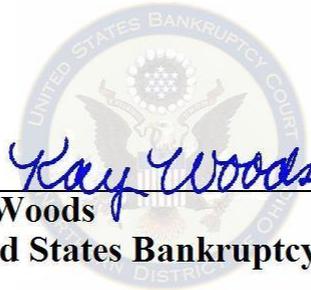


IT IS SO ORDERED.



Dated: April 25, 2011  
02:45:49 PM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

CHRISTOPHER J. HARRIS and  
JOYCE L. HARRIS,

Debtors.

\* \* \* \* \*

CHRISTOPHER J. HARRIS and  
JOYCE L. HARRIS,

Plaintiffs,

v.

SALLIEMAE, INC.,

Defendant.

CASE NUMBER 06-42128

ADVERSARY NUMBER 10-04065

HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING SALLIE MAE'S MOTION  
FOR SUMMARY JUDGMENT  
\*\*\*\*\*

This cause is before the Court on (i) Defendant Sallie Mae, Inc.'s Motion for Summary Judgment ("Motion"); (ii) Defendant Sallie

Mae, Inc.'s Statement of Uncontested Material Facts for Purposes of Summary Judgment ("Statement"); and (iii) Memorandum in Support of Defendant Sallie Mae, Inc.'s Motion for Summary Judgment ("Memo") (collectively, "Motion for Summary Judgment") (Doc. # 39) filed by Defendant Sallie Mae, Inc. ("Sallie Mae") on January 14, 2011.<sup>1</sup> On February 21, 2011, Debtors/Plaintiffs Christopher J. Harris and Joyce L. Harris filed Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Response") (Doc. # 49).<sup>2</sup> In reply, Sallie Mae filed (i) Defendant Sallie Mae, Inc.'s Reply Memorandum in Support of Motion for Summary Judgment ("Reply") (Doc. # 56) on February 25, 2011, and (ii) Defendant Sallie Mae, Inc.'s Supplemental Reply Memorandum in Support of Motion for Summary Judgment ("Supplement") (Doc. # 61) on March 8, 2011. On March 7, 2011, the Debtors filed Motion to Amend Memorandum in Opposition ("Motion to Amend") (Doc. # 59), which the Court granted on March 8, 2011.<sup>3</sup> For the reasons set forth herein, the Court will grant the Motion for Summary Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in

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<sup>1</sup> Attached to the Motion for Summary Judgment as Exhibit E was Affidavit of Brent E. Smith, Director of the Bankruptcy Litigation Unit for Sallie Mae, which was executed on October 8, 2010 ("Sallie Mae Affidavit"). (See Mot. for Summ J., Ex. E.)

<sup>2</sup> Attached to the Response as Exhibit A was Affidavit of Debtor Christopher J. Harris, which was executed on February 17, 2011 ("Harris Affidavit"). (See Resp., Ex. A.)

<sup>3</sup> The Court entered Order Granting Motion for Leave to Amend Memorandum in Opposition ("Order Amending Response") (Doc. # 60), which incorporated into the Response the case law cited by the Debtors in the Motion to Amend.

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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Main Case.**

On December 19, 2006, the Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code ("Petition Date"), which was denominated Case No. 06-42128 ("Main Case"). Debtor Christopher J. Harris had outstanding student loan debt on the Petition Date. (Harris Aff. ¶¶ 2-3.) The Debtors did not schedule any student loan debt or list Sallie Mae on Schedule F – Creditors Holding Unsecured Nonpriority Claims. (See Main Case, Doc. # 1.) On the Statistical Summary of Certain Liabilities and Related Data ("Statistical Summary"), the Debtors scheduled "Student Loan Obligations (from Schedule F)" in the amount of \$0.00. (Main Case, Doc. # 1, Stat. Summ.) Sallie Mae was not listed on the Debtors' Creditor Matrix. (See Main Case, Doc. # 1, Creditor Matrix.)

On August 22, 2007 – approximately eight months after the Petition Date – Mr. Harris executed Federal Family Education Loan Program (FFELP) Federal Consolidation Loan Application and Promissory Note ("Consolidation Loan"). (See Mot. for Summ. J., Ex. F.) The Consolidation Loan identified Educational Direct as the "Guarantor, Program, or Lender" and US Bank ELT Affinity Direct as

the "Consolidating Lender." (*Id.* at 1.) The Consolidation Loan was disbursed and transferred to Sallie Mae on or about January 22, 2008. (Sallie Mae Aff. ¶ 4; Statement ¶ 14.)

