

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE: CASE NO. 04-62538)
ANITA NICOLE THOMAS)
)
Debtor)
*****)
ANITA NICOLE THOMAS)
)
Plaintiff)
)
CHRYSLER FINANCIAL CORP.)
)
Defendant)

ADV. PROCEEDING NO. 04-6217

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION

I

Statement of Proceedings

This Adversary Proceeding came before the Court on August 5, 2005 for a hearing on the Motion filed by the Chapter 13 Debtor and Plaintiff Anita Nicole Thomas ("Plaintiff") on March 15, 2005 for the entry of a default Judgment versus the Defendant Chrysler Financial Corporation ("Defendant").

The Plaintiff appeared by Attorney Hawkins.

The Defendant appeared by Attorney Hamady.

Submitted. Evidence and arguments heard.

II

Findings of Fact

A

Judicial Notice of Record in the Main
Chapter 13 Case of the Plaintiff-Debtor,

Case No. 04-62538 and Findings
of Fact Based on Judicial Notice

The Court hereby takes judicial notice of the record in the main Chapter 13 Case filed by the Plaintiff, Case No. 04-62538.¹

The Plaintiff filed her Chapter 13 Petition on May 21, 2004. The Plaintiff filed a Verified Creditor Matrix on May 21, 2004 and listed the Defendant as a creditor with an address of Post Office Box 5055, Southfield, MI 48086.

The Plaintiff also filed a Schedule D-Creditors Holding Secured Claims on May 21, 2004, listing the Defendant with an address of Post Office Box 5055, Southfield, MI 48086. Schedule D states that the Defendant held a Security Agreement as to the Plaintiff's 2001 Dodge Durango valued at \$14,850.00, that the amount of the Defendant's secured claim was \$24,575.00, and that the Defendant was unsecured in the amount of \$11,067.50.

¹ Federal Rule of Bankruptcy Procedure 9017 provides that the Federal Rules of Evidence apply in cases under the Code. See also, Fed. R. Evid. 1101(a) and (b). Federal Rule of Evidence 201 provides that the Court, whether or not requested, may take judicial notice of adjudicative facts stage of the proceedings. Federal rule of Evidence 201 is the only evidentiary rule on the subject of judicial notice.

This Court has held in In re Snider Farms, Inc., 83 B.R. 977, 986 (Bankr. N. D. Ind. 1988), citing, In re Woodmar Realty, 294 F.2d 785, 788 (7th Cir. 1961), cert. den. 369 U.S. 803, 82 S. Ct. 643, 7 L.Ed.2d 5550 (1962), that a bankruptcy court is duty bound to take judicial notice of its records and files. See Friedlich v. Mottaz, 294 F.3d 864, 70 (7th Cir. 2002) (bankruptcy judge did not err by taking judicial notice of schedules filed by debtor in main case in §548(a)(1) adversary proceeding)/ State of Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975) (not error for a bankruptcy court to take judicial notice of related proceeding and records in cases before a court); In re E. R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989) (the Court may take judicial notice of the file and record in the underlying case). See also Green v. Warden, U. S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983) (a Court may take judicial notice of its own court documents and records).

The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of the contents of any such document for the purposes of making a finding of fact. However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions, or exhibits thereto. They are evidentiary admissions. In re Cobb, 56 B.R. 440, 442 n. 3 (Bankr. N. D. Ill. 1985). See Fed. R. Evid. 801(d)(2) (admission by a party opponent not hearsay). See, e.g. In re Habiballa, 337 B.R. 911, 917 (Bankr. E.D. Wis. 2006), In re Smith, 325 B.R. 498, 503 Bankr. D. N. H. 2005), Larson v. Groos Bank, NA, 204 B.R. 500, 502 (1996), In re Leonard, 151 B.R. 639, 643 (Bankr. N.D. N.Y. 1992), In re Davis, 108 B.R. 95, 99 (Bankr. D. Md. 1989).

The Plaintiff also filed a Chapter 13 Plan on May 21, 2004 which provided at Par. 8 that the Defendant would have an allowed secured claim of \$14,850.00 payable at the rate of \$309.00 a month for 48 months. The Clerk on May 28, 2004 issued a Notice of Chapter 13 Case, Meeting of Creditors and Deadlines on May 28, 2004, ("Notice") attaching a copy of the Plan filed by the Plaintiff.

On June 4, 2004, EPI filed its Certificate of Service declaring under the Penalties of Perjury that the Notice and the Plaintiff's Plan were served by it on the Defendant on June 1, 2004 at the address listed on the Plaintiff's verified matrix and Schedule D, i.e. P. O. Box 5055, Southfield, MI 48086

The record reveals that the Notice to the Defendant was not returned as undeliverable for an incorrect address or for any other reason. No notice or motion was filed by the Defendant with the Court that the address listed for the Defendant by the Plaintiff on her Verified Creditor Matrix was incorrect.

There was no objection filed to the Plaintiff's Plan by the Defendant, and on August 25, 2004 the Court entered an Order Confirming the Plaintiff's Plan upon recommendation of the Chapter 13 Trustee. At the time of the Confirmation hearing, the Court was not aware that the Plaintiff still had a Chapter 7 case pending. The Defendant never filed a Motion to set aside the Confirmation Order based on a lack of or improper Notice of the Plaintiff's Chapter 13 Petition, and the Notice of Chapter 13 Case setting out the deadline to object to the Plan and to file a claim.

The Claims Register maintained by the Clerk shows that no claim was ever filed by the Defendant versus the Plaintiff's Chapter 13 Estate, and that neither the Plaintiff or the Trustee filed a Claim on behalf of the Defendant as permitted by Fed. R. Bk. P. 3004.

The Trustee on January 3, 2007 filed his Final Report and Account as to the Plaintiff's main Case which shows that no disbursements were made to the Defendant by the Trustee pursuant to the Plaintiff's Confirmed Plan, showing a Claim Classification for the Defendant of "Ignore," i.e. no Plan

payments by the Plaintiff could be distributed to the Defendant by the Trustee as the Defendant had not filed a claim. The Trustee's Final Report and Account also states that the Plaintiff never made any Plan payments to the Trustee for the benefit of the Defendant as provided for by her Confirmed Plan. The Court also takes judicial notice that the Plaintiff's Schedule I - Current Expenditures of Individual Debtors, did not provide for any direct payments from the Plaintiff to the Defendant as to its allowed secured Claim. Thus, the Defendant has never received any Plan payments on its security interest in the Plaintiff's motor vehicle pursuant to the Plaintiff's Confirmed Plan.

The Court on February 6, 2006 entered an Order granting the Debtor a discharge pursuant to §1328, which purportedly discharged the Plaintiff's in personam a debt to the Defendant,² but did otherwise void the Defendant's in rem Lien or Security interest in her Motor Vehicle, except to the extent that the Defendant's Lien or Security Interest was modified or "cramed down" by the Plaintiff's Confirmed Plan pursuant to §1322(b)(2), §1325(a)(5), and §1327. As observed previously, the Plaintiff's Confirmed Plan provided that the amount of the Defendant's Security Interest in the motor vehicle would be the principal sum of \$14,850.00, payable with interest at the rate of 3% per annum, at the rate of \$309.00 per month.

B.

Judicial Notice of the Record in
the Plaintiff's Prior Chapter 7 Case
Filed Under Case No 04-61634
and Findings of Fact Based
Thereon

The Court takes judicial notice of the record of the prior Chapter 7 Case filed under Case No. 04-61634 filed by the Plaintiff. The Plaintiff filed this Case on April 7, 2004. The Matrix, or List of Creditors

² Because the Debtor had already received a discharge on July 19, 2004 in her prior Chapter 7 Case No. 04-61634, wherein the Defendant was scheduled as a Creditor, the purported Discharge subsequently granted to the Plaintiff as to her in personam debts in her Chapter 13 Case was a mere surplusage, as to the Plaintiff's personal liability to the Defendant.

filed by the Plaintiff listed the Defendant with an address of P.O. Box 5055, Southfield, MI 48086. The Plaintiff's Schedule D-Creditors Holding Secured Claims, also listed Defendant with an address of P.O. Box 5055, Southfield, MI 48066, and stated the Defendant had a security interest in the Plaintiff's 2001 Dodge Durango motor vehicle with a value of \$13,507.50 and a claim in the amount of \$24,575.00.

The Defendant appeared by counsel on April 13, 2004 and filed its Motion for Stay Relief and to Abandon the 2001 Durango Motor Vehicle, which is the subject of the present Adversary Proceeding. The Motion alleged that the Debtor had a valid security interest therein, that the Plaintiff was indebted to the Defendant in the principal sum of \$24,232.80 plus interest, that the Plaintiff had no equity in said vehicle, and should be abandoned by the Chapter 7 Trustee.

The Chapter 7 Trustee did not object to this Motion. However, on April 23, 2004, the Plaintiff filed her combined Objection to the Defendant's Motion and a Motion to Redeem the motor vehicle for the Sum of \$14,850.00 pursuant to §722 and Fed. R. Bk. P. 6008.

On April 23, 2004 the Plaintiff and the Defendant filed their Agreed Order of Redemption as to the subject motor vehicle. The Agreed Order fixed the amount of the Defendant's Secured Claim for redemption purposes at \$14,850.00, and provided that the Plaintiff could redeem said motor vehicle by paying the Defendant the redemption amount on or before the thirtieth (30th) day following the entry of the Agreed Order, and upon the failure of the Debtor to pay said sum, the automatic stay would automatically terminate. The Court approved this Agreed Order on April 27, 2004, and thus the Plaintiff had until May 27, 2004 to redeem the motor vehicle.

On April 28, 2007 the Plaintiff withdrew her Objection to the Defendant's Motion for Stay relief and to Abandon, and on May 10, 2007 the Court granted the Defendant's Motion. Thus, as of May 10, 2007, the motor vehicle was no longer property of the Plaintiff's Chapter 7 estate. However, the Order Terminating the Stay and Abandonment expressly stated it was subject to the Plaintiff's rights of redemption pursuant to the Court's Order of Redemption entered on April 27, 2004.

The Chapter 7 Trustee on May 12, 2004 filed his "No Asset" report, and on July 19, 2004 an Order was entered granting the Plaintiff a Chapter 7 Discharge. The case was closed on July 23, 2004.

