SO ORDERED.
SIGNED this 30th day of July, 2019

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

WILLIAM JAMES FRAZER

Debtor

Case No. 3:17-bk-30764-SHB
Chapter 13

MEMORANDUM AND ORDER ON MOTION FOR CONTEMPT AGAINST CARRINGTON MORTGAGE SERVICES, LLC AS SERVICING AGENT FOR BANK OF AMERICA

Hindsight is 20-20, but a creditor may not turn a blind eye without investigating nonsensical automated systems.

This contested matter is before the Court on the Motion for Contempt Against Carrington Mortgage Services, LLC as Servicing Agent for Bank of America ("Motion for Contempt") filed by Debtor on January 22, 2019 [Doc. 42], asking the Court to hold Carrington Mortgage Services, LLC ("Carrington") in contempt for willfully violating the automatic stay and to award actual and punitive damages together with legal fees and expenses incurred to file and prosecute the Motion for Contempt. Carrington filed its Opposition to Motion for Contempt Against

Carrington Mortgage ("Response"). [Doc. 43.] On May 22, 2019, the Court held an evidentiary hearing on the Motion for Contempt and Response. The record before the Court consists of nineteen exhibits admitted into evidence together with the testimony of Debtor and Tyrone Cogshell, a case manager with Carrington.

The issue before the Court can be distilled to this: Does a creditor violate the automatic stay when its automated system places numerous collection calls to a debtor in bankruptcy concerning not the debtor's account but the account of another for which the debtor's phone number was listed, when the creditor delays investigating the reason for the repeated calls after being notified of the calls by the debtor and debtor's counsel? The answer is yes – when the creditor fails to act reasonably and diligently in light of the circumstances, the automatic stay is violated notwithstanding that the creditor was not intending to collect on the debtor's account.

I. FINDINGS OF FACT

Carrington admits that calls were made to Debtor's home phone number, but because they were not calls concerning Debtor's account, Carrington argues that the calls did not violate the automatic stay. [Doc. 43 at ¶ 6.] The following facts are undisputed. Debtor commenced this Chapter 13 case on March 16, 2017, and notice was provided to all creditors, including Bank of America, N.A., the holder of a secured claim in the amount of $118,257.03 as reflected by the proof of claim filed on May 30, 2017 [Tr. Ex. 3; Doc. 49 at ¶¶ 2-3]. Bank of America, N.A. subsequently transferred its servicing rights for Debtor's claim to Carrington as its servicing agent.[1] [Tr. Ex. 4; Doc. 49 at ¶ 5.]

In September 2018, Debtor, who suffers from a number of health issues including post-

[1] Pursuant to the Order Confirming Chapter 13 Plan ("Confirmation Order") entered on May 10, 2017 [Doc. 27; Doc. 49 at ¶ 2], the Chapter 13 Trustee has made monthly maintenance payments and monthly cure installments on the $9,105.75 arrearage owed to Carrington as of the petition date to Carrington. [See Ex. Tr. Ex. 5.]

traumatic stress disorder, depression, and high blood pressure, began receiving automated collection calls from Carrington to his unpublished land-line telephone number. He testified that he picked up on the first six or so "robocalls" and was required to provide personal information to get through the automation to speak to an individual in the collection department or to speak with a supervisor.[2] Additionally, he did not answer a number of calls, and messages were left on his answering machine stating, "Your friendly brokers at Carrington need to talk to you about your account;" however, none of the messages referenced Debtor's name or his loan number.

On October 8, 2018; December 22, 2018; and January 11, 2019, Debtor provided his attorney with listings of the calls he had received. [*See* Tr. Ex. 6.] On October 9, 2018, Debtor's attorney notified Carrington's counsel of record in this case that Debtor was receiving the calls, requested that the calls stop, and advised that a motion for contempt would be filed if the calls did not stop. [Tr. Ex. 7.[3]] Debtor's counsel received a reply email from Carrington's counsel dated October 17, 2019, advising, "We have advised the client of the continued collection calls and I offer my sincere apologies on Carrington's behalf. I received confirmation from Carrington that Mr. Frazer's number has been updated so that it is kept out of the dialer. Thank you for reaching out to us so that we could advise our client of the severity of this problem." [Tr. Ex. 8.]

