**IT IS SO ORDERED.**

**Dated: May 25, 2012**
**02:17:17 PM**

Kay Woods
**Kay Woods**
**United States Bankruptcy Judge**

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

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| **IN RE:** | * | |
| **DAVID S. TWYFORD and KENDRA L. TWYFORD,** | * | **CASE NUMBER 08-43767** |
| **Debtors.** | * | |
| * * * * * * * * * * * * * * * * | * | |
| **KENDRA L. TWYFORD and DAVID S. TWYFORD,** | * | **ADVERSARY NUMBER 09-4307** |
| **Plaintiffs,** | * | |
| **v.** | * | |
| **ABSOLUTE COLLECTION SERVICE,** | * | **HONORABLE KAY WOODS** |
| **Defendant.** | * | |

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**MEMORANDUM OPINION REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT**
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This cause is before the Court on Motion for Partial Summary Judgment as to Liability for Violations of the Automatic Stay ("Motion") (Doc. # 45) filed by Debtors/Plaintiffs David S. Twyford

and Kendra L. Twyford on February 13, 2012. On February 27, 2012, Defendant Absolute Collection Service filed Defendant Absolute Collection Service, Inc.'s Reply to Motion for Partial Summary Judgment ("Response") (Doc. # 46). On March 5, 2012, the Plaintiffs filed Reply Brief in Support of Motion For Partial Summary Judgment as to Liability for Violations of the Automatic Stay (Doc. # 47). For the reasons that follow, the Court will grant the Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012-7) 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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

## I. PROCEDURAL AND FACTUAL BACKGROUND

### A. Procedural History

The Plaintiffs filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on December 19, 2008, and received a discharge on April 30, 2009 (Main Case, Docs. ## 1, 25). On September 25, 2009, the Plaintiffs filed Motion to Reopen Case (Main Case, Doc. # 29), which the Court granted on October 6, 2009 (Main Case, Doc. # 30). The Plaintiffs commenced the instant adversary proceeding on November 4, 2009, by filing Complaint Seeking Damages in Core and Non-Core Adversary Proceeding for Violation of the

Discharge Injunction and Federal Law ("Complaint") (Doc. # 1). The Complaint alleges three separate claims[1]: (i) willful violation of the automatic stay; (ii) willful violation of the discharge injunction; and (iii) violations of the Fair Debt Collection Practices Act. (Compl. at 5-6.) On February 5, 2010, the Defendant filed Defendant Absolute Collection Service, Inc.'s Answer and Affirmative Defenses (Doc. # 10). The Defendant's Answer contains general denials ands various affirmative defenses.

After various orders extending discovery deadlines were entered (Docs. ## 15, 18, 21), the discovery period concluded as of August 7, 2011 (Doc. # 32). On January 9, 2012, the Court granted the parties leave to file dispositive motions and set a briefing schedule.

**B. Facts**

As stated, *supra*, the Plaintiffs filed a voluntary petition on December 19, 2008. The Plaintiffs did not list any medical debts owed to Northside Medical Center or the Defendant. On February 26, 2009, the Plaintiffs filed Amended Schedule F, which listed a debt owed to the Defendant in the amount of $286.75 (Main Case, Doc. # 18 at 1) and a debt owed to WRCS (as a collection account for Northside Medical Center) in the amount of $893.50 (*id.* at 4).

## II. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R.

[1] Because the Motion seeks summary judgment with respect to the violation of the automatic stay only, the Court does not address the merits of the other counts of the Complaint.

CIV. P. 56(a), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a) (West 2012); *see also 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); *Tenn. Dept. of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (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 movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for

summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## III. ANALYSIS

Section 362 of the Bankruptcy Code, entitled Automatic Stay, "stops all collection activities related to the recovery of a prepetition debt against the debtor. The purpose of the stay is twofold: (1) to ensure the orderly liquidation of the debtor's bankruptcy estate; and (2) to provide the debtor with a breathing spell from the creditors' collection efforts." *In re Perviz*, 302 B.R. 357, 365 (Bankr. N.D. Ohio 2003).

Section 362(a) sets forth eight types of prohibited activities, including "(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(a)(6) (West 2012). Section 362(a)(6) applies here because the Defendant attempted to collect a debt incurred by the Plaintiffs prior to the filing of their bankruptcy petition. *See Ryan v. Ohio Edison Co.,* 611 F.2d 1170, 1175 (6th Cir. 1979) (finding that mailing letters and making phone

calls to a debtor violates the automatic stay if the purpose of such contact is to collect a prepetition debt).