It is noted that the Plaintiff filed her Chapter 13 Petition in her presently pending case under Case No. 04-65238 on May 21, 2004, or just six (6) days before the last day for the Plaintiff to redeem the motor vehicle pursuant to the Agreed Redemption Order entered on April 27, 2004 in the Defendant's prior Chapter 7 Case No. 04-61634, i.e. May 27, 2004. In addition, since the Plaintiff filed her Chapter 13 Petition in the present Case No. 04-65238 on May 21, 2004 that Petition was filed before she obtained her Discharge in the prior Chapter 7 Case No. 04-61634, which was entered on July 19, 2004. Thus, the Debtor had two cases pending at one time up until July 23, 2004, when the Debtor's Chapter 7 Case No. 04-61634 was closed, one filed under Chapter 7 and one filed under Chapter 13.

However, the Order in Chapter 7 Case No. 04-61634 dated May 10, 2004 granted the Defendant's Motion for Stay Relief and to Abandon the motor vehicle. Thus, even though two cases by the Plaintiff were pending at the same time, the motor vehicle was no longer property of the Defendant's Chapter 7 estate in Case No. 04-61634 at the time the Debtor filed her Chapter 13 Petition under Case No. 04-62538 on May 21, 2004. Thus, the motor vehicle was property of the Debtor's Chapter 13 estate when she subsequently filed her Chapter 13 Petition in Case No. 04-65238. It is also noted that when the Plaintiff received her Discharge in the prior Chapter 7 Case No. 04-61634, the §362(a) Automatic Stay in that case terminated by operation of law pursuant to §362(c)(2)(A). Upon entry of the Plaintiff's Chapter 7 Discharge in Case No. 04-61634, the Discharge injunction pursuant to §524(a)(2) went into effect. However, the Chapter 7 Discharge injunction in Case No. 04-61634 did not enjoin the Defendant from exercising its in rem right to enforce its security interest in the motor vehicle which survived the Plaintiff's Chapter 7 Discharge, subject, of course, to any redemption rights the Plaintiff had pursuant to the Agreed Redemption Order dated April 27, 2004.

C.

Judicial Notice of the Record in this
Adversary Proceeding No. 04-6217 filed by
Plaintiff in Her Chapter 13 Case No. 04-62538
and Findings of Fact Based on Judicial Notice

The Court takes judicial Notice of the record in this Adversary Proceeding presently before the Court and finds that on November 10, 2004, or over five months after she filed her Chapter 13 Petition, the Plaintiff filed her Adversary Complaint versus the Defendant alleging that the Plaintiff filed her Chapter 13 Petition on May 21, 2004 listing the Defendant; that the Clerk issued a notice to the Plaintiff's Creditors on June 1, 2004 of the Plaintiff's Petition; that the Defendant repossessed the Plaintiff's motor vehicle, a 2001 Dodge Durango on or about June 3, 2004; and, that the Defendant through demanded by the Plaintiff to do so failed, neglected to turnover said motor vehicle to the Plaintiff whereby she has been forced to expend additional funds for transportation to and from her place of employment. The Plaintiff's prayer for Relief asked for money damages in the amount of \$15,000 as the fair market value of the motor vehicle or, in the alternative, that the Defendant turn over said vehicle, plus attorney's fees and costs.

The Clerk on November 10, 2004 issued a Summons to the Plaintiff's attorney for service on the Defendant. The Plaintiff on November 10, 2004 filed a Certificate of Service as to said Summons together with the Complaint showing service on the Defendant on November 10, 2004 by regular, first class United States mail, postage fully pre-paid, addressed to the Defendant at P.O. Box 5055, Southfield, MI 48086 and 1000 Chrysler Drive, Auburn Hills, MI 48326.

The Plaintiff also filed two Affidavits of Service on November 19, 2004 as to the Summons issued by the Clerk to the Plaintiff showing that service of the Complaint and Summons was made on the Defendant by the Plaintiff by certified mail to the Defendant at 1000 Chrysler Drive, Auburn Hills, MI 48326, and Post Office Box 5055, Southfield, MI 48086, although the Plaintiff was permitted to serve the Complaint and Summons by regular mail pursuant to Fed. R. Bk. P. 7004(a). The certified

mail was signed as received by the Defendant on November 15, 2004 at both of the above addresses.

No timely appearance or answer was filed by the Defendant, and on December 13, 2004, the Plaintiff filed a Motion for the Entry of Default versus the Defendant.

The Court on January 5, 2005 issued an Order denying the Plaintiff's Motion on the grounds that the service on the Defendant by the Plaintiff was defective pursuant to Fed. R. Bk P. 7003(b)(3) in that Summons was not mailed to the Defendant, which is a domestic Corporation, to the attention of an officer, a managing agent, or any other agent authorized by appointment of law to receive service of process.

On January 12, 2005 the Plaintiff filed a Certificate of Service of an Alias Summons and a copy of the Complaint on the Defendant on January 12, 2005 at both P.O. Box 5055, Southfield, MI 48086 and at 1000 Chrysler Drive, Auburn Hills, Mi 48326, both to the attention of the General Manager.

No timely appearance or answer was filed by Defendant to the Alias Summons, and on February 25, 2005 the Court entered a Default versus the Defendant.

On March 15, 2005, the Plaintiff filed a Motion for the Entry of a Default Judgment, seeking compensatory damages in the sum of \$15,000. This sum being alleged by the Plaintiff to be the fair market value of the Plaintiff's 2001 Dodge Durango motor vehicle. Although not required to do so as the Defendant had been defaulted for failure to appear, See Fed. R. Civ. P. 5(a), as made applicable by Fed. R. Bk. P. 7005, the Plaintiff filed a Certificate of Service as to said Motion, certifying that said Motion was served on the Defendant at both P. O. box 5055, Southfield, MI 48086 and 1000 Chrysler Drive, Auburn Hills, MI 48326, and both to the attention of the Defendant's Chief Executive Office, by depositing the same in the U.S. Mail in envelopes addressed to the Defendant with sufficient first class postage affixed.

The Court by Order dated April 6, 2005, set the Plaintiff's Motion for Default Judgment for

hearing on May 4, 2005 pursuant to Fed. R. Civ. P. 55(b), as made applicable by Fed. R. Bk. P. 7055 to determine the amount of damages that might be awarded to the Plaintiff in entering a default judgment since the alleged damages were not for a sum that by computation could be made certain, and thus it was necessary for the Court to determine the amount of damages..

The Defendant on May 3, 2005 filed its Appearance by counsel and filed a Motion to Set Aside the Default pursuant to Fed. R. Civ. P. 60(b), as made applicable by Fed. R. Bk. P. 9024 based on excusable neglect. Attached to the Motion was an Affidavit of Attorney Biana Hamady with the Law Firm of Shermeta & Adams, P.C., which averred that on or about January 26, 2005, DaimlerChrysler Services North America, L.L.C., as Successor by merger to Chrysler Financial Corp., sent a copy of the Complaint filed by the Plaintiff in this Adversary Proceeding to Shermeta & Adams, P.C., that on April 12, 2005 the Defendant also notified the office of Shermeta & Adams, P.C. that a "Default Judgment" had been entered, versus the Defendant and that Defendant's counsel then obtained the file and discovered the Adversary Proceeding had not been brought to the attention of the attorneys (no Default Judgment had been entered pursuant to Fed. R. Civ. P. 55(b)(2) as made applicable by Fed. R. Bk. P. 7055, only a Default pursuant to Fed. R. Civ. P. 55(a), as made applicable by Fed. R. Bk. P. 7055, had been entered versus the Defendant. Thus, Fed. R. Civ. P. 60(b) was not applicable. A Default may be set aside for "good cause" pursuant to Fed. R. Civ. P. 55(c), as made applicable by Fed. R. Bk. P. 7055).

The Motion of the Defendant further alleged that on April 12, 2005, Shermeta & Adams P.C., discovered that the Alias Summons and Complaint issued to the Defendant had been filed without Shermeta and Adams, P.C., taking any action thereon. The Defendant's Motion asserted that the failure of the Defendant and Shermeta & Adams, P.C. to respond to the Alias Complaint and Summons was the result of excusable neglect pursuant to Fed. R. Civ. P. 60(b) as made applicable by Fed. R. Bk.P. 9024, and that the Default should be set aside. (Fed. R. Civ. P. 60(b) is not applicable to a motion to

set aside a default, and which is only applicable to a motion to set aside a default judgment. Federal Rule of Bankruptcy Procedure 55(c), as made applicable by Fed. R. Bk. P. 7055, provides that a default as opposed to a default judgment may be set aside for "good cause").

The Defendant's Motion also stated that it had a valid defense to the Plaintiff's Complaint in that the Plaintiff had filed a previous Chapter 7 case under Case No. 04-61634 and that on May 10, 2004, the Defendant received relief from the Automatic Stay subject to the right of the Defendant to redeem the motor vehicle in question by a date certain, and that on May 21, 2004 the Defendant filed her Chapter 13 Petition in Case No. 04-62538 or prior to her receiving a discharge in her prior Chapter 7 case, which was entered on July 17, 2004.

The Plaintiff on May 25, 2005 filed her Memorandum in Opposition to the Defendant's Motion.

A hearing was held on May 25, 2005 on the Motion to Set Aside the Default and the Court on May 25, 2006 denied said Motion pursuant to Findings of Fact and Conclusions of Law as orally stated and recorded in open Court on the grounds that the Defendant had not show "good cause" to set aside the default pursuant to Fed. R. Civ. P. 55(c), as made applicable by Fed. R. Bk. P. 7055.

The Court rejected the Defendant's argument that there was "good cause" to set aside the Default based on the allegation that there was "breakdown" in the internal office procedures of the Law Firm of Shermeta and Adams, P.C. , in that the Complaint and Alias Summons that was sent to the Law Firm by the Defendant was mistakenly filed away by office staff without knowledge of the attorneys, and thus no timely action was taken thereon. Compare North Central Illinois Laborers District Council v. S.J. Groves & Sons Company, Inc., 842 F.2d 164, 167-68 (7th Cir 1984) (breakdown in internal procedures did not constitute excusable neglect); Pioneer Inv. Services v. Brunswick Associates, 113 S. Ct. 1489, 1499 (1993) (Court finds no merit to the contention that a client may suffer the consequences of attorney's unexcused conduct. Clients must be held accountable for the acts and omissions of their

attorneys. Court gives little weight to fact counsel was experiencing upheaval in his law practice); Pretzel & Stouffer v. Imperial Adjustors, Inc., 28 F.3d 42, 46 (7th Cir. 1994) (routine back-office problems do not rank high in the list of excuses for default).