[2] Debtor testified that he actually spoke with Carrington employees seven times. The first four times, he spoke with random collection agents, and twice he spoke with supervisors. Each time he spoke with a representative of Carrington, Debtor advised that he was in bankruptcy and provided his case number, and each time he was advised that the problem would be fixed.

[3] The letter to Carrington's counsel was mailed as well as emailed. [*See* Tr. Ex. 7.]

When the calls continued after October 17,[4] Debtor's counsel once again notified Carrington's counsel, by email dated October 26, 2018, that Debtor was "still getting collection calls on this mortgage loan." [Tr. Ex. 9.] When over the next three months, the calls did not stop,[5] Debtor filed the Motion for Contempt. Since Debtor filed the Motion for Contempt on January 22, 2019, Carrington has finally stopped calling Debtor's number.

Carrington acknowledges that its system, in fact, made automated calls to Debtor's phone number; however, the calls were intended for another customer as Debtor's phone number was mistakenly reflected on the other account. [*See* Tr. Ex. 12.] At the evidentiary hearing, Mr. Cogshell testified that while investigating Debtor's account ("Account xxxx6446") after the Motion for Contempt was filed, he discovered that the calls made to Debtor's phone number were made in connection with another customer's unrelated account ("Account xxxx1927"), upon which Debtor's home telephone number was associated. Although Account xxxx1927 belongs to Debtor's step-daughter and her husband (who do not and have not lived with Debtor), Mr. Cogshell testified that Debtor is not a co-signer on the note and is not in any way obligated to Carrington on Account xxxx1927, which Carrington started servicing in April 2015. Mr. Cogshell also confirmed that Carrington's records reflect that all calls made to Debtor's telephone number during the pendency of his bankruptcy case related solely to Account xxxx1927. [*See* Exs. 13, 14.] He testified that Carrington's records as of January 31, 2019, reflect that Debtor's number was removed from Account xxxx1927, and that the records also reflect no record of Debtor's phone number having been added to Account xxxx1927 in the two

[4] Debtor's record of the calls indicates that after the October 17 response from Carrington's counsel to Debtor's counsel, Debtor received a flurry of calls from Carrington on October 18, 19, 20, 22, 24, and 25. [*See* Tr. Ex. 6.]

[5] Debtor documented three additional calls after the October 26 email from Debtor's counsel to Carrington's counsel. [*See* Tr. Ex. 6.]

years preceding January 31, 2019. [Tr. Ex. 15 ("No record in 2 year history of this [telephone number] being added to this loan.").] Finally, Mr. Cogshell testified that in his approximate ten years of experience in the industry, he has not encountered a situation such as this, when two unrelated accounts have shared the same phone number.

Debtor spoke with Carrington representatives on at least two occasions, according to Carrington's own records. [*See* Tr. Ex. 16.] Both Debtor and Mr. Cogshell testified that Debtor was required to input his account number to reach a live representative after receiving an automated call. On questioning by the Court, Mr. Cogshell admitted that Carrington could have used its own computer systems to search for Debtor's telephone number, given that Debtor's account reflected that his number had already been removed from the auto-dialer. That is, it would have taken from thirty seconds to one hour to research Debtor's number to discover that the robocalls concerned another account to which Debtor's telephone number was associated. Nonetheless, the problem was not cured until after Debtor filed the Motion for Contempt.

II. CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 362(a)(3) and (a)(6), the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . 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[] and/or any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." In other words, creditors are enjoined from sending letters or engaging in informal contact with debtors, including telephone calls. *Colo. E. Bank & Tr. v. McCarthy (In re McCarthy)*, 421 B.R. 550, 565 (Bankr. D. Colo. 2009). In the event a willful violation of the stay occurs – i.e., when "the creditor knew of the stay and violated the stay by an intentional act," *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999) –

the injured party "shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may additionally recover punitive damages." 11 U.S.C. § 362(k)(1).

> A specific intent to violate the stay is not required, or even an awareness by the creditor that [its] conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional. Satisfying these requirements itself creates strict liability.[6] There is nothing more to prove except damages.

