bankruptcy court in the Northern District of Ohio has awarded damages for emotional distress for a willful violation of the automatic stay. In *Lohbauer v. Credit Based Assets Servicing (In re Lohbauer)*, 254 B.R. 406 (Bankr. N.D. Ohio 2000), the bankruptcy court awarded \$3,000.00 for emotional distress, in addition to lost wages of \$3,000.00 and attorney's fees of \$1,500.00. See also, *McGee v. Society Bank & Trust (In re McGee)*, 181 B.R. 307, 311 (Bankr. N.D. Ohio 1995) (Bankruptcy court awarded \$88.00 in lost wages and \$350.00 for "embarrassment and aggravation.")

A district court in this district, however, analyzed the ambiguity of the term "actual damages" in section 362 and expressly found that § 362(h)<sup>1</sup> should be construed to "authoriz[e] compensation for only tangible/economic injuries." *United States*

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<sup>1</sup> This case was decided prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005, when the provision for damages was contained in § 362(h).

*v. Harchar (In re Harchar)*, 331 B.R. 720, 728 (N.D. Ohio 2005).

The affidavits of the Debtors demonstrate that they suffered embarrassment, humiliation, stress, strain to their marital relationship, and being reprimanded at work as a result of TEBO's wrongful retention of the Vehicle. Moreover, Sarah Twyford corroborated that Mrs. Zupp was so distressed on the telephone that she was unable to continue speaking and had to terminate a call because of such distress. (Twyford Aff. ¶ 9.) Debtors, without any attempt to substantiate the amount, request \$2,000.00 in non-economic damages for emotional distress. Emotional distress is extremely hard to quantify; however, because TEBO has made no attempt to dispute Debtors' allegation that they have suffered \$2,000.00 in emotional damages, the Court will award Debtors this amount.

### **C. Punitive Damages**

Debtors argue for imposition of punitive damages. The Court agrees that the circumstances of this case warrant the imposition of punitive damages, for the following reasons:

1. Sarah Twyford's affidavit states that Charles Jobes, on behalf of TEBO, stated that "he was in no hurry [to return the Vehicle to the Debtors] since they hadn't paid [TEBO]." (Twyford Aff. ¶ 3.)
2. Two days after the Petition Date, on May 26, 2010, TEBO filed a document styled Notice to Trustee (Doc. # 13), which purported to put the Chapter 13 Trustee on "notice"

that TEBO had "recovered" and was "holding in storage" the Vehicle "till further notice from the Court."

Despite the content of the Notice, TEBO failed to file a motion for relief from stay or any other motion that would trigger an order of the Court concerning the Vehicle. The Notice to Trustee was procedurally and substantively defective. TEBO's filing of the Notice - while willfully retaining possession of the Vehicle - appears to be an attempt to put the burden on the Chapter 13 Trustee to take some action to compel return of the Vehicle. TEBO's conduct in this regard is particularly troubling in light of the numerous requests by the Debtors for return of the Vehicle. In addition, TEBO filed an objection to confirmation of the Debtors' chapter 13 plan. Neither of these filings authorized TEBO to retain the Vehicle, which it did in violation of the automatic stay.

The docket in the Debtors' case clearly shows that TEBO had early notice of Debtors' bankruptcy filing and imposition of the automatic stay. TEBO is a sophisticated creditor that knows the impact and effect of the automatic stay. At the hearing on the Debtors' Motion, the only reason proffered by TEBO's counsel for failing to return the vehicle was TEBO's alleged confusion about whether the Debtors had filed a chapter 7 or a chapter 13 case. This confusion is belied by the fact that two days after the Petition Date, TEBO filed the Notice to Trustee, clearly marked as a chapter 13 case. Even if there was confusion, however, the automatic stay applies equally in chapter 7 and chapter 13 cases,

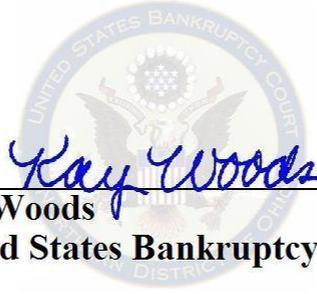
so any such confusion could not and does not justify TEBO's actions.

Debtors ask for "progressive" punitive damages, citing *In re Kortz*, 283 B.R. 706 (Bankr. N.D. Ohio 2002). Unlike the *Kortz* case, however, which involved escalating attempts to collect from the debtors, TEBO didn't escalate its actions, but rather continued to exercise control over the Vehicle. As a consequence, this Court does not find it appropriate to impose progressive punitive damages in the instant case. Instead, this Court will award punitive damages in the amount of \$3,800.00 (based on \$100.00 per day for each day TECO exercised control over the Vehicle in violation of the automatic stay).

An appropriate order will follow.

# # #

**IT IS SO ORDERED.**



**Dated: August 04, 2010  
04:43:58 PM**

**Kay Woods  
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO**

**IN RE:**

**GARY JOSEPH ZUPP and  
MARLENE ANN ZUPP,  
  
Debtors.**

\*  
\*  
\* **CASE NUMBER 10-41948**  
\*  
\* **CHAPTER 13**  
\*  
\* **HONORABLE KAY WOODS**  
\*

\*\*\*\*\*  
**ORDER AWARDING DAMAGES FOR WILLFUL VIOLATION OF STAY**  
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On July 2, 2010, this Court entered Order (i) Granting Motion for Turnover, and (ii) Setting Briefing Schedule ("Turnover Order") (Doc. # 41), which granted Motion to Enforce Automatic Stay & for Turnover Pursuant to the Provisions of the Bankruptcy Code (Doc. # 31) filed by the Debtors Gary Joseph Zupp and Marlene Ann Zupp on June 23, 2010. In the Turnover Order, this Court ordered (i) TEBO Financial Services, Inc ("TEBO") to return to the Debtors a 2001 Oldsmobile Alero; and (ii) the parties to brief the issue of damages to which the Debtors may be entitled as a result of TEBO's violation

of the automatic stay.

On July 12, 2010, the Debtors timely filed Memorandum in Support of Damages ("Damages Memo") (Doc. # 45), to which three affidavits were attached as exhibits. TEBO failed to respond to the Damages Memo.

For the reasons more fully stated in the Court's Memorandum Opinion Regrading Damages for Willful Violation of Stay entered this date, the Court hereby awards the Debtors:

- (i) \$2,863.75 in attorney's fees;
- (ii) \$2,000.00 in noneconomic damages; and
- (iii) \$3,800.00 in punitive damages.

The total damage award in favor of Debtors and against TEBO is \$8,663.75.

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