A hearing was held on the Defendant's Motion for Entry of Default Judgment on August 5, 2005 and pursuant to an Order dated August 5, 2005, the Court sua sponte raised the issue of whether the address of Post Office Box 5055, Southfield Michigan on the Plaintiff's Creditor Matrix in her main case was correct. The Defendant was Ordered to file a statement on or before August 17, 2005 designating a Representative of the Defendant who could testify as to whether said address was the correct address and who could also testify as to what address the Plaintiff was to make her monthly payments.

The Defendant on August 26, 2005 filed its Amended Affidavit that the Defendant had access to Post Office Box 5055, Southfield, MI 48086, and that based on a review of the books and records of the Defendant, the Defendant never received notice of the Plaintiff's Chapter 13 Case No. 04-65238. The Defendant also averred that according to its books and records, the Plaintiff was to make all payments to the Defendant by "telephone pay", Western Union, or to one of three Post Office Boxes, which were P.O. Box 3208, Milwaukee, WI, 53201-2993; (sic) 1728 Newark, New Jersey, 071701-1728, and P.O. Box 3208, Milwaukee, Wi 53201-2993.

The Plaintiff on August 22, 2005 filed her Response to the Court's Order of August 5, 2005, attaching thereto an unverified Statement by the Southfield, MI Post Office, Box Section, that Post Office Box 5055, Southfield, MI 48086-5055 was a good address for the Defendant. This Response was not objected to by the Defendant.

The Court on September 7, 2005 issued an Order that in light of the fact that the Defendant had acknowledged that the address on the Creditor's Matrix was correct no hearing would be held on that

discrete issue unless either party requested a hearing thereon on or before September 21, 2005. No request for a hearing on that issue was filed by either party, and thus no hearing was held.

The Defendant on September 20, 2005 filed its memorandum of Law in Support of Proposed Findings of Fact and Conclusion of Law. ("Defendant's Memorandum").

D

Findings of Fact Based Upon
Evidence Submitted at Trial

The Plaintiff's mother, Dorothy Henderson, testified that after the Defendant repossessed the Plaintiff's motor vehicle on or about June 2, 2004, beginning in October, 2004, she permitted the Plaintiff to use her vehicle, and in consideration thereof the Plaintiff paid her \$209.22 a month through May of 2005, which she applied to her car loan with Bank One. (See Plaintiff's Group Exh. 2.) In addition, the Plaintiff paid her \$103.00 a month to cover the monthly insurance premiums to Hartford Insurance Company on her vehicle beginning in October, 2004 through May of 2005. (See Plaintiff's Group Exh. No. 3.) Based on these Exhibits the Plaintiff paid the mother \$1673.76 (8 months x \$209.22 = \$1673.76) to apply on her car loan and \$824.00 (8 months x \$103.00 = \$824.00) to apply to the insurance on this motor vehicle.

The Plaintiff testified that she made the monthly payments to her mother in consideration for the use of her mother's vehicle in the amounts testified to by the Plaintiff's mother, in that she needed the motor vehicle to take her three children ages 6, 10, and 13 to school, and to go to her place of employment. The Plaintiff also testified that in addition to the foregoing payments to her mother, she also incurred \$689.77 for gas (Plaintiff's Exh. No. 4); \$17.00 for tire repairs (Plaintiff's Exh. No. 5); \$46.53 for rotor repairs (Plaintiff's Exh. No. 6); \$13.08 for an oil change (Plaintiff's Exh. No. 7); \$57.09 to repair a spring (Plaintiff's Exh. No. 8); \$156.00 for repair of exhaust pipe (Plaintiff's Exh.

No. 9); \$31.65 for an oil change (Plaintiff's Exh. No.10); repairs of \$59.99 (Plaintiff's Exh. No. 11); and \$100.00 for repairs and two used tires (Plaintiff's Exh. No. 12).

The Plaintiff further testified that she was on medication for uncontrollable hypertension, and that her condition was aggravated by the stress caused by the repossession of the vehicle by the Defendant, whereby she had to increase her medication.

The Defendant's only witness was Doug Wirebaugh, a retail credit analyst for the Defendant, who was familiar with the procedure and manner by which the credit history of the Plaintiff's account was maintained by the Defendant in the ordinary course of the Defendant's business. The Plaintiff did not object to the Defendant's history of the Plaintiff's account and the same was admitted into evidence as Defendant's Exhibit. "A". Wirebaugh testified that the Loan History is a computer-generated print out in which each transaction, or event relating to the Plaintiff's account, e.g. letters, phone calls, notices, and comments etc. by an employee of the Defendant, is entered into the Defendant's computer system by each individual employee of the Defendant who had personal knowledge of the transaction or event in question.

The print out of the Loan History at page 8, states that if Plaintiff did not redeem by May 28, 2004 pursuant to the Redemption Oder in the Plaintiff's prior Chapter 7 Case No. 04-61634, the Stay would be terminated. Page 10 states that the Defendant placed the Plaintiff's motor vehicle for repossession on June 2, 2004. No entry was made in the Loan History that the Defendant had actual or official notice of the Plaintiff's Chapter 13 Petition filed under Case No. 04-6217 on May 21, 2004 at this point in time. Page 11 of the Loan History states the Defendant was advised on June 2, 2004 that the motor vehicle had been repossessed by its repossession agent on June 2, 2004 at 4:42 o'clock P.M., or just one day after EPI certified it had mailed the Notice of the Plaintiff's Chapter 13 case to the Defendant by U. S. Mail.

Page 16 of the Loan History states that on January 25, 2005 the Defendant received the (alias) Complaint and Summons served on the Defendant in this Adversary Proceeding in Case No. 04-62538 by the Plaintiff on January 12, 2005. According to Wirebaugh, the Loan History indicated that this was the first notice that the Defendant had that Plaintiff filed her Chapter 13 Case No. 04-62538, which was filed on May 21, 2004.

Defendant's Exhibit "D" admitted into evidence as record kept in the ordinary course of business by the Defendant, is a Notice After Repossession by the Defendant to the Plaintiff dated June 4, 2004, informing the Plaintiff that the motor vehicle would be offered at private sale by the Defendant beginning on June 21, 2004, and from day to day thereafter until sold, unless the Plaintiff redeemed the motor vehicle before it was actually sold by paying the redemption amount of \$25,172.59. This Notice was addressed to the Plaintiff at 4843 VanBuren St., Gary, IN 46408, which was the Plaintiff's address at that time. The Notice also states that it was mailed by first class Mail to the Plaintiff on June 4, 2004. The vehicle was sold by the Defendant on or about July 22, 2004. See Loan History, P. 15.

Wirebaugh admitted on cross-examination that he did not have any personal knowledge of the events and transactions reported in the Loan History. Wirebaugh also admitted on cross-examination that he could not say that the Loan History was complete and correct, i.e. that all events and transactions relating to the Plaintiff's account had been entered therein or correctly entered therein by the employee of the Defendant responsible for any discrete entry.

III

CONCLUSIONS OF LAW AND DISCUSSION

A.

Jurisdiction and Core Proceeding

_____ No Objection was made by counsel to the subject-matter jurisdiction of this Court as to this Adversary Proceeding. The Court finds subject matter jurisdiction to be present, pursuant to 28 U.S.C. §1334(b), and that this Adversary Proceeding is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E) and (O).

B

General Principles on Issue of Whether a Party is Presumed to Receive a Notice by Mail

The law in the Seventh Circuit and every Circuit on the issue as to whether a party is presumed to have received a notice by mail that has been properly addressed, stamped, and mailed is well-established, and is in harmony with the general rule. The United States Court of Appeals, Seventh Circuit, in the case of In re Longardner & Associates, Inc., 855 F.2d 455 (7th Cir. 1988), stated as follows:

We consider first whether the bankruptcy court's order confirming the reorganization plan should be set aside because the creditor did not receive notice of the confirmation hearing. On this issue, the bankruptcy court made the following findings of fact: (1) on December 12, 1984, it issued a notice rescheduling the confirmation hearing for March 7, 1985; (2) copies of this notice were mailed to all parties, including Bunn, as the creditor's counsel; and (3) the notice mailed to Bunn was addressed correctly and was not returned to the clerk's office. Based on these findings, which are not clearly erroneous, the bankruptcy court correctly concluded that notice of the hearing was "reasonably calculated to reach interested parties," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318, 70 S. Ct. 652, 659, 94 L. Ed. 865 (1950), and thus satisfied the requirements of due process. We conclude that the court's notice also met the requirements of the Bankruptcy Code. See Bankr. R. 2002(b) ("the clerk ... shall give ... all creditors ... 25 days notice by mail of ... the hearing to consider confirmation of a plan"); Id., 9006(e) ("notice by mail is complete on mailing").

Actual receipt of notice of the hearing by the creditor is not required. See In re Park Nursing Center, Inc., 766 F.2d 261, 263 (6th Cir. 1985). Nevertheless, in this case, in which notice was properly addressed, stamped and mailed, there is a presumption that Bunn received it on behalf of the creditor. See Hagner v. United States, 285 U.S. 427,

430, 52 S. Ct. 417, 418, 76 L. Ed. 861 (1932); In re Nimz Transp., Inc., 505 F.2d 177, 179 (7th Cir. 1974); In re Moseley, 74 B.R. 791, 802 (Bankr. C.D. Cal. 1987). Bunn’s denial of receipt alone does not rebut the presumption, but merely creates a question of fact. See In re Farris, 43 B.R. 726, 727-28 (Bankr. N. D. Ill. 1984); In re American Properties, Inc., 30 B.R. 239, 244 (Bankr. D. Kan. 1983). But see, In re Yoder Co., 758 F.2d 1114, 1118 (6th Cir. 1985). The bankruptcy court resolved this question against the creditor.