Prior to execution of the Consolidation Loan, on August 1, 2007, the Debtors filed an amended chapter 13 plan ("Amended Plan") (Main Case, Doc. # 33), which was confirmed on October 19, 2007 (Main Case, Doc. # 41). Sallie Mae was not included in the Amended Plan. On December 11, 2007, the Debtors filed a second amended chapter 13 plan ("Second Amended Plan") (Main Case, Doc. # 49). Notice of the Second Amended Plan was sent to Sallie Mae (see Second Am. Plan at 6), but Sallie Mae was not included in the Second Amended Plan (see *id.* at 1-3). On April 25, 2008, the Court entered Order Approving Amendment to Chapter 13 Plan (Main Case, Doc. # 64).

Prior to approval of the Second Amended Plan, on January 29, 2008, the Debtors filed an amended (i) Summary of Schedules; (ii) Statistical Summary of Certain Liabilities and Related Data ("Amended Statistical Summary"); (iii) Schedule I; and (iv) Schedule J (Main Case, Doc. # 55). On the Amended Statistical Summary, the Debtors again scheduled "Student Loan Obligations (from Schedule F)" in the amount of \$0.00. (Am. Stat. Summ.)

On February 4, 2008, Student Loan Funding – Sallie Mae Inc / GLELSI on behalf of Great Lakes Higher Education Guarantee Corp. filed Claim No. 16-1 ("Claim 16") in the amount of \$23,788.78 for "student loans(s)." (Claim 16 at 1.) Claim 16 stated that the student loan debt was incurred during the period December 30, 2002,

through April 5, 2005. (*Id.*) On that same date, Student Loan Marketing Assoc / GLELSI on behalf of Great Lakes Higher Education Guarantee Corp. filed Claim No. 17-1 ("Claim 17") (together with Claim 16, "Claims") in the amount of \$14,579.30 for "student loan(s)." (Claim 17 at 1.) Claim 17 stated that the student loan debt was incurred during the period July 20, 2005, through September 11, 2006. (*Id.*) Correspondence from Great Lakes Educational Loan Services, Inc. ("Great Lakes"), attached to the Claims, stated, *inter alia*, "We respectfully request that our Proof be allowed since our first notification of this bankruptcy was on February 4, 2008." (*Id.* at 3; Claim 16 at 3.)

On September 26, 2008, the Clerk of Court entered Notice of Transfer of Claim other than for Security ("Notice") (Main Case, Doc. # 73), which transferred the Claims from Great Lakes to Sallie Mae. The certificate of service attached to the Notice indicated that Great Lakes, but not Sallie Mae, was served with the Notice. (See Notice at 2.) On June 22, 2010, Sallie Mae withdrew the Claims because they were "submitted in error" (Main Case, Doc. # 79). Neither the Debtors nor any other party in interest objected to the Claims while they were pending.

The Debtors' bankruptcy case remains open. The Debtors' Second Amended Plan has not been completed and the Debtors have not yet received a discharge.

**B. Adversary Proceeding.**

On April 5, 2010, the Debtors filed Complaint Seeking Damages

in Core and Non-Core [sic] Adversary Proceeding for Violation of the Discharge Injunction [sic] and Federal Law ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding. The Debtors assert that Sallie Mae attempted to "collect a debt included in the debtors' bankruptcy" in violation of the automatic stay in 11 U.S.C. § 362. (Compl. ¶ 1.) The Complaint contains a single cause of action – willful violation of the automatic stay – and alleges that the "actions of [Sallie Mae] in this case, in seeking to collect payment in violation of the automatic stay by falsely and deceptively attempting to coerce the Debtors are in violation of 11 U.S.C. §362 entitling [the Debtors] to damages, attorneys fees and costs." (*Id.* ¶ 54.) On September 9, 2010, Sallie Mae filed Sallie Mae, Inc.'s Answer to Complaint Seeking Damages in Core and Non-Core Adversary Proceeding for Violation of the Discharge Injunction and Federal Law ("Answer") (Doc. # 12). Sallie Mae "denied that the debt to [Sallie Mae] is 'included' in the [Debtors'] bankruptcy case [or] that [Sallie Mae] violated the automatic stay." (Ans. ¶ 1.)