Paragraph (k) of § 362[2] provides that "an individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k). "As used here, 'willful' does not require any specific intent to violate the stay. Rather, 'willful' has simply been interpreted to mean any intentional and deliberate act undertaken with knowledge – whether obtained through formal notice or otherwise – of the pending bankruptcy." *Perviz*, 302 B.R. at 365 (internal citations omitted). Further, "bankruptcy law only requires that a party receive actual notice which is defined as the type of notice that would cause a reasonably prudent person to make a further inquiry; formal notice is not required." *Id.* at 367-68.

In this case, on several occasions, the Plaintiffs notified the Defendant of the then-pending bankruptcy; however, despite having this information, the Defendant continued to contact the Plaintiffs in an attempt to collect prepetition debts. The Defendant states, "The essential legal question is whether Defendant's request for written confirmation of the Plaintiffs' bankruptcy is unreasonable." (Resp. at 2.) However, the Defendant misstates the legal standard

[2] Pursuant to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), § 362(k) now deals with the consequences of a violation of the automatic stay. 11 U.S.C. § 362 (West 2012). Prior to BAPCPA, the relevant section was § 362(h). 11 U.S.C. § 362 (West 2004).

for a willful violation of the automatic stay. The essential question is whether the Defendant's actions were willful – not whether the Defendant's actions were objectively unreasonable. The Defendant does not dispute that it: (i) had knowledge of the Plaintiffs' bankruptcy case number as of January 13, 2009; and (ii) had the name and phone number of the Plaintiffs' bankruptcy attorney as of January 14, 2009. (*See* Mot., Ex. 1, at 4.) After those dates – with knowledge of the Plaintiffs' bankruptcy case – the Defendant contacted the Plaintiffs, via phone, at least seven additional times.

While it is true that the Defendant was not originally listed as a creditor on the bankruptcy petition, the Plaintiffs amended their Schedule F on February 26, 2009 (Main Case, Doc. # 18), which was approximately forty (40) days after the Plaintiffs orally informed the Defendant of their pending bankruptcy case. The Court notes that the collection phone calls appear to have ceased once the schedules were amended, but the Defendant had actual notice of the Plaintiffs' bankruptcy case, within the meaning of § 362(k), prior to the amendment. Despite having actual notice of the Plaintiffs' bankruptcy no later than January 13, 2009, the Defendant continued its collection efforts. Such actual notice was sufficient to make the Defendant's contacts a willful violation of the automatic stay. *See Perviz, supra*, at 6.

## IV. CONCLUSION

The automatic stay was in place when the Defendant attempted

to collect prepetition debts from the Plaintiffs. The automatic stay protects debtors from attempts to collect prepetition debts, with § 362(a) of the Bankruptcy Code specifically prohibiting the actions taken by the Defendant in this case. The Plaintiffs put the Defendant on notice of their then-pending bankruptcy case. Despite having actual knowledge of the Plaintiffs' bankruptcy case, the Defendant continued to contact the Plaintiff regarding the prepetition debts. As a consequence, the Court finds that the Defendant willfully violated the automatic stay and will grant summary judgment to the Plaintiffs with respect to the Defendant's liability for willfully violating the automatic stay. An appropriate order will follow.

# # #

**IT IS SO ORDERED.**

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| **ABSOLUTE COLLECTION SERVICE,** | * | **HONORABLE KAY WOODS** |
| **Defendant.** | * | |

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**ORDER (i) GRANTING PARTIAL SUMMARY JUDGMENT AND**
**(ii) SETTING FINAL PRE-TRIAL**

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This cause is before the Court on Motion for Partial Summary Judgment as to Liability for Violations of the Automatic Stay

("Motion") (Doc. # 45) filed by Debtors/Plaintiffs David S. Twyford and Kendra L. Twyford on February 13, 2012. On February 27, 2012, Defendant Absolute Collection Service filed Defendant Absolute Collection Service, Inc.'s Reply to Motion for Partial Summary Judgment ("Response") (Doc. # 46). On March 5, 2012, the Plaintiffs filed Reply Brief in Support of Motion For Partial Summary Judgment as to Liability for Violations of the Automatic Stay (Doc. # 47). For the reasons set forth in the Memorandum Opinion, entered on this date, the Court will grant the Motion.

A final pre-trial in this matter is set for Tuesday, June 19 at 9:30 a.m. at which time the parties as well as their counsel, shall be prepared to provide the Court with: (i) the estimated time trial will take; (ii) the number of witnesses that will be called and their identity; (iii) the number and identity of exhibits that each party intends to introduce and any other information necessary for the Court to be able to schedule a trial on the calendar.

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