The creditor nevertheless argues that the debtor presented no evidence to meet its burden of showing that notice was in fact mailed. We agree with the district court, however, that the bankruptcy court properly relied on its own records, which showed that notice was properly addressed, sent to the creditor’s counsel and not returned to the clerk’s office. Cf., American Properties, 30 B.R. at 244 (“proof of custom of mailing is sufficient.... the mailing employee need not testify.”). We also do not accept the creditor’s argument that the absence of a zip code on the address used by the clerk precludes a finding that the notice was properly addressed. Although the presumption of delivery may be weakened by the absence of a zip code, cf., id. (“Where an address is slightly incorrect, ... the presumption is weakened, but still raised.”), it is strengthened in this case by the fact that the notice was never returned to the clerk’s office, see In re Torres, 15 B.R. 794, 797 (Bankr. E.D.N.Y. 1981).

Thus, we conclude, as did the courts below, that the creditor has failed to rebut the presumption that notice of the confirmation hearing was delivered to Bunn.

Id., 855 F.2d at 459-60. (Footnote omitted). See Hagner v. United States, 285 U.S. 427, 430, 52 S. Ct. 417, 419, 76 L. Ed. 861 (1932) cited with approval in the Seventh Circuit in Longardner (“The Rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it is addressed. Rosenthal v. Walker, 111 U.S. 185, 193, 4 S. Ct. 382, 28 L. Ed. 395.”).³ See also Boomer

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See also, In re Pettibone Corporation, 123 B.R. 304, 310 (Bankr. N.D. Ill. 1990) (Where a debtor establishes that notice was properly addressed and deposited in the mail with sufficient postage, then a rebuttable presumption is raised that the notice was received (citing, In re Nimz Transportation, Inc., 505 F.2d 177, 179 (7th Cir. 1974)); Beck v. Somerset Technologies, Inc., 882 F.2d 993, 996 (5th Cir. 1989) (Evidence that a properly addressed notice was placed in the mail by the clerk creates a presumption that it arrived at its destination and was received by the party to whom it was addressed); In re Bucknum, 951 F.2d 204, 206-07 (9th Cir. 1991) (Certificate of Mailing in Chapter 7 debtor’s bankruptcy file listing judgment creditors created presumption of creditor’s receipt of notice of bar date to file nondischargeability complaints); In re Eagle Bus. Mfg., Inc., 62 F.3d 730, 735 (5th Cir. 1995) (A correctly mailed notice creates a presumption that proper notice was given). The question becomes whether the sender properly mailed the notice, and not whether the intended recipient received it. Id., (Citing, In re Schepp’s Food Stores, Inc., 152 B.R. 136, 139-140 (Bankr. S.D. Tex. 1993); In re Bucknum, 951 F.2d 204, 207 (9th Cir. 1991), (citing, In re Ricketts, 80 B.R. 495, 497 (Bankr. 9th Cir. 1987)). See Fed. R. Civ. P. 9006(e), which states that “notice by mail is complete on mailing.” Service of a notice can be by first class mail, postage

v. AT&T Corp. 309 F.3d 404, 415 N.5 (7th Cir. 2002); In re Eagle Bus. Mfg. Inc., 62 F.3d 730, 735-36 (5th Cir. 1995).

The law is also clear that the mere denial of receipt of a notice by mail is insufficient to rebut the presumption that proper notice was given. Longardner, 855 F.2d at 459. This principle of law is well-summarized in In re Schepp Food Stores, Inc., 152 B.R. 136 (Bankr. S.D. Tex. 1992), where the Court stated as follows:

Most bankruptcy cases hold that the mere denial of receipt is insufficient to rebut the presumption that proper notice was given. However, denial of receipt does raise a question of fact. See In re Bucknum, 951 F.2d [204] at 206-07 [(9th Cir. 1991)] (an affidavit denying receipt does not rebut the common law presumption). In re Longardner, 855 F.2d [455] at 459 [(7th Cir. 1988)] (denial of receipt alone does not rebut the common law presumption, it merely raises a question of fact). In re Treister, 38 B.R. [228] at 230 [(Bkrtcy. S.D.N.Y. 1984)] (a naked assertion of nonreceipt is insufficient to rebut the presumption under Bankruptcy Rule 9006(e)). Cf., Beck [v. Somerset Technologies, Inc.], 882 F.2d [993] at 996 [(5th Cir. 1989)] (the common law presumption is not rebutted by an employee's testimony that he did not remember receiving the letter and that he did not remember whether the person who signed for it was an employee). This rule is based on practicality, rather than on equity. If denial of receipt alone could rebut the presumption that notice was given, then "the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled." See In re Bucknum, 951 F.2d at 206-07 (quoting, Osborn v. Ricketts (In re Ricketts), 80 B.R. [495] 496, 497 (9th Cir. BAP 1987)).

Id., 152 B.R. at 139-40. See also, In re Pettibone, 123 B.R. at 310, supra, (It is the [addressee's] responsibility to rebut the presumption of receipt. (Collecting cases). Denial by the addressee of receipt of mail does not rebut the presumption of receipt, but merely raises a question of fact). (Citing, In re Robintech, Inc., 863 F.2d 393, 396 (5th Cir.) cert. den. -- U.S. --, 110 S. Ct. 55, 107 L. Ed. 2d 24 (1989)); In re O.W. Hubbell and Sons, Inc., 180 B.R. 31, 32 (N.D.N.Y. 1995) (Affidavits of employees denying

prepaid. See Fed. R. Bk. P. 9001(8) defining "mail". Thus, an acknowledgment of receipt is not required. The absence of this requirement indicates that, under the Bankruptcy Rules, the sender's obligations are fulfilled when the notice is sent. In re Schepp's Food Stores, Inc., 152 B.R. 136, 140 (Bankr. S.D. Tex. 1993). But see, In re Yoder Co., 758 F.2d 1114, 1118-20 (6th Cir. 1985) (Discussing Fed. R. Evid. 301 and effect thereof on presumption). However, there is no presumption that an incorrectly addressed letter was duly received. Optivision, Inc. v. Syracuse Shipping Center Associates, 472 F. Supp. 665, 683 (N.D.N.Y. 1979) (applying State law).

receipt of notice are not sufficient to rebut presumption of receipt) (Collecting cases).

Where a creditor challenges the accuracy of a listed address, the burden is on the creditor to establish that the address provided by the debtor was not sufficiently accurate to permit delivery by the United States Postal Service to the appropriate party. In re Walker, 175 B.R. 177, 180 (Bankr. E.D. Mich. 1990) (citing, Hill v. Smith, 260 U.S. 592, 595, 43 S. Ct. 219, 220, 67 L. Ed. 2d 419 (1923)), (collecting cases). If the creditor is able to show that the address was inadequate for the purpose intended, the burden then shifts to the debtor to show that, notwithstanding the incorrect address, the creditor had timely notice or knowledge of the case. Id.

The Defendant filed her Chapter 13 Petition on May 21, 2004. The Plaintiff's verified Matrix of Creditors listed the Defendant with an address of Post Office Box 5055, Southfield, MI 48086. On June 4, 2004, EPI filed its Certificate of Service declaring under the penalties of perjury that it had served the Defendant with a Notice of the Plaintiff's Chapter 13 case on June 1, 2004 at P. O. Box 5055, Southfield, MI 48086. This Notice was not returned as undeliverable for an incorrect address.

In addition, it is also noted that the Plaintiff subsequently filed her Affidavit of Service in this Adversary Proceeding on November 19, 2004, that service of the initial Complaint and Summons was served on the Defendant by the Plaintiff on November 10, 2004 by Certified Mail at P. O. Box 5055, Southfield, MI 48086, which was signed for by the Defendant on November 15, 2004.

The Defendant in its Amended Affidavit filed in this Adversary Proceeding on August 26, 2005 acknowledged that it had access to Post Office Box 5055, Southfield, MI 48086. The Plaintiff on August 22, 2005 filed a Statement by the Southfield, MI Post Office that Post Office Box 5055, Southfield, MI is a good address for the Defendant.

Notwithstanding the foregoing, the Defendant has at all times denied that it received said Notice of the Plaintiff's Chapter 13 Petition which EPI certified it had served on the Defendant by U. S. Mail on

June 1, 2005 at the Southfield , Michigan address. However, no evidence was presented by the Defendant as to its standard practices and procedures for receiving , processing, and routing its mail.

As discussed above, in Section III. B of the Court's Conclusions of Law, the law is well settled in this Circuit and other Circuits that when a notice is properly addressed, stamped, and mailed, there is a presumption that the notice reached its destination and was actually received, and actual receipt is not required. The mere denial of receipt by the Defendant both by testimony and by affidavit, standing alone, does not rebut the presumption See e.g. In re Ms. Interpret, 222 B.R. 409, 413-414 (Bankr. S.D. N.Y. 1998) (Collecting cases); Compare In re Dodd, 82 B.R. 924, 929 (N.D. Ill. 1987) (direct testimony of non-receipt, particularly in combination with evidence that standard procedures are used in processing mail would be sufficient to rebut presumption that mail was received).

The only evidence that the Defendant presented was that the Defendant did not receive notice of the Plaintiff's Bankruptcy by EPI was the Defendant's Exhibit "A", the Defendant's Loan History of the Plaintiff's account maintained by the Defendant, which did not show any entry that it had received the Notice. However, the Defendant's witness admitted that he could not confirm that the various entries in the Loan History were complete or accurate. Thus, based on the record, the Court finds that the Defendant has not met its burden of rebutting the presumption that it received official and actual Notice of the Plaintiff's Chapter 13 Petition by virtue of service thereof by EPI by U. S. Mail on June 1, 2004. Pursuant to Fed. R. Bk. P. 9006(e) service of any notice by mail is complete on mailing. Accordingly, the Court finds that the Defendant had Official Notice of the Plaintiff's Chapter 13 Petition from EPI by U.S. Mail which was served by it on June 1, 2004.

C.

General Principles on the Effect of
the §362(a) Automatic Stay

Having decided that the Defendant received Official Notice of the Plaintiff's Chapter 13 Petition

from EPI by U.S. Mail pursuant to its Certificate of Service, the Court must now decide if the Defendant wilfully violated the §362(a) Automatic Stay.