Sallie Mae filed the Motion for Summary Judgment on January 14, 2011.<sup>4</sup> Sallie Mae contends that it is "the holder of a post-petition debt only. Accordingly, communications from Sallie Mae seeking to collect the post-petition debt are not violations of the automatic stay . . . ." (Mot. ¶¶ 5-6.) Sallie Mae states, "The Consolidation Loan is a new loan and creates a new, post-petition

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<sup>4</sup> Sallie Mae moved for leave to file a motion for summary judgment (Doc. # 30), which the Court granted on December 17, 2010 (Doc. # 35).

debt. . . . The automatic stay has no application to debts incurred after a bankruptcy case is filed (except to the extent that the automatic stay prohibits efforts to take possession of, or exercise control over, property of the bankruptcy estate).” (Memo at 3-4.) Sallie Mae argues that § 362(a) does not prohibit actions to collect post-petition debts, such as the Consolidation Loan, and, thus, it could not have violated the automatic stay. (*Id.* at 4-5.) As a result, Sallie Mae argues that there is no genuine issue of material fact in the instant proceeding and that it is entitled to judgment as a matter of law. (Mot. ¶¶ 6-7.)

On February 21, 2011, the Debtors filed the Response,<sup>5</sup> which states that Sallie Mae violated the automatic stay in § 362 “by consolidating a pre-petition debt into a post-petition debt without court approval and relief from the automatic stay.” (Resp. at 1.) The Debtors also allege that Sallie Mae violated the automatic stay “by attempting to obtain possession of property of the estate through collection calls, threats to garnish, threats to intercept tax refunds, and acceleration of the [Consolidation Loan] and demand for payment in excess of \$45,000.” (*Id.*) In addition, the Debtors allege that Sallie Mae violated the automatic stay by failing to comply with 11 U.S.C. § 1305. In particular, the Debtors argue that Sallie Mae, as a post-petition creditor, was not permitted to receive payments for the Claims because Sallie Mae failed to seek

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<sup>5</sup> The Debtors were granted three extensions of time, until February 21, 2011, to respond to the Motion for Summary Judgment. (See Docs. ## 41, 46, 51.)

approval from the chapter 13 trustee prior to issuing the Consolidation Loan. (*Id.* at 2.) Finally, the Debtors contend that genuine issues of material fact remain regarding (i) Sallie Mae's participation in issuing the Consolidation Loan; (ii) Sallie Mae's knowledge of the Debtors' bankruptcy; and (iii) Sallie Mae's knowledge of the Claims. (*Id.*)

Sallie Mae filed its Reply on February 25, 2011. Sallie Mae asserts that its efforts to collect the Consolidation Loan – *i.e.*, contacting Mr. Harris to demand payment – did not constitute acts to obtain possession of or exercise control over property of the estate and, thus, did not violate the automatic stay in § 362(a)(3). (Reply at 3-6.) With respect to the solicitation and issuance of the Consolidation Loan, Sallie Mae avers that (i) Ed Direct,<sup>6</sup> not Sallie Mae, solicited Mr. Harris to execute the Consolidation Loan, as admitted by Mr. Harris, and (ii) Sallie Mae was not a pre-petition lender and, thus, the issuance of the Consolidation Loan could not be an improper attempt by Sallie Mae to collect a pre-petition debt. (*Id.* at 6-7.) Lastly, Sallie Mae contends that § 1305 is not relevant to whether Sallie Mae violated the automatic stay. (*Id.* at 9-10.)

Prior to the filing of Sallie Mae's Reply, on February 21, 2011, the Debtors filed Motion for Leave to Amend Plaintiffs' Complaint ("Motion for Leave") (Doc. # 50). The Court held a hearing on the Motion for Leave on March 3, 2011, at which appeared

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<sup>6</sup> Ed Direct is not a named defendant in the instant proceeding.

Philip D. Zuzolo, Esq. on behalf of the Debtors. Mr. Zuzolo represented to the Court that the causes of action and arguments that the Debtors wished to include in an amended complaint were, in fact, already contained in the Response. As a result, on March 4, 2011, the Court entered Order Denying Motion for Leave to Amend Complaint (Doc. # 57). Although the Court denied the Motion for Leave, the Debtors were not prejudiced because the causes of action and arguments contained in the Response were considered by the Court and are addressed by the Court in this Memorandum Opinion.

On March 8, 2011, the Court entered the Order Amending Response, which incorporated into the Response additional case law cited by the Debtors in the Motion to Amend. On that same date, Sallie Mae filed the Supplement in rebuttal to the case law cited in the Motion to Amend.

