CHAPTER 13 QUARTERLY NEWSLETTER
DECEMBER 2024

1. **SEASONS GREETINGS AND BEST WISHES FOR A HAPPY NEW YEAR!**

During 2024, the number of bankruptcy filings began to show a steady increase in the number of people needing bankruptcy relief.

Attorneys will continue to face challenges and unique issues in addressing the needs of their clients. However, the local bankruptcy bar in Northeast Ohio is both resilient and dedicated to meeting the needs of their clients.

The Chapter 13 office wishes everyone best wishes for the holiday season and new year!

To allow the Chapter 13 staff to spend time with their families please note that the Chapter 13 office will be closed on December 24, December 25, December 26, 2024, and January 1, 2025.

2. **NEW AKRON PROCEDURES FOR ADDRESSING NON-FILED CLAIMS FOR SECURED CREDITORS LISTED IN THE PLAN**

As of November 21, 2024, the Akron Court has issued new orders in some cases regarding the continuing issue of secured creditors not filing a claim.

The non-filing of claims by secured creditors can greatly hinder the Debtor(s) ability to be successful in a Chapter 13 plan as non-filing secured claims can result in the Debtor(s) being unable to pay off an automobile or other secured debt.

Pursuant to 11 USC § 1327, the Court has issued orders in some cases directing the Chapter 13 Trustee to pay secured creditors listed in the plan even if the secured creditors have not filed a claim.

It will be imperative for counsel to have the correct creditor and creditor’s correct address listed in the plan as the information stated in the plan will be used by the Chapter 13 Trustee in processing payment to secured creditors listed in the plan but have not filed a claim.

If the funds sent to the secured creditor are returned to the Chapter 13 office, said funds will be held in escrow pending further order of the Court. Absent further order of the Court, the Trustee will motion the Court to turn said funds over to the Court’s unclaimed funds account at the conclusion of the Chapter 13 case.

3. NOTICE THAT PLAN CANNOT BE CONFIRMED

As a reminder, the Trustee will continue the practice of filing a notice with the Court (which is served on counsel via the ECF system) on why the plan cannot be confirmed. One of the reasons that the plan may not be confirmed is that a secured creditor has not filed a claim.

The notice can give Debtor(s) counsel an opportunity to file a claim for the secured creditor (please review line item 4 below) or take other action counsel deems appropriate.

4. DEBTOR(S) COUNSEL SHOULD FILE A CLAIM FOR THE NON-FILING SECURED CREDITOR

The secured creditor's failure to file a claim timely or not file a claim at all can hinder the main purpose of the plan as often times these claims represent automobiles and homes that the Debtor(s) is seeking to retain by making payments on these assets through the Chapter 13 plan.

Bankruptcy Rule 3004 allows the Debtor(s) (and their counsel) to file claims on behalf of the creditor if the creditor has not filed a proof of claim by the claims bar date. Debtor(s) (and their counsel) have 30 days to file a claim, from the claims bar date on behalf of the creditor pursuant to Rule 3004.

Given that the late filed and non-filed claims appear to be an ongoing issue, the Trustee recommends that counsel follow up on their cases to make sure that creditors properly file claims in the case, especially when the claim is for an automobile or home the Debtor(s) is seeking to maintain. Debtor(s) (and their counsel) should file the claim within 30 days of the claims bar date if the creditor has not filed a claim. If more than 30 days have elapsed, counsel will need court permission to file a claim on behalf of the secured creditor.

Even if the Trustee is ordered to pay the claim pursuant to the plan, counsel should consider filing a claim on behalf of the secured creditor if counsel has more up to date information regarding the claim (especially a lower amount due the creditor) than was available at time the petition was filed.

5. AKRON COURT'S DIRECTIVES ON IN PERSON COURT HEARINGS

Please find attached to this newsletter a directive from the Honorable Alan M. Koschik regarding the requirements for in person court attendance for the US Bankruptcy Court in Akron.

6. CHANGES IN INTEREST RATE

There have been a few changes in the interest rate from the Federal Reserve this year requiring a revision for lower rates to be reflected in Chapter 13 plans. Please note that the default interest rate in Chapter 13 plans should be the prime rate + 2% (unless the creditor has asked for a lower amount in their proof of claim).

As a reminder to counsel, there is a link on the Chapter 13 website for interest rates. The link can be found under the "Federal Prime Rate by Wall Street Journal" heading.

The Chapter 13 website is: www.chapter13info.com.