The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000). As stated by the Court in Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982), the purpose of the automatic stay is to preserve what remains of the Debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors, secured, as well as unsecured, thereby preventing a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts. "[T]he stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditor's interests with one another." A.H. Robins Co. v. Piccinin, 788 F.2d 944, 998 (4th Cir. 1986) (quoting, Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2nd Cir. 1976), cert. den. 429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540.) The stay is imposed automatically in order to give the bankruptcy court an opportunity to assess the debtor's situation and to embark on an orderly course in resolving the estate. United States v. Michalek, 54 F.3d 325, 333 (7th Cir. 1995).

As soon as a petition in bankruptcy is filed the automatic stay provisions of 11 U.S.C. §362 takes effect, and prevents all pre-petition creditors from taking any action to collect their debts. Matter of Vitreous Steel Products Co., 911 F.2d 1223, 1231 (7th Cir. 1990); In re Price, 42 F.3d 1068, 1071 (7th Cir. 1994). The automatic stay is effective upon the date of filing, and formal service thereof is not required. Richard v. City of Chicago, 80 B.R. 451, 453 (N.D. Ill. 1987); In re Miller, 22 B.R. 479, 481 (D. Md. 1982); Morgan Guar. Trust Co. of New York v. Hellenic Lines, Ltd., 38 B.R. 987, 998 (S.D.N.Y. 1984). Thus, the automatic stay does not require actual notice to be effective. In re Lile, 103 B.R. 830, 836 (Bankr. S.D. Tex. 1989); Matter of Carter, 16 B.R. 481, 482-83 (W.D. Mo. 1981), aff'd.

691 F.2d 390; In re O'Connor, 42 B.R. 390, 392 (Bankr. E.D. Ark. 1984); In re Stucka, 77 B.R. 777, 781 (Bankr. C.D. Cal. 1987); In re Victoria Grain Co. of Minneapolis, 45 B.R. 2, 6 (Bankr. D. Minn. 1984).

Actions taken in violation of the stay are void ab initio, and without effect. Middle Tenn. News Co. v. Charnel, 250 F.3d 1077, 1082 (7th Cir. 2001); Matthew v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984); In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000); In re Soares, 107 F.3d 969, 976 (1st Cir. 1997); Constitution Bank v. Tubbs, 68 F.3d 685, 692 (3^d Cir. 1995); Parker v. Bain, 68 F.3d 1131, 1138 (9th Cir. 1995); Franklin Sav. Ass'n. v. Office of Thrift Supervision, 31 F.3d 1020, 1022 (10th Cir. 1994)/ Rexnord Holdings, Inc., v. Bidermann, 21 F.3d 522, 527 (2nd Cir. 1994); Maritime Elec. CO., Inc., v. United Jersey Bank, 959 F.2d 1194, 1206-07 (3rd Cir. 1991). In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992); Raymiak Industries, Inc., Lai, 973 F.2d 1125, 1132 (3rd Cir. 1992); In re Calder, 907 F.2d 953, 956 (10th Cir. 1990); F.D.I.C. v. Shearson-American Express, 996 F.2d 493, 498 (1st Cir. 1993)/ In re Smith, 876 F.3d 524, 526 (6th Cir. 1989).

Actions taken in violation of the stay are void, ab initio, even if the creditor has no notice of the stay. In re Calder, 907 F.2d 953, 956 (3rd Cir. 1990); In re Smith, 876 F.2d 524, 526 (6th Cir. 1989); Richard v. City of Chicago, 80 B.R. at 453, supra, (citing, In re Ellis, 66 B.R. 821, 823 (N.D. Ill. 1986), and Rhyme v. Cunningham, 59 B.R. 276, 278 (Bankr. E.D. Pa. 1986)); In re Clark, 60 B.R. 13, 14 (Bankr. N.D. Ohio 1986); In re Scott, 24 B.R. 738 (Bankr. Ala. 1982); In re Eisenberg, 7 B.R. 683, 686 (Bankr. N.Y. 1980).

The cases are rather consistent in holding that once a creditor has been notified of the bankruptcy filing, and the automatic stay, after initially taking certain action versus the property of the Debtor's estate without knowledge of the bankruptcy, the creditor has a duty to inquire as to the scope of the stay, and to take affirmative steps to restore the status quo, at the time of the filing of the bankruptcy petition. That is, the creditor should undo its postpetition collection activities without the

Debtor having to seek affirmative relief from the bankruptcy court, and failure to do so may subject the creditor to sanctions for violating the automatic stay. See In re Meis-Nachtrab, 190 B.R. 302, 307 (Bankr. N.D. Ohio 1995); In re Smith, 170 B.R. 111, 115 (Bankr. N.D. Ohio 1994); In re Roberts, 175 B.R. 339, 343 (9th Cir. BAP 1994); In re Fry, 122 B.R. 427, 429-30 (Bankr. N.D. Okla. 1990); In re Lile, 103 B.R. 830, 837 (Bankr. S.D. Texas 1989); In re Sams, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (collecting cases); In re Dumgey, 99 B.R. 814, 816-17 (Bankr. S.D. Ohio 1989); In re Holman, 92 B.R. 764, 769 (Bankr. S.D. Ohio 1998); In re Skinner, 90 B.R. 470, 480 (D. Utah 1988); In re Wright, 75 B.R. 414, 416 (M.D. Fla. 1987); In re Stephen W. Grosse, P.C., 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987); Matter of DePoy, 29 B.R. 471, 476 (Bankr. N.D. Ind. 1983); In re Lowry, 25 B.R. 52, 56 (Bankr. E.D. Mo. 1982); In re Miller, 22 B.R. 479, 481 (D. Md. 1982); In re Johnson, 18 B.R. 755, 757 (Bankr. S.D. Ohio 1982); In re Warimer, 16 B.R. 216, 218 (Bankr. N.D. Tex. 1981); In re Elder, 12 B.R. 491, 495-96 (Bankr. M.D. Ga. 1981). The debtor has the burden of proving the creditor with actual notice. Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay. Fleet Mortg. Group, Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999).

Thus, a creditor's retention of property repossessed postpetition without knowledge of the stay after it had been notified of the debtor's bankruptcy filing is, itself, a violation of the automatic stay, for which sanctions may be imposed, even though the creditor had not known of the debtor's bankruptcy petition at the time of the initial seizure. In re Rhodes, 155 B.R. 491, 494 (W.D. Ark. 1993); In re Abrams, 127 B.R. 239, 241-43 (9th Cir. B.A.P. 1991), (citing, In re Knaus, 889 F.2d 773 (8th Cir. 1989); Miller v. Savings Bank, 22 B.R. 479, 480 (D. Md. 1982); In re Holman, 92 B.R. 764, 768 (Bankr. S.D. Ohio 1988); and, In re Carlsen, 63 B.R. 706, 711 (Bankr. C.D. Cal. 1986)). For example, a creditor has an affirmative duty to stop garnishment proceedings when notified of the automatic stay. In re Pulliam, 262 B.R. 539, 543 (Bankr. D. Kan. 2001); In re Manuel, 212 B.R. 517, 519 (Bankr. E.D. Va. 1997); In

re Mims, 209 B.R. 746, 748-749 (Bankr. M.D. Fla. 1997); In re Gray, 97 B.R. 930, 934-935 (Bankr. N.D. Ill. 1989); In re Roberts, 175 B.R. 339, 343 (9th Cir. B.A.P. 1994) (collecting cases).

However, if the secured creditor repossesses its collateral prepetition, it is not in violation of the automatic stay upon the subsequent filing of the bankruptcy petition by the debtor if the secured creditor refuses to immediately turn over the collateral to the debtor until it has been provided a hearing as to whether or not it should be afforded adequate protection, even though the repossessed collateral is still property of the debtor's estate as of the petition date, pursuant to §541(a). In re Quality Health Care, 215 B.R. 543, 571-578, 580-582 (Bankr. N.D. Ind. 1997). Accord, In re Coleman, 229 B.R. 428, 432 (Bankr. N.D. Ill. 1997); In re Barringer, 244 B.R. 402, 408-410 (Bankr. E.D. Mich. 1999); In re Spears, 223 B.R. 159, 166 (Bankr. N.D. Ill. 1998).

Finally, where there is uncertainty about an order of the bankruptcy court, or the applicability of the automatic stay, the creditor may petition the court for clarification, and otherwise the creditor takes a calculated risk under threat of contempt when he undertakes his own determination of what the order means. Matter of Batala, 12 B.R. 397, 400 (Bankr. Ga. 1981); In re Clark, 49 B.R. 704, 707 (Bankr. Guam 1985); In re Kearns, 161 B.R. 701, 705 (D. Kan. 1993), opinion modified on reconsideration, 168 B.R. 423; In re Gray, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989).

The EPI served the Notice of the Plaintiff's case on June 1, 2004 by U. S. Mail. The Defendant repossessed the Plaintiff's motor vehicle postpetition on June 2, 2004 at 4:42 o'clock P.M., and on June 4, 2004, mailed the Plaintiff a Notice After Repossession, also postpetition, that it intended to sell the motor vehicle at private sale beginning on June 21, 2004.

The Court finds that although the Defendant received Official Notice of the Plaintiff's Chapter 13 case, it is highly unlikely that the Defendant actually received the Notice of the Plaintiff's case from EPI via U. S. Mail before the Defendant repossessed the motor vehicle the next day on June 2, 2004,

and it is more likely than not that it had not received that Notice before it mailed the Notice After Repossession to the Plaintiff on June 4, 2004.

Thus, as discussed above, the Defendant had not intentionally violated the Stay at this point, in that the Defendant in all likelihood did not have either official or actual notice of the Plaintiff's Chapter 13 case at those times. However, as noted above, the postpetition acts by the Defendant in repossessing the motor vehicle, and mailing the Notice after repossession, were rendered void Ab initio by the Automatic Stay, even though the Defendant had no official or actual notice of the Plaintiff's Chapter 13 case at the time these acts were performed by the Defendant.

Section 362(h) expressly provides for an award of damages for any willful violation of the automatic stay. Section 362(h) provides as follows:

(h) 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.

As the Court in In re Skinner, 90 B.R. 470 (D. Utah 1988) stated:

Recognizing the need to compensate and even punish for violations of the automatic stay, Congress added subsection (h) to section 362 in 1984. This provision empowers the bankruptcy court to impose sanctions for willful violations of the automatic stay.

* * * *

Pursuant to this provision, the bankruptcy court must compensate an individual injured by a willful violation of the automatic stay for actual damages, including attorney's fees and costs. In appropriate circumstances, the bankruptcy court can impose punitive damages and thereby punish the individual or entity violating the stay.