## **II. STANDARD FOR REVIEW**

The procedure for granting summary judgment is governed by Federal Rule of Civil Procedure 56(c), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7056. See FED. R. BANKR. P. 7056 (West 2010). Rule 56(c) states, in pertinent part, "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56 (West 2010). Accordingly, summary judgment is proper if there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if a rational trier of fact could find in favor of either party on the issue. *Id.* at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27, 30 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Anderson*, 477 U.S. at 248-49. In response to a proper motion for summary judgment, the nonmoving party must present evidence upon which a reasonable trier of fact could rule in its favor. *Id.* at 252. The evidence must be viewed in the light most favorable to the nonmoving party.<sup>7</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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<sup>7</sup> Because the Court must view the evidence in the light most favorable to the Debtors for purposes of the Motion for Summary Judgment, this Memorandum Opinion makes no findings of fact unless expressly so stated.

### III. LEGAL ANALYSIS

#### A. The Consolidation Loan Is a Post-Petition Debt.

The first issue before the Court is whether the Consolidation Loan is a pre-petition debt or a post-petition debt. The Debtors appear to acknowledge that the Consolidation Loan is a post-petition debt by alleging that Sallie Mae "violated the automatic stay by consolidating a pre-petition debt into a post-petition debt," but the Debtors fail to expressly concede that the Consolidation Loan is, in fact, a post-petition debt. (Resp. at 1 (emphasis added).)

In *Barrett v. Great Lakes (In re Barrett)*, 417 B.R. 471 (Bankr. N.D. Ohio 2009), the Bankruptcy Court for the Northern District of Ohio examined whether the post-petition consolidation of pre-petition student loans created a post-petition debt. Finding in the affirmative, the Bankruptcy Court reached the "widely applied" conclusion that the consolidation of student loan debt "effectuates a new debt for purposes of determining when a debt arose." *Id.* at 477-78.<sup>8</sup> The Bankruptcy Court compared loan consolidation to contract novation and stated, "[T]he Court can see no reason why the Debtor's consolidation of her student loans would not, as opposed to a modification, effectuate a novation, thereby giving rise to a postpetition debt." *Id.* at 477; see also *Rudnicki v. Southern College of Optometry (In re Rudnicki)*, 228 B.R. 179, 181 (B.A.P. 6th Cir. 1999) ("[C]onsolidation of [the debtor]'s loan extinguished the

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<sup>8</sup> Although the Bankruptcy Court analyzed student loan consolidation in the context of 11 U.S.C. § 727, its analysis is equally applicable in the instant proceeding.

original promissory notes . . . . When [the debtor] consolidated his student loans, he received a new loan from [the consolidating lender], the proceeds of which paid in full his original educational loans."); *Clarke v. Paige (In re Clarke)*, 266 B.R. 301, 307 (Bankr. E.D. Pa. 2001) ("[F]ederal consolidation loans are new agreements which discharge the liabilities of the old loans and create their own obligations.").

This Court adopts the thorough and persuasive reasoning of the Bankruptcy Court in *Barrett*. As a consequence, the Court finds that the Consolidation Loan, which was executed after the Petition Date, is, in fact, a post-petition debt.

**B. Sallie Mae Did Not Violate the Automatic Stay.**

Section 362(a) states, in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 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;

\* \* \*

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

11 U.S.C. § 362 (West 2010).

**1. Efforts to Collect the Consolidation Loan.**

The Debtors argue, "[S]hould this honorable Court determine that the consolidation loan is a post-petition debt the Defendants

[sic] actions were still in violation of §362(a)(3).” (Resp. at 3.) To establish a violation of the automatic stay in § 362(a)(3), “three elements must be shown: (1) a property interest is involved; (2) the property interest is estate property; and (3) there occurred either an act to obtain possession of the estate property or there existed an act to exercise control over estate property.” *Harchar v. United States (In re Harchar)*, 393 B.R. 160, 167 (Bankr. N.D. Ohio 2008), *aff’d* 435 B.R. 480 (N.D. Ohio 2010), (citing *Allentown Ambassadors, Inc. v. Northeast Am. Baseball, LLC (In re Allentown Ambassadors, Inc.)*, 361 B.R. 422, 440 (Bankr. E.D. Pa. 2007)).