Counsel will be required to amend their plans prior to confirmation for any updates in interest rates. Generally, the Court does not require a new service of the plan if the amended plan notes that it is being filed solely to update interest rates.

7. UPDATED MEANS TEST

Please find attached updated numbers for the means test effective November 1, 2024.

Counsel should work with their computer providers to make sure they have the most updated numbers for completing the means test.

8. PERSONAL FINANCIAL MANAGEMENT COURSE

The Chapter 13 office will continue to sponsor an on-line Personal Financial Management Course through the Trustee Education Network. Information regarding the online program is available on the Chapter 13 website at www.chapter13info.com. There is no charge to take the course online for Chapter 13 Debtor(s) who have filed in Akron, Ohio.

Please note: in a joint case, each Debtor must take the on-line course separately and use two different e-mails. The software program generates the required certificates of completion partly based on e-mails to keep track of who has taken the required course.

Please find attached to this newsletter a flyer for the on-line course that counsel may share with their clients in Chapter 13 cases.

9. SERVICE ON SUMMIT COUNTY FISCAL OFFICE

Please note that some counsel have not been using the correct address to serve the Summit County Fiscal Office. When serving the Summit County Fiscal Office, please note that the following address should be used:

Summit County Fiscal Office
175 S. Main Street Room 330
Akron, Ohio 44308

10. CASE LAW

Klemkowski v. CitiMortgage Inc. (In re Klemkowski), 22-10257 (Bankr. D. Md. Oct. 30, 2024).

The debtor confirmed her chapter 13 plan in the bankruptcy court in Baltimore. Before the bankruptcy filing, the debtor had been using the servicer, CitiMortgage, CitiMortgage's website to pay her mortgage. Under the plan, the debtor was paying mortgage arrears through the trustee but was paying CitiMortgage directly for post-petition obligations. After the bankruptcy filing, CitiMortgage barred the debtor from using the online payment platform, claiming that it was a convenience, not a right.

During testimony, a witness for CitiMortgage said it was "policy" to prevent debtors from using the platform because it was "impossible" for the platform to be used by debtors and nondebtors. CitiMortgage may have been concerned that communications sent automatically by the platform might violate the automatic stay.

The debtor filed a motion to hold CitiMortgage in contempt of the automatic stay. The debtor testified that CitiMortgage had no office nearby, that she no longer had a car and that payments by telephone often took hours, because some customer service representatives believed she could not make payments since she was bankrupt. She also testified that mail was unreliable.

Without the option to make online mortgage payments, the debtor defaulted on the mortgage. CitiMortgage moved for a modification of the automatic stay, but the dispute was resolved by stipulation.

There was a separate agreement between CitiMortgage and the debtor governing use of the online payment platform. The agreement said that CitiMortgage could terminate the customer's use of the platform for violation of any agreement with CitiMortgage or the lender. The agreement also allowed CitiMortgage to terminate a customer's use of the platform "without notice."

Bankruptcy Judge Michelle M. Harner stated in her opinion that barring use of the online platform made "it more difficult and time-consuming for the debtor to make her payments and removes a commonly used payment method from the debtor's toolkit."

Judge Harner stated several steps to decide whether taking away the payment platform violated the automatic stay. She began with Section 362(a)(3), which provides that the filing of the petition gives effect to an automatic stay 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."

Before delving into whether there was a stay violation, Judge Harner considered whether removal of the platform was done to "exercise control over property of the estate."

"It is a well-established principle," Judge Harner said, "that a debtor's prepetition agreements (as well as her rights under those agreements) generally become property of the bankruptcy estate under section 541 of the Code." Citing Section 541(c), she went on to say, "Those interests became property of the estate notwithstanding any provision in the agreement 'that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title.'"

Even if use of the portal were seen as a property interest of CitiMortgage or a privilege, Judge Harner said, "Many courts have recognized such a contractual right to use as property of the bankruptcy estate under section 541(a) of the Code." Based on the evidence, she concluded that "the Debtor had a prepetition contractual right to use the online portal" and that the "Debtor's right to use the online portal and her interests in the Online Access Agreement came into the bankruptcy estate."

Having established that there was deprivation of the use of estate property, Judge Harner turned to the question of whether CitiMortgage had violated Section 362(a)(3). She quoted the U.S. Supreme Court for having recently said that "§ 362(a)(3) halts any affirmative acts that would alter the status quo [of estate property] as of the time of the filing of a bankruptcy petition." City of Chicago, Illinois v. Fulton, 592 U.S. 154, 158 (2021).