Because section 362(h) provides broad compensatory and even punitive remedies for a violation of the automatic stay, the provision contains fairly rigid threshold requirements. In particular, subsection (h) only provides a remedy for willful violations of the stay. For purposes of section 362(h), "willful" means deliberate or intentional. In re Advanced Professional Home Health Care, Inc., 82 B.R. 837, 844 (Bankr. E. D. Mich. 1988); In re Rinehart, 76 B.R. 746, 756 (Bankr. D. S.D. 1987); In re Shafer, 63 B.R. 194, 198 (Bankr. D. Kan. 1986).

Id., 90 B.R. at 474. Aff'd. 917 F.2d 444 (10th Cir. 1990). See also, In re Price, 42 F.3d 1068, 1071 (7th

Cir. 1994) (a "wilful violation" does not require a specific intent to violate the stay; violation by IRS was wilful as was aware of bankruptcy proceeding and declined to halt collection); In re Landsdale Family Restaurants, Inc., 977 F.2d 826, 829 (3rd Cir. 1992) (violation "willful" if creditor knows of stay and takes intentional action violating it, and good faith belief insufficient to escape liability); In re Riddick, 231 B.R. 265, 267-68 (Bankr. W. D. Ohio 1999) ("Wilful" in §362(b) has been interpreted to simply mean acting intentionally and deliberately while knowing of a pending bankruptcy) (collecting cases). Thus, "willfulness" for damages for stay violation purposes does not require that the defendant intended to violate the automatic stay, rather it requires that the acts which violate the stay be intentional.

The Court finds that the postpetition sale of the motor vehicle by the Defendant on or about July 22, 2004 was not only void, but also was a wilful violation of the Stay as by this time it is presumed the Defendant had received Official Notice of the Plaintiff's Chapter 13 case from EPI prior to the sale and it proceeded to deliberately and intentionally conduct the sale of Plaintiff's motor vehicle after receipt of the Notice.

D

WHETHER THE FILING OF A CHAPTER 13 PETITION PRIOR TO RECEIVING A DISCHARGE IN A PRIOR CHAPTER 7 CASE RENDERS THE CHAPTER 13 PETITION A NULLITY

The Defendant's Post-Trial Memorandum asserts for the first time that the Plaintiff's Chapter 13 Case No. 04-62538 filed on May 21, 2004 was a "nullity", in that at that time the Plaintiff's prior Chapter 7 Case No. 04-61634, filed on April 7, 2004, was still pending, and the Plaintiff did not receive her prior Chapter 7 Discharge in Case No. 04-61634 until July 19, 2004, or some 58 days after her Chapter 13 Petition was filed on May 21, 2004, citing, Association Financial Services Corp. v. Cowen, 29 B.R. 888, 894-95 (Bankr. S. D. Ohio 1993), and In re Kosenka, 104 B.R. 40-44 (Bankr. N. D. Ind. 1989). The Defendant asserts that these cases are in accord with the majority rule that a debtor cannot have two

separate bankruptcy cases pending simultaneously, as a debtor has only one bankruptcy estate, and thus the debtor's assets cannot be administered simultaneously in two separate cases.

In Cowen, the Court held that the "serial" filing of a successive Chapter 13 Petition may not be permitted until, at the earliest, after the granting of the discharge in the prior Chapter 7 case, and dismissed the Chapter 13 case. Cowen, 29 B.R. at 895. The Court in Kosenka, held that a debtor may not file a Chapter 13 Petition before receipt of a Chapter 7 discharge in a prior case, 104 B.R. at 43. However, the Kosenka case held that a debtor may file a Chapter 13 petition prior to the closing of an earlier Chapter 7 case as long as the Clerk has received a Chapter 7 discharge. Id. 104 B.R. at 43. The Kosenka Court also correctly observed that §109 governing eligibility to file a bankruptcy petition does not expressly prohibit simultaneous cases under Title 11. Id. 104 B.R. at 42. The Kosenka Court also observed that there is no per se rule that a debtor may not simultaneously maintain two cases under any set of circumstances, distinguishing the opinion of the Supreme Court in the case of Freshman v. Atkins, 269 U. S. 121, 122, 123, 46 S. Ct. 41, 70 L.Ed 193 (1925) relied on by many courts. Id. 104 B.R. at 43-47.

As noted by Judge Lundin in his treatise on Chapter 13:

Prior to 1991, there was a split of authority whether a debtor could manage liens that survived Chapter 7 discharge in a subsequent Chapter 13 case, especially when the debtor sought to cure defaults and reinstate a home mortgage that remained a lien but was unsupported by personal liability of the debtor. In 1991 the Supreme Court resolved that the surviving lien is a claim that may be provided for in a Chapter 13 case [Johnson v. Home State Bank, 501 U. S. 78, 111 S. Ct. 2150, 115 L.Ed2, 66 (1991)]. The debtor coming out of a routine Chapter 7 case is usually eligible for Chapter 13 and can accomplish the restructuring of liens securing claims on which the debtor is no longer personally liable.

Lundin, Chapter 13 Bankruptcy 3rd Ed., §19.1, P. 19-12 (2000 + Supp. 2004) (footnotes omitted).

The Seventh Circuit Court of Appeals in the subsequent case of In re Sidebottom, 430 F.3d 893 (7th Cir. 2005). distinguished between a Chapter 13 case that followed the conclusion of a Chapter 7 case, a "Chapter 20", as permitted by the Supreme Court in Johnson v. Home State Bank, 111 S. Ct. 2150, and a case where the debtor has filed a Chapter 13 case during the pendency of a Chapter 7 case (a

"Simultaneous 20"). Id. 430 F.3d at 896-97. The Seventh Circuit in Sidebottom concluded that a debtor may not maintain two or more concurrent actions with respect to the same debts. The Sidebottom Court thus aligned itself with a majority of the Courts and decided that the majority rule was correct that a debtor is not entitled to maintain a Chapter 13 case while his Chapter 7 case pending, and that such a "simultaneous 20" was prohibited. Id. 430 F.3d at 898-99. However, Court distinguished a Chapter 7 case that was finished except for some minor technicalities at the end, such as the filing of the Trustee's Final Report. Id. 430 F.3d at 899. It is noted that the above statements by the Sidebottom Court were dicta, as the decision below was affirmed on the grounds that the debtor was not an eligible Chapter 13 debtor as the debtor's debts exceeded the statutory cap for eligibility under Chapter 13 pursuant to §109(e) Id. 430 F.3d 900-901.

This Court is persuaded by the analysis of the Court in In re Bullock, 206 B.R. 389 (Bankr. E. D. Va. 1997) as to when a debtor may have simultaneous cases pending, one filed under Chapter 7, and a subsequent case filed under Chapter 13.

In Bullock, the debtor filed her Chapter 7 case. A secured creditor who held a mortgage lien in the debtor's residence filed a Motion for Stay Relief which was granted by the Court. The residence was set for a sheriff's sale. While her Chapter 7 case was pending, and before she received a Chapter 7 discharge the debtor filed a Chapter 13 case. The secured Creditor filed a Motion for Stay Relief in the Chapter 13 Case on the grounds that the Debtor had misused the bankruptcy process by filing a Chapter 13 Petition before she had received a discharge in her Chapter 7 case. The Chapter 13 Plan of the Debtor did not seek a discharge of her debt to the secured Creditor as the debt was of a type falling under §1328(c)(1), which provides that a debtor will not be discharged of any debt provided for under §1322(b)(5). The debtor's Plan provided for a cure of the prepetition arrears to the secured creditor.

The Bullock Court observed that the several Courts operating under the present Code have cited Freshman v. Atkins, 269 U. S. 121, 46 S. Ct. 41, 70 L.Ed 193 (1925) as holding that two cases brought by

the same debtor cannot be open at the same time i.e. the Single Estate Rule, but that these cases have overstated the sweep of the Supreme Court's ruling in that, at most, Atkins could be interpreted as stating that two cases which discharge the same debt cannot be pending simultaneously. Id. 206 B.R. at 392-93 (collecting cases). The Bullock Court concluded that the Single Estate Rule has no foundation in either the language or the legislative history of the Code, and that this Rule represents nothing more than a practical judicial choice among competing philosophies in face of a void left by Congress. Id. 104 B.R. at 393. The Court in Bullock held that while it agreed with the general rule that a debtor should not have multiple pending bankruptcy cases, the Court must retain the ability to treat varying situations in an equitable manner in keeping with the purposes of the Code, and thus if the second filing does not materially hinder the efficient administration of the debtor's estate, the Court may recognize the viability of the second case, rejecting the Courts that apply the per se rule that a Chapter 13 Petition can never be filed until a discharge has been entered in the Chapter 7 case. Id. 104 B.R. at 393 + N. 5. Accord In re Strohscher, 278 B.R. 432, 434-36 (Bankr. N. D. Ohio 2002; Compare In re Cowan, 235 B.R. 912-915-18 (Bankr. W. D. Mo. 1999) (collecting cases); In re Hodurski, 156 B.R. 353, 356-57 (Bankr. D. Mass. 1993).

The Court in Bullock observed that because the debtor subsequently received her discharge in the Chapter 7 case, and was effectively dormant, and the debtor did not seek to obtain another discharge of her debt to the secured creditor in her subsequent Chapter 13 case, the subsequent Chapter 13 did not materially hinder the administration of the debtor's estate. The Court then denied the secured creditors Motion.

The facts in Sidebottom are certainly distinguishable from the case Sub judice. In Sidebottom, after the Debtor filed his Chapter 7 Petition, the creditors, the Broylesses, had filed a nondischargeability Adversary Complaint pursuant to §523(a)(2) based on fraud and conversion. The Court had granted the debtor his general discharge as to all other debts. Two weeks before trial on the Adversary Complaint in the Chapter 7 case, the debtor filed a Chapter 13 Petition, which insofar as the Broylesses Claim was

concerned covered the exact same debts as in the Adversary Proceeding.