Bankers Healthcare Grp., Inc. v. Bilfield (In re Bilfield), 494 B.R. 292 (Bankr. N.D. Ohio 2013) (quoting *In re Daniels*, 206 B.R. 444, 445 (Bankr. E.D. Mich. 1997)); *see also In re Waldo*, 417 B.R. 854, 891 (Bankr. E.D. Tenn. 2009).

Carrington argues that it did not violate the automatic stay because even though it placed automated calls to Debtor's phone number, it was not calling Debtor or attempting to collect a debt from Debtor so that any calls made to Debtor's telephone number by mistake were not an intentional "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). The Court disagrees and finds that once Debtor made Carrington aware of the problem, Carrington was under an affirmative obligation to investigate and stop any calls being made to Debtor's home telephone number, irrespective of whether the calls were being made on Debtor's account. Such an investigation seems patently reasonable under the circumstances.

First, it is undisputed that at least sixteen calls were made to Debtor's phone number from Carrington between September 2018 and January 2019. It is also undisputed that Debtor spoke

[6] The Supreme Court recently declined to decide whether the text of § 362(k) "supports a standard akin to strict liability." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804 (2019). The Court, however, noted that "the automatic stay provision uses the word 'willful,' a word the law typically does not associate with strict liability but '"whose construction is often dependent on the context in which it appears."'" *Id.* The Court's decision here is not dependent on application of a strict-liability standard. Instead, as explained below, the Court finds that Carrington's failure to investigate timely the repeated robocalls was objectively unreasonable under the circumstances.

with a Carrington representative at least twice by entering prompts when he received robocalls. When Debtor spoke with Carrington representatives, they could see that Debtor's account already reflected his bankruptcy. Moreover, according to Mr. Cogshell and trial exhibit 13 (which is a call log for the automated calls made to Debtor on Account xxxx1927), a Carrington representative could have queried a call log on Debtor's account to see that it reflected no automated calls. The next logical step of a reasonable investigation into the matter would have been to reverse search in Carrington's system on Debtor's telephone number. Such an investigation might have taken as little as thirty seconds, according to Mr. Cogshell. Thus, Carrington's failure to act reasonably to investigate the source of and end the automated calls resulted in harassing and intentional acts that were willful stay violations.

"[W]illfulness does not refer to the intent to violate the automatic stay, but the intent to commit the act which violates the automatic stay." *Lofton v. Carolina Fin. LLC (In re Lofton),* 385 B.R. 133, 140 (Bankr. E.D.N.C. 2008) (citations omitted) (finding that the creditor bank did not "have proper procedures in place, for a bank of its size, which regularly collects debts and receives bankruptcy notices . . . [and if it had] . . . the phone calls to the Debtor would not have been as numerous"), *cited with approval in In re Stringer*, 586 B.R. 435, 443 n.6 (Bankr. S.D. Ohio 2018). Acts that "by their nature constitute efforts to collect debts . . . are not excused simply because they were mistakenly pursued." *In re Jones*, 367 B.R. 564, 569 (Bankr. E.D. Va. 2007). As the Bankruptcy Court for the Western District of Virginia held, even if a statement was sent by "mistake" – or, in this case, sixteen phone calls were made by mistake – the creditor "clearly intended" to take the action it took. *In re Tucker*, 526 B.R. 616, 621 (Bankr. W.D. Va. 2015) (finding that damages did not flow from the technical violation because "[i]mmediately after [the creditor] became aware of this error, the mail code was corrected to prevent any further

mortgage billing statement or other collection notices from being mailed to the Debtor").

Furthermore, "[a] creditor's good faith belief that its intentional actions did not violate the automatic stay is not a defense to a § 362(k) action." *Springer v. RNBJ RTO LLC (In re Springer),* Adv. No. 16-3007, 2017 WL 3575859, at *3 (Bankr. W.D. Ky. Aug. 16, 2017) (citing *TranSouth Fin. Corp. v. Sharon (In re Sharon),* 234 B.R. 676, 688 (B.A.P. 6th Cir. 1999)). A creditor is obligated to "restore the status quo and undo its previous actions which violated the stay," *In re Banks*, 253 B.R. 25, 31-32 (Bankr. E.D. Mich. 2000) (citations omitted), and "[f]ailure to take affirmative action to undo an innocent violation of the automatic stay . . . may constitute a willful violation." *Mitchell Constr. Co., Inc. v. Smith (In re Smith),* 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995); *see also Henson v. Bank of America, N.A. (In re Henson),* 477 B.R. 786, 788 (Bankr. D. Colo. 2012) ("[A] creditor who has taken an action that has set a course of action in motion may be required to take affirmative steps to stop the proceeding.").