“ “[T]he automatic stay does not prohibit the prosecution of an action against a debtor based upon a claim that arose after the filing of the bankruptcy petition.” *In re Shuman*, 122 B.R. 317, 318 (Bankr. S.D. Ohio 1990) (quoting *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 498 (Bankr. E.D.N.Y. 1986)). However, “the automatic stay . . . restrains postpetition creditors from taking action against ‘property of the estate’ . . . to collect their postpetition debts.” *Id.* (quoting *In re Woodall*, 81 B.R. 17 (Bankr. E.D. Ark. 1987)). Stated differently, the automatic stay in § 362(a)(3) “serves as a restraint only on acts to gain possession or control over property of the estate.” *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991). “Control, necessarily requires a creditor to exercise some authority or influence over the property in derogation of the estate. The degree of control necessary to rise to the level of a stay violation, however, is not

defined and has lead [sic] to a divergence of opinion on the issue." *Harchar*, 393 B.R. at 170 (emphasis added).

After thoroughly arguing that Sallie Mae's collection efforts were directed at property of the Debtors' estate (see Resp. at 3-6),<sup>9</sup> the Debtors summarily state, "In accordance with the applicable case law, the threats to intercept tax returns, garnish wages, and have the [Consolidation Loan] paid from the debtors [sic] income are clearly attempts to obtain possession and/or exercise control over property of the estate." (*Id.* at 6 (citing *Harchar*, 393 B.R. at 183-184).) The only case that the Debtors cite in support of their argument that Sallie Mae's collection efforts were acts to obtain possession of or exercise control over property of the estate is *Harchar v. United States (In re Harchar)*, 393 B.R. 160 (Bankr. N.D. Ohio 2008), *aff'd* 435 B.R. 480 (N.D. Ohio 2010). However, the holding in *Harchar* contradicts the Debtors' argument that Sallie Mae's collection efforts violated § 362(a)(3).

In *Harchar*, the debtors alleged that the IRS violated § 362(a)(3) by placing an administrative freeze on the debtors' tax refund for approximately four months while the IRS investigated the debtors' tax returns. The Bankruptcy Court for the Northern District of Ohio concluded that the tax refund was property of the debtors' estate, but found that the IRS did not attempt to obtain

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<sup>9</sup> Because the issue of whether Sallie Mae was attempting to collect property of the Debtors' estate, as opposed to property of the Debtors, is not dispositive in the instant proceeding, the Court will not address that issue and this Memorandum Opinion should not be construed as offering any guidance regarding that issue.

possession of or exercise control over property of the estate. The Bankruptcy Court stated:

Although some of the conduct of the IRS in performing this task cannot be termed laudable, it can hardly be said to constitute an act to exercise "control" over the property. The term "control," while broad in concept under § 362(a)(3), necessary [sic] requires some showing that the creditor sought to place the estate property beyond the reach of the creditor [sic].

*Id.* at 183 (citing *In re Bernstein*, 252 B.R. 846, 848 (Bankr. D.D.C. 2000)).

Much like the IRS in *Harchar*, Sallie Mae has taken no action to "obtain possession of" or "exercise control over" property of the Debtors' estate. Although the Debtors allege that Sallie Mae threatened to garnish wages and threatened to intercept tax refunds, the Debtors fail to allege that Sallie Mae actually took such action. (See Resp. at 1-2, 5-6.) The Debtors emphasize the Bankruptcy Court's statement in *Harchar* that "[g]iven their similarities, conduct giving rise to a stay violation under § 362(a)(3) carries with it the potential to give rise to a stay violation under § 362(a)(6), and vice versa." *Harchar*, 393 B.R. at 183-84. However, the Bankruptcy Court went on to state:

The opposite is also true; conduct which does not give rise to a stay violation under § 362(a)(3), will, in many instances, not be sufficient to sustain a cause for a stay violation under § 362(a)(6). . . . As a result, the following discussion will concentrate on that aspect of § 362(a)(6) which is unique from § 362(a)(3): its focus on protecting the debtor from collection activities.

*Id.* at 184 (emphasis added).

Section 362(a)(6) prohibits acts "to collect, assess, or

recover a claim . . . that arose before the commencement of the case.” 11 U.S.C. § 362 (West 2010). Section 362(a)(3)’s prohibition on acts to obtain possession of or exercise control over property of the estate notably is not limited to pre-petition claims. See *id.* As a consequence, Sallie Mae – a post-petition creditor – was permitted to engage in efforts “to collect, assess, or recover” the Consolidation Loan – a post-petition debt – so long as Sallie Mae did not attempt to obtain possession of or exercise control over property of the estate. The actions the Debtors argue violated § 362(a)(3) – *e.g.*, threatening to garnish wages, sending collection letters and accelerating the Consolidation Loan – do not constitute acts to obtain possession of or exercise control over property, regardless of whether such property was property of the Debtors’ estate. Significantly, Sallie Mae never took action to exercise authority or influence over any property. Accordingly, the Court finds that Sallie Mae’s efforts to collect the Consolidation Loan did not, as a matter of law, violate the automatic stay in § 362(a)(3).