In the Plaintiff's prior Chapter 7 case No. 04-61634 there was no objection filed by any creditor to the dischargeability of any specific debt pursuant to §523(a) or to the Plaintiff's general discharge pursuant to §727(a) within the time provided pursuant by Fed. R. Bk. P. 4007(c) or Fed. R. Bk. P. 4004(a). Although the Plaintiff had not received her Chapter 7 discharge before her Chapter 13 Petition in Case No. 04-62538 was filed, she was fully eligible for a general Chapter 7 discharge, even though the Plaintiff did not become fully eligible for such discharge until after the Chapter 13 Petition was filed.

The Trustee in the Chapter 7 case filed its "No Asset" Report, or Report of No Distribution, on May 12, 2004 that there was no property of the Plaintiff's estate available for distribution and pursuant to §704(a) and Fed. R. Bk. P. 5009 certified that the Plaintiff's estate had been fully administered. This "No Asset" Report did not constitute abandonment of the property of the Plaintiff's estate pursuant to §554 unless the Court closes the case. In re Reed, 940 F.2d 1317, 1321 (9th Cir. 1991). However, there was no objection to the Chapter 7 Trustee's Report within 30 days, and thus there was a presumption the Plaintiff's Chapter 7 estate was fully administered pursuant to Fed R. Bk. P. 5009. Thus, after 30 days had expired a Final Decree approving the Trustee's Report and Closing the Chapter 7 case was properly entered. The Plaintiff was entitled to a general discharge immediately after the time to object to the Plaintiff's Discharge had expired. See Fed. R. Bk. P. 4004(c) which provides that on expiration of the time fixed for filing a Complaint objecting to discharge, the Court shall forthwith grant a discharge unless certain exceptions apply which were not applicable in the Plaintiff's case. Pursuant to the Notice issued by the Clerk on April 7, 2004 the last day to object to discharge was July 12, 2004. Thus, a Chapter 7 discharge of the Plaintiff could have been entered on July 13, 2004. A General Discharge Order was entered on July 19, 2004, and a Final Decree closing the Chapter 7 case was entered on July 23, 2004. The Discharge Order dissolved the Automatic Stay pursuant to §362(c)(3)(C) and the discharge injunction pursuant to §524(b) then went into effect.

By Order dated May 10, 2004 the Court granted the Defendant's Motion for Stay Relief and Abandonment as to the subject motor vehicle in the Plaintiff's Chapter 7 Case No. 04-61034, and as a result, the subject motor vehicle was no longer property of the Plaintiff's Chapter 7 estate in Case No. 04-63634 pursuant to §554(b). This occurred prior to the time that the Plaintiff filed her Chapter 13 Case No. 04-62538 on May 21, 2004. Thus, the motor vehicle was property of the Plaintiff's subsequent Chapter 13 Case No. 04-62583 pursuant to §541 and was not as of that date property of the Plaintiff's prior Chapter 7 Case No. 04-61634 at the time the Plaintiff filed her Chapter 13 Petition. Accordingly, the Plaintiff's motor vehicle subject to the Defendant's security interest was not being administered simultaneously in her two separate cases.

Finally, it is observed that the Plaintiff properly scheduled her in personam, secured debt to the Defendant in her prior Chapter 7 Case No. 04-61634, and thus the personal liability by the Plaintiff to the Defendant was discharged in that Chapter 7 case, although the lien held by the Defendant in the Plaintiff's motor vehicle survived her Chapter 7 discharge. Thus, the Plaintiff by filing her subsequent Chapter 13 Petition could not again discharge her in personam liability to the Defendant in her Chapter 13 case, which had been discharged in her prior Chapter 7 case. Accordingly, in her Chapter 13 case the Plaintiff was not attempting to discharge her in personam debt to the Defendant simultaneously in two separate cases.

All of these factors discussed above lead the Court to conclude that there was no prohibition against the Plaintiff filing her Chapter 13 Petition prior to her receiving a discharge in her prior Chapter 7, in that when the Plaintiff filed her Chapter 13 Petition the motor vehicle was no longer property of the Plaintiff's Chapter 7 estate, but was property of her Chapter 13 estate. No objections had been filed to the Plaintiff's Chapter 7 Discharge. The Trustee was not administering any assets of the Plaintiff's Chapter 7 estate. Pursuant to the decision of the Supreme Court in Johnson v. Home State Bank, the Defendant's surviving lien in the motor vehicle, wherein the Plaintiff's in personam debt to the Defendant

in her prior Chapter 7 was discharged, constituted a "claim" in the Plaintiff's succeeding Chapter 13 case pursuant to §101(5), and said lien was susceptible to treatment in the Plaintiff's Chapter 13 Plan.

In any event, assuming arguendo that the Plaintiff was not "eligible" to file her subsequent Chapter 13 prior to her Discharge in her prior Chapter 7 case, the subsequent Chapter 13 Petition was not a "nullity" or void ab initio, as asserted by the Defendant, as lack of eligibility to file a Bankruptcy Petition, either pursuant to §109 or based on Case Law, is not jurisdictional In re Lybrook, 951 F.2d 136, 139 (7th Cir. 1991); In re Montgomery, 37 F.2d 413, 415 n. 5 (8th Cir. 1994) (Citing, Rudd v. Laughlin, 866 F.2d 1040, 1042 (8th Cir. 1989) and In re Phillips, 844 F.2d 230, 235 n. 2 (8th Cir. 1988)); In re Mendez, 367 B.R. 109, 116-17 (9th Cir. BAP 2007); In re Verdunn, 210 B.R. 621, 623.24 (Bankr. M.D. Fla. 1997); In re Ross, 338 B.R. 134, 136-139 + n n. 2 & 5 (Bankr. N. D. Ga. 2006). (Collecting cases). The filing of a Petition under Chapter 13 by an ineligible individual debtor effectively commences a case that results in the imposition of the Stay under §362(a). Id. 338 B.R. at 138 (Citing In re Flores, 291 B.R. 44, 52 (Bankr. S. D. N. Y. 2003)).

Thus, the Court had subject-matter jurisdiction over the Plaintiff's Chapter 13 case, albeit the Plaintiff may not have been an eligible Chapter 13 Debtor as asserted by the Defendant. The remedy for any lack of eligibility is not to strike the Petition ab initio as a nullity, but for a creditor, the Trustee, or U. S. Trustee to file either a motion to dismiss the case, a motion for stay relief or to annul the stay, object to confirmation of the debtor's plan, move to vacate the confirmation order, or object to the debtor's discharge. The Defendant failed to exercise any of these remedies. Because this Court at all relevant times had subject-matter jurisdiction over the Plaintiff's Chapter 13 case, the Orders Confirming the Plaintiff's Chapter 13 Plan and granting the Plaintiff a Chapter 13 Discharge were validity entered. In confirming the Plaintiff's Plan the Court, without the knowledge of the Plaintiff's pending Chapter 7 Case) necessarily found that the Plaintiff's Chapter 13 Plan was filed in good faith

and not by any means forbidden by law pursuant to §1325(a)(3). Pursuant to Fed. R. Bk. P. 3015(f), if there is not objection to the debtor's plan, the Court may determine the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues. There were no objections to the Plan and the Trustee recommended the Plaintiff's Plan be confirmed. This Court not being aware of the Plaintiff's pending Chapter 7 case confirmed the Plan. Any such Orders, though there might be argument that they were erroneous, were at most voidable and not void and entitled to res judicata effect.

E

The Relief that Should
Be Awarded to the
Plaintiff

Having decided that the Court had subject-matter jurisdiction over the Plaintiff's Chapter 13 case, that §362(a) was in effect, and that the Defendant wilfully sold the Plaintiff's motor vehicle in violation of the Stay as it had notice of the Plaintiff's Petition prior to said sale, the Court must now decide what relief should be awarded to the Plaintiff. Because of the rather unusual factual scenario that unfolded in the two cases, the formulation of an appropriate remedy by the Court is indeed most difficult.

No objections were filed to the Plaintiff's Confirmed Plan. As observed above, upon confirming the Plan on the recommendation of the Trustee, the Court necessarily found that the Plaintiff's Plan was proposed in good faith, §1325(a)(3), and pursuant to Fed. R. Bk. P. 3015(f), which provides that if no objection is timely filed the Court may determine that a Plan has been proposed in good faith without receiving evidence on such issue.

An Order confirming a Plan is Res judicata on all issues that could have been and should have been raised pertaining to the Plan. §1327(a), Effect of Confirmation. See In re Glow, 111 B.R. 209, 224 (Bankr. N. D. Ind. 1999). The confirmation of a Plan binds both the debtor and his creditors to the Plan provisions. Id. Once a Plan has been confirmed neither the Debtor nor a creditor can assert rights that

are inconsistent with its provisions. Id. The fact that the confirmation Order may have been erroneous does not preclude the same from being valid and having Res judicata effect as long as the Court had proper jurisdiction over the Plaintiff's estate and no fraud was committed on the Court. Id. 111 B.R. at 226. See also In re Harvey, 213 F.3d 318,321-323 (7th Cir. 2000). Matter of Chappell, 984 F.2d 775, 782-83 (7th Cir. 1993) (citing, Matter of Pence, 905 F.2d 1107, 1009 (7th Cir. 1990)); In re Lascia, 294 B.R. 718, 721-22 (Bankr. N. D. Il. 2003) (collecting 7th Cir. cases).

Thus, upon confirmation the Defendant would have retained an allowed secured claim in the Plaintiff's motor vehicle as provided in the Plaintiff's confirmed Plan in the principal sum of \$14,850.00, payable at 3% per annum interest if the motor vehicle had not been sold.

No claim was filed by the Defendant versus the Plaintiff's estate nor did the Plaintiff file a claim on behalf of the Defendant pursuant to Fed. R. Bk. P. 3004. Of course, the Defendant asserts it filed no claim as it did not have notice of the Plaintiff's Petition. The fact that the Plaintiff scheduled the Defendant as a Creditor and listed the Defendant in her confirmed Plan is not a basis to allow the Defendant's Claim. In re Greenig, 152 F.3d 631, 635-36 (7th Cir. 1998).

In any event, a secured creditor need not file a claim but may simply rely on its lien. In re Tarnow, 749 F.3d 464, 465-67 (7th Cir. 1984); Matter of Penrod, 50 F.3d 459, 461-62 (7th Cir. 1995). However, if no claim is filed the creditor cannot receive any distribution from the trustee under the Plan In re Balridge, 232 B.R. 391, 396 (Bankr. N.D. Ind. 1999) (no one is required to file a claim. However, to receive a distribution under a confirmed Plan even secured creditors must file a claim). Because no claim was filed by the Defendant, no Plan payments were ever made by the Trustee to the Defendant.