Mr. Cogshell testified that even though it would have taken only thirty second to one hour to fully research why Debtor was receiving the calls, he could not state why Carrington did not research the problem until after the Motion for Contempt was filed. The Court can easily determine that this objectively unreasonable inaction by Carrington constitutes the same sort of omission or failure to affirmatively act to support a finding of willfulness under § 362(k).

III. ACTUAL DAMAGES

Because Carrington did not take affirmative action to research and remedy its mistake even after communication with Carrington by Debtor's counsel and acknowledgement by Carrington's counsel of the "severity of th[e] problem," and the automated calls to Debtor continued until after the Motion for Contempt was filed, the Court finds that at least the calls following October 26, 2019 (i.e., the date of Debtor's counsel's second contact with Carrington's

counsel about continuing calls) were willful stay violations. As a result, pursuant to §362(k)(1), Debtor is entitled to actual damages, including costs and attorneys' fees. Debtor testified that he incurred mileage costs totaling $85.02[7] for trips to his attorneys' office four times (a thirty-two-mile round-trip) and one trip to the court (a twenty-eight-mile round-trip), and he paid $10.00 to park on the day of the damages hearing. Debtor also testified that he incurred attorneys' fees and expenses for filing and prosecuting the Motion for Contempt. Debtor's counsel will be required to submit an affidavit of fees and expenses incurred.

IV. PUNITIVE DAMAGES

Section § 362(k)(1) authorizes the Court to award punitive damages for willful stay violations in appropriate cases. The following non-exhaustive list of factors are often considered when determining the appropriateness and amount of punitive damages: (1) the nature of the creditor's conduct; (2) the nature and extent of harm to the debtor; (3) the creditor's ability to pay damages; (4) the level of sophistication of the creditor; (5) the creditor's motives; and (6) any provocation by the debtor. *See Henderson v. Auto Barn Atlanta, Inc. (In re Henderson),* Adv. No. 09-5114, 2011 WL 1838777, at *9 (Bankr. E.D. Ky. May 13, 2011). Courts also "consider 'the degree of reprehensibility' of the conduct [as well as] 'the disparity between the harm or potential harm suffered . . . and [the] punitive damages award.'" *In re Johnson*, 580 B.R. 766, 801 (Bankr. S.D. Ohio 2018) (quoting *Bavelis v. Doukas (In re Bavelis)*, 571 B.R. 278, 326 (Bankr. S.D. Ohio 2017) (second alteration in original)).

Notwithstanding Carrington's inaction to remedy its mistake, based on the unique circumstances of this case as well as the fact that Carrington was making legitimate calls on a legitimate account and Mr. Cogshell testified that he has never encountered this problem in the

[7] The total mileage expense is computed by multiplying 156 miles by the standard mileage rate of 54.5 cents per mile.

past (nor has the Court seen a situation with even remotely similar facts), the Court finds that punitive damages are not appropriate.

V. ORDER

For the foregoing reasons, the Court directs the following:

1. Having found that Carrington willfully violated the automatic stay, the Motion for Contempt filed by Debtor on January 22, 2019 [Doc. 49], is GRANTED.

2. As a result of Carrington's repeated willful violations of the automatic stay, Debtor is entitled to actual damages, including $85.02 for mileage and $10.00 for parking expenses incurred, as well as attorneys' fees and expenses incurred for filing and prosecuting the Motion for Contempt.

3. Debtor's counsel, no later than August 16, 2019, shall submit an affidavit of fees and expenses incurred from October 26, 2019 through the preparation of the fee affidavit.

4. Should Carrington desire to respond to the affidavit of fees, it may do so no later than August 30, 2019.

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