## **2. Consolidation of Pre-Petition Debt.**

The Debtors next assert that Sallie Mae violated the automatic stay in § 362(a)(6) by “consolidating a pre-petition debt into a post-petition debt without court approval and relief from the automatic stay.”<sup>10</sup> (Resp. at 1, 7.) The Debtors contend that Sallie

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<sup>10</sup> The Debtors repeatedly accuse Sallie Mae of impropriety based on Sallie Mae’s alleged failure to request and obtain Court approval prior to soliciting and issuing the Consolidation Loan. However, it is the responsibility of the

Mae was required to "seek approval by the bankruptcy court or for [sic] relief from the automatic stay to pay off the pre-petition debt . . . ." (*Id.* at 8.) The Debtors do not cite any case law to support their argument that "paying off" a pre-petition debt constitutes an act to collect, assess or recover a pre-petition debt. Instead, in support of their position that issuing the Consolidation Loan violated § 362(a)(6), the Debtors state, "[Sallie Mae]'s position is that they [sic] can solicit a chapter 13 debtor to convert their [sic] pre-petition debt into a post-petition debt. [Sallie Mae] can then collect the debt with impunity without regard to . . . the automatic stay." (*Id.*)

Regardless of Sallie Mae's alleged role in issuing the Consolidation Loan,<sup>11</sup> the Debtors do not allege, and it is not disputed, that Sallie Mae was not the holder of Mr. Harris's pre-

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debtor – not the lender – to request and obtain court approval to acquire post-petition credit. See 11 U.S.C. § 364 (West 2010); FED. R. BANKR. P. 4001 (West 2010).

In addition, Mr. Harris casts wrongdoing on Sallie Mae by stating, "During the process, I was not advised that I would no longer be under bankruptcy protection by entering into consolidation. . . . I was also never told that Sallie Mae would be treating this [Consolidation Loan] as a post-petition debt and expect to be paid outside of my chapter 13 plan." (Harris Aff. ¶¶ 10-11.) What Mr. Harris fails to state is that Mr. Harris was represented by counsel during the time when the Consolidation Loan was solicited and issued. As a result, the Court finds that such statements are improper attempts by Mr. Harris to mischaracterize his own failures to seek advice from counsel and obtain Court approval to enter into the Consolidation Loan as a violation of the automatic stay by Sallie Mae.

<sup>11</sup> The record fails to support the Debtors' allegation that Sallie Mae was associated with issuing the Consolidation Loan. The Consolidation Loan itself identified Educational Direct as the "Guarantor, Program, or Lender" and US Bank ELT Affinity Direct as the "Consolidating Lender." (Mot. for Summ. J., Ex. F, at 1.) Furthermore, although Mr. Harris may "believe that Sallie Mae was associated with that solicitation for the [Consolidation Loan]" (Harris Aff. ¶ 4), nothing in the record supports this contention. In fact, Mr. Harris admits that he "was solicited by Ed Direct sometime around September 2007 to consolidate [his] student loans." (*Id.*)

petition student loan debt. (See Reply at 7 (“Sallie Mae was not a pre-petition lender . . . . The consolidation loan is the first debt, owed by [Mr. Harris], held by Sallie Mae.”).) Section 362(a)(6) operates as a stay against attempts to collect debts “that arose before the commencement of the case.” See 11 U.S.C. § 362 (West 2010). Because Sallie Mae was not the holder of the pre-petition student loan debt satisfied by the Consolidation Loan, Sallie Mae could not have violated the automatic stay in § 362(a)(6) by issuing the Consolidation Loan. Accordingly, the Court finds that Sallie Mae – a post-petition creditor – did not, as a matter of law, violate the automatic stay in § 362(a)(6).

**3. Violation of 11 U.S.C. § 1305.**

Finally, the Debtors argue that Sallie Mae violated the automatic stay because, pursuant to § 1305(c), “a post-petition creditor must obtain approval by the Court [sic] or be left with waiting until the chapter 13 is over to attempt to receive funds.” (Resp. at 8.) In particular, the Debtors contend that Sallie Mae was not permitted to receive payments for the Claims because Sallie Mae failed to request and obtain approval from the chapter 13 trustee prior to issuing the Consolidation Loan – a post-petition debt.