While the Rules stated above reflect the majority position of the Courts that have addressed these issues, their application is made difficult by the fact that the Plaintiff's motor vehicle was repossessed by the Defendant on June 2, 2004 and sold on July 22, 2004 while the Plaintiff's Plan was subsequently confirmed on August 25, 2004, which provided that the Defendant have an allowed secured claim of

\$14,850.00. Thus, at the time Plan was confirmed providing the Defendant with an allowed secured claim the Plaintiff's motor vehicle had already been sold.

This Adversary Proceeding is further compounded by the fact that in the Plaintiff's prior Chapter 7 case the Plaintiff entered into an arms length Agreed Order on April 27, 2004, for redemption of the Plaintiff's motor vehicle in the sum of \$14,850.00, to be paid in full within 30 days of the Order, or on or before May 27, 2004. The Plaintiff failed to redeem as agreed and instead filed her Chapter 13 Petition on May 21, 2004, or before the time had expired to redeem the motor vehicle in her prior Chapter 7. This evidences a bad faith manipulation of the Plaintiff's two cases and will be considered by the Court in fashioning a remedy.

The Prayer for Relief in the Plaintiff's Complaint asks generally for a judgment of \$15,000.00. The Complaint does not itemize the Plaintiff's alleged damages in any way.

At Trial, the Plaintiff's evidence as to damages incurred by her based on the wrongful sale of the motor vehicle were limited to out-of-pocket expenses that she incurred in paying her mother for the use of her motor vehicle as a result of the repossession and sale of the motor vehicle by the Defendant. No evidence was submitted by the Plaintiff that she incurred damages by virtue of a loss by her of any equity in the motor vehicle by virtue of the Defendant's sale thereof.

A party who violates the automatic stay may be held in contempt, and the Court may award damages to compensate for actual loss suffered pursuant to §105(a) or §362(h). In re Price, 42 F.3d 1068, 1071 (7th Cir. 1994) (debtor may recover actual damages - attorney's fees and costs - under §362(h)). The purpose is to restore the parties to their precontempt position. In re 2218 Bluebird Ltd. Partnership, 41 B.R. 540, 545 (Bankr. S.D. Cal. 1984).

Actual damages "must be based on losses actually suffered" as a result of the stay violation. Archer v. Macobm County Bank, 853 F.2d 497, 500 (6th cir. 1988). As the Court stated in In re Alberto, 119 B.R. 985 (Bankr. N.D. Ill. 1990):

The Court cannot award damages, costs, or fees where none have been clearly proven. Such results obtain, notwithstanding the fact that both Rule 9011 and section 362 have been violated. Damages can only be awarded if there is evidence supporting the award of a definite amount, which may not be predicated upon pure speculation. Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty.

Id., 119 B.R. at 995. See also Lovett v. Honeywell, 930 F.2d 625, 629 (8th Cir. 1991); In re Still, 117 B.R. 251, 254 (Bankr. E.D. Tex. 1990). However, attorney's fees and costs may be assessed in enforcing the stay violation even though no actual underlying damages are show, as these fees and costs are themselves a form of actual damages. See In re Chateaugay Corp., 112 B.R. 526, 533 (S.D.N.Y. 1990), rev'd on other grounds, 920 F.2d 183 (2nd Cir. 1990); In re Omni Graphics, Inc., 119 B.R. 641, 645 (Bankr. E.D. Wis. 1990).

The Plaintiff has met her burden of proving that she incurred actual damages as to the following as direct result of the Defendant's violation of the Stay:

1. Payments by the Plaintiff to her mother in the sum of \$1673.00 for the use of her mother's motor vehicle, which the Plaintiff's mother applied to her own car loan with Bank One.
2. Payments by the Plaintiff to her mother in the sum of \$824.00, which the Plaintiff's mother applied to the insurance premiums due and owing on the insurance policy on her own motor vehicle.

These two items of damages total \$2,497.00. The balance of the payments made by the Plaintiff for gas and oil changes, would have been incurred by the Plaintiff in any event, even if the Defendant had not repossessed the Plaintiff's motor vehicle, and shall be denied.

The Court shall also award the Plaintiff the sum of \$435.53 for miscellaneous repair expenses incurred by the Plaintiff in maintaining her mother's vehicle. (\$17.00 tire repairs; \$46.53 rotor repairs; \$57.00 repair of spring; \$156.00 repair of exhaust pipe; \$59.00 miscellaneous repairs; and \$100.00 for repairs and two used tires).

Thus, the Plaintiff shall be awarded the sum of \$2,932.53 in actual damages (2,497.00 + \$435.53).

The Plaintiff also seeks an award of attorneys fees. At the Trial, the Plaintiff filed an Attorney's Fee Affidavit averring that the Plaintiff had incurred \$6,240.00 in attorney's fees as a result of the Defendant's violation of the Stay.

The Statement of Services rendered attached to the Affidavit sets out a Chronological Itemized Statement by the tenth of an hour showing 31.2 hours expended running from June 3, 2004 to August 5, 2005 at the rate of \$200.00 an hour. The repossession by the Defendant took place on June 2, 2004, and the first entry in the Statement is on June 3, 2004, or the day thereafter.

First, the Court finds that a rate of \$200.00 per hour is reasonable based upon the customary, prevailing rate charged by comparable skilled practitioners in Northwest Indiana in consumer cases other than those under the Bankruptcy Code, and the experience and skills of the Plaintiff's attorney.

Secondly, the Court finds that the amount of time expended by the Plaintiff's attorney was reasonable and was commensurate with the complexity, importance and the nature of the issues addressed in prosecuting this Adversary Proceeding.

Thus, the Plaintiff shall be awarded \$6,240.00 in attorney's fees. Accordingly, the Plaintiff shall be awarded a judgment in the sum of \$2,932.53 in actual damages, together with \$6,240.00 in attorney's fees, plus interest thereon.

The Court concludes based on the totality of the circumstances, including the fact that the Plaintiff not only defaulted on her Redemption Agreement with the Defendant in her prior Chapter 7 case, but filed her subsequent Chapter 13 Petition prior to the time to Redeem, the damages that shall be awarded to the Plaintiff shall be limited to certain out-of-pocket expenses incurred by her. The Plaintiff shall not be awarded the fair market value of the motor vehicle which she valued in her Schedules and in her Plan in the sum of \$14,850.00, with a balance due and owing of \$24,575.00, in that although the Defendant violated the Stay in selling the motor vehicle, the fact remains that the Defendant still retained a valid security interest in said motor vehicle in amount equal to the value

thereof both at the time the Defendant repossessed and sold the same. See In re Thomas, 883 F.2d 991, 998 (11th Cir. 1999) (Section 1327 does not operate to extinguish a lien on property passing through bankruptcy for which no proof of claim was filed). If, for example, the motor vehicle, valued at \$14,850.00, had exceeded a balance due to the Defendant in the sum of \$9000.00, the Plaintiff would have incurred damages for the loss of her equity in the motor vehicle of \$5,880.00 (\$14,850.00 - \$9000.00).. Thus, because the Plaintiff had no equity in the motor vehicle at the time the Defendant sold the Plaintiff's motor vehicle, she suffered no actual damages as to the loss of any equity interest in the vehicle itself by the Defendant's actions.

The final issue is the interest to be awarded to the Plaintiff. When a federal judgment is based on a state law claim, the Court must look to state law to determine the propriety of prejudgment interest on recovery. The Travelers Insurance Company v. Transport Insurance Company, 846 F.2d 1048, 1051 (7th Cir. 1988). However, federal law governs as to post judgment interest on a federal judgment. Id. See 28 U.S.C. §1961(a). Inasmuch as the judgment versus the Defendant is based on §362(h), a federally-created cause of action, the state prejudgment interest rate is not applicable.

The United States Court of Appeals, Seventh Circuit in the case of Gorenstein Enterprises, Inc., v. Quality Care - USA, Inc., 874 F.2d 431, 437 (7th Cir. 1989), indicated that the preferable prejudgment interest rate based on a federally created right is the prime rate. See als, In re Diversified Products, Inc., 193 B.R. 868, 881-882 (Bankr. N.D. Ind. 1995), Aff'd., 100 F.3d 53 (7th Cir. 1996).⁴

In addition to the principal sum that is recoverable from the Defendant by the Plaintiff, prejudgment interest shall be awarded from the date of demand on the Defendant, or absent a demand, from the date of the complaint if the Plaintiff is successful. In re Southern Indus. Banking Corp., 87

⁴ The Court takes judicial notice of Federal Reserve Statistical Release H.15, Selected Interest Rates, November 15, 2004, wherein the Prime Rate was 4.75%.

B.R. 518, 522 (Bakr.E.D. Tenn. 1988) (citing, Kaufman v. Tredway, 195 U.S. 271, 273, 25 S. Ct. 33, 34 49 L.Ed. 190 (1904)); Waite v. Second National Bank, 68 F.2d 984, 987 (7th Cir. 1948); Larking v. Welch, 86 F.2d 442, 446 (7th Cir. 1936). There was no evidence of the first demand made by the Plaintiff. The Plaintiff's Complaint was filed on November 10, 2004. Thus, pre-judgment interest rate shall accrue from November 10, 2004.

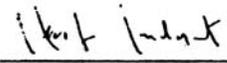
Pursuant to 28 USC §1961(a), postjudgment interest shall be computed at a rate equal to the weekly average 1-year constant maturity treasury yield as published by the Board of Governors of the Federal Reserve System, for the calendar week proceeding the judgment.⁵

It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Plaintiff should and shall hereby have judgment versus the Defendant in the principal amount of \$2,932.53, together with reasonable attorney's fees in the amount of \$6,240.00, plus pre-judgment interest at the rate of 4.75% per annum from November 10, 2004, post-judgment interest at the rate of 4.15% , per annum, plus costs.

The Clerk shall enter this judgment on a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: August 27, 2007



JUDGE, U. S. BANKRUPTCY COURT

⁵ The Court takes judicial notice of Federal Reserve Statistical Release H.15, Selected Interest Rates, August 20, 2007, wherein the 1-year constant maturity treasury yield was 4.15%.