Section 1305 states, in pertinent part:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor–

\* \* \*

(2) that is a consumer debt, that arises after the

date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

\* \* \*

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

11 U.S.C. § 1305 (West 2010) (emphasis added).

The Court finds that the Debtors' reference to § 1305 and the Claims does not affect whether a violation of the automatic stay occurred. Section 1305, entitled "Filing and allowance of postpetition claims," has no bearing on pre-petition claims. See *id.* ("A proof of claim may be filed by any entity that holds a claim against the debtor . . . that arises after the date of the order for relief . . . .") Claim 16 was filed with respect to student loan debt incurred during the period December 30, 2002, through April 5, 2005 (Claim 16 at 1), and Claim 17 was filed with respect to student loan debt incurred from July 20, 2005, through September 11, 2006 (Claim 17 at 1). Because the Petition Date was December 19, 2006, the Claims were pre-petition claims and, thus, were not subject to § 1305.

Assuming, *arguendo*, that § 1305 has any application to the instant proceeding, § 1305(c) contains an internal remedy when a post-petition creditor knew or should have known that trustee approval was not obtained prior to the debtor incurring the post-petition debt – the claim "shall be disallowed." 11 U.S.C. § 1305

(West 2010). However, the Debtors never objected to the Claims. In fact, after the Debtors filed the instant adversary proceeding, Sallie Mae voluntarily withdrew the Claims and returned the funds received in association with the Claims to the chapter 13 trustee. (See Sallie Mae Aff. ¶ 10.)

The Debtors' argument that § 1305(c) rendered Sallie Mae "unable to collect this debt without seeking relief from the automatic stay" is baseless. As pre-petition claims, the Claims were not subject to § 1305. Furthermore, the Debtors never objected to the Claims. Accordingly, the Court finds that § 1305 has no bearing on Sallie Mae's alleged violation of the automatic stay.

**C. There Is No Genuine Issue of Material Fact & Sallie Mae Is Entitled to Judgment as a Matter of Law.**

Despite the Debtors' argument to the contrary, there is no genuine issue of material fact in the instant proceeding. The Debtors argue that genuine issues of material fact exist regarding (i) when Sallie Mae received notice of the Debtors' bankruptcy; (ii) Sallie Mae's role in soliciting and issuing the Consolidation Loan; and (iii) Sallie Mae's knowledge of the Claims. (Resp. at 2, 10-11.)

Because the Court concluded that, as a matter of law, the actions of Sallie Mae did not violate the automatic stay in § 362(a), whether Sallie Mae received notice of the Debtors' bankruptcy is not material. However, in an attempt to clarify the

record, the Court notes the following facts.<sup>12</sup> Despite the Debtors' statements to the contrary, Sallie Mae was not scheduled in the Debtors' Petition. (See Compl. ¶ 10 ("In Schedule F of [the Debtors'] petition, SallieMae [sic] was listed as a creditor with an approximate balance of \$39,000.")) As stated *supra* at 3, the Debtors did not schedule Sallie Mae on Schedule F or list Sallie Mae on the Creditor Matrix. (See Main Case, Doc. # 1, Sch. F and Creditor Matrix.) In addition, the Debtors scheduled "Student Loan Obligations (from Schedule F)" in the amount of \$0.00 on the Statistical Summary. (Stat. Summ.) According to the docket, Sallie Mae was first given notice of the Debtors' bankruptcy when the Debtors filed the Second Amended Plan on December 11, 2007.<sup>13</sup> (See Second Am. Plan at 6.) However, on January 29, 2008, the Debtors filed the Amended Statistical Summary, which continued to schedule "Student Loan Obligations (from Schedule F)" in the amount of \$0.00. (Am. Stat. Summ.) Thus, even if Sallie Mae received notice of the Second Amended plan, nothing on the docket would suggest to Sallie Mae that it was a creditor of the Debtors. Had the Debtors scheduled Sallie Mae as a creditor or scheduled Mr. Harris's student loan debt, it is possible that much of the alleged wrongdoing on the part of Sallie Mae would never have occurred. Instead, the Debtors

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<sup>12</sup> For purposes of the Motion for Summary Judgment, the Court must view the evidence in the light most favorable to the Debtors. However, the Court need not accept as true the Debtors' statements that directly contradict the Petition and Schedules, which the Debtors signed and filed under penalty of perjury.

<sup>13</sup> The Court offers no opinion as to whether Sallie Mae received actual notice of the Debtors' bankruptcy prior to the filing of the Second Amended Plan.

brought the instant adversary proceeding before the Court and now attempt to mischaracterize their own failures as misconduct on the part of Sallie Mae.

The Debtors also argue that Sallie Mae's role in soliciting and issuing the Consolidation Loan is disputed. Even assuming, *arguendo*, that Sallie Mae solicited and issued the Consolidation Loan, the Court found that such conduct could not, as a matter of law, have violated the automatic stay in § 362(a)(6). Accordingly, the alleged participation of Sallie Mae – which did not hold any pre-petition debt of the Debtors – in soliciting and issuing the Consolidation Loan is not material to the Motion for Summary Judgment.

Finally, the Debtors argue that Sallie Mae's knowledge of its receipt of payments for the Claims is disputed. The Court concluded that Sallie Mae's receipt of payments for the Claims, regardless of § 1305, did not, as a matter of law, violate the automatic stay. As a result, Sallie Mae's knowledge of the Claims and payment received for such Claims is not material to resolution of this adversary proceeding.

#### **IV. CONCLUSION**

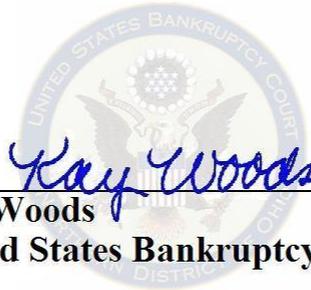
Sallie Mae has established and this Court finds that (i) the Consolidation Loan is a post-petition debt, having been executed on August 22, 2007 – approximately eight months after the Petition Date; (ii) the collection efforts of Sallie Mae – e.g., threatening to garnish wages, sending collection letters and accelerating the

Consolidation Loan – were not acts to obtain possession of property of the estate or exercise control over property of the estate; (iii) Sallie Mae was not the holder of a pre-petition debt when the Consolidation Loan was solicited or issued; and (iv) the Claims were pre-petition claims to which the Debtors never objected. These facts are sufficient to establish that, as a matter of law, Sallie Mae did not violate the automatic stay in § 362(a). As a consequence, the Court finds that there is no genuine issue of material fact and Sallie Mae is entitled to judgment as a matter of law. The Court will grant Sallie Mae’s Motion for Summary Judgment.

An appropriate order will follow.

# # #

IT IS SO ORDERED.



Dated: April 25, 2011  
02:45:49 PM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

CHRISTOPHER J. HARRIS and  
JOYCE L. HARRIS,

Debtors.

\* \* \* \* \*

CHRISTOPHER J. HARRIS and  
JOYCE L. HARRIS,

Plaintiffs,

v.

SALLIEMAE, INC.,

Defendant.

CASE NUMBER 06-42128

ADVERSARY NUMBER 10-04065

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER GRANTING SALLIE MAE'S MOTION FOR SUMMARY JUDGMENT  
\*\*\*\*\*

This cause is before the Court on (i) Defendant Sallie Mae, Inc.'s Motion for Summary Judgment; (ii) Defendant Sallie Mae, Inc.'s Statement of Uncontested Material Facts for Purposes of

Summary Judgment; and (iii) Memorandum in Support of Defendant Sallie Mae, Inc.'s Motion for Summary Judgment (collectively, "Motion for Summary Judgment") (Doc. # 39) filed by Defendant Sallie Mae, Inc. ("Sallie Mae") on January 14, 2011. On February 21, 2011, Debtors/Plaintiffs Christopher J. Harris and Joyce L. Harris filed Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. # 49). In reply, Sallie Mae filed (i) Defendant Sallie Mae, Inc.'s Reply Memorandum in Support of Motion for Summary Judgment (Doc. # 56) on February 25, 2011, and (ii) Defendant Sallie Mae, Inc.'s Supplemental Reply Memorandum in Support of Motion for Summary Judgment (Doc. # 61) on March 8, 2011. On March 7, 2011, the Debtors filed Motion to Amend Memorandum in Opposition (Doc. # 59), which the Court granted on March 8, 2011.

For the reasons set forth in this Court's Memorandum Opinion Regarding Sallie Mae's Motion for Summary Judgment entered on this date, the Court hereby finds:

- (i) There is no genuine issue of material fact;
- (ii) Sallie Mae did not violate the automatic stay in 11 U.S.C. § 362(a); and
- (iii) Sallie Mae is entitled to judgment as a matter of law.

As a consequence, the Court hereby grants Sallie Mae's Motion for Summary Judgment.

**IT IS SO ORDERED.**

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