Having concluded from the facts that CitiMortgage had altered the status quo, Judge Harner next raised the question of whether CitiMortgage's action was an "exercise of control." She decided that the action was "akin to a contract termination, which did in fact remove the value of the contract from the bankruptcy estate."

Although every breach of contract is not a stay violation, Judge Harner found "more than a mere breach." The action, she said, "effectively terminated the operative purpose of the Online Access Agreement; it was 'tantamount to a termination.'" She therefore held that CitiMortgage had "changed the status quo and [that the violation of] the automatic stay is void ab initio."

In the motion for contempt, the debtor sought only injunctive relief, not monetary damages under Section 362(k). Furthermore, the record had no "discernable monetary damages to the Debtor," Judge Harner said. In addition, she said that the debtor had not "establish[ed] that she was foreclosed from making her monthly mortgage payments, including through an ACH (Automated Clearing House) or other electronic transfer from her primary bank account to CitiMortgage."

On the record, Judge Harner said that she could not make a finding of monetary damages under Section 362(k). However, she did "not foreclose the possibility that in a matter with a different factual record, an award of monetary damages under section 362(k), if requested, might be warranted." Furthermore, the debtor's failure to establish monetary damages under section 362(k) of the Code does not excuse CitiMortgage's violation of the stay.

"The primary way to abate this violation," Judge Harner said, "is for CitiMortgage to restore the status quo and the Debtor's rights under the Online Access Agreement." On the record, though, she could not "determine whether any such remedy is appropriate or warranted." Therefore, Judge Harner called for more briefing and another hearing. Judge Harner found herself unable to "address the underlying policy issue, namely whether and when borrowers in financial distress should lose access to online accounts and portals that they have become accustomed to using."

"To the extent that electronic payment methods (such as the online portal) facilitate greater access to credit or success in bankruptcy," Judge Harner said, "the system might benefit from a per se rule that mandates such access. But any such change must be implemented by Congress or an appropriate regulatory agency."

<u>Miller v. Wylie</u> (In re Wylie), 24-1321 (6th Cir. Oct. 23, 2024)

The debtors were facing problems because the husband's health was deteriorating from cancer, forcing him to stop working and sell business assets to satisfy creditors' claims.

The debtors' tax returns were complex because it was unclear how much they would owe in capital gains taxes from the sale of business assets that had depreciated for years. Their accountant completed and filed their returns almost one year after the April 15 deadline for tax year 2018. The tax return showed that they had overpaid their 2018 taxes by about $40,000. In the return that was filed five months before they filed their chapter 7 petition, the couple elected to have the 2018 refund applied to their 2019 taxes.

The couple testified that they applied the overpayment to 2019, believing they would owe taxes in 2019 but that creditors would garnish a 2018 refund before they could pay 2019 taxes.

The couple filed their 2019 tax return three weeks after filing their chapter 7 petition. Again, they elected for the $21,000 refund to be applied to their 2020 taxes.

The chapter 7 trustee filed a complaint to deny the debtors' discharges. With regard to the election made before bankruptcy, the trustee alleged under Section 727(a)(2)(A) that the debtors made a transfer within a year before bankruptcy with intent to hinder, delay or defraud a creditor or the trustee. Regarding the election made after filing, the complaint sought to deny the debtors' discharges under Section 727(a)(2)(B) for having made a post-petition transfer of estate property with intent to hinder, delay or defraud the trustee.

The bankruptcy court dismissed the Section 727(a)(2)(A) claim based on the pre-bankruptcy election. Finding that the couple intended to hinder the trustee by making the post-petition election, the bankruptcy court denied the couple's discharges under Section 727(a)(2)(B). See Miller v. Wylie (In re Wylie), 649 B.R. 852 (Bankr. E.D. Mich. April 17, 2023).

The debtors appealed to the U.S. district court which reversed and remanded with instructions to grant discharges, because the district court judge was "left with the 'definite and firm conviction' that the bankruptcy court erred in finding that the debtors intended to hinder the trustee." Wylie v. Miller, 657 B.R. 602 (E.D. Mich. March 29, 2024).

The trustee appealed to the Sixth Circuit Court of Appeals.

In the Sixth Circuit opinion affirming the district court, Circuit Judge Richard Allen Griffin said that the "sole issue on appeal concerns the bankruptcy court's finding that the [debtors] transferred their anticipated 2019 tax refund 'with intent to hinder' the trustee," referring to Section 727(a)(2). The subsection provides that the court will deny a discharge if the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition.

To affirm the district court, Judge Griffin said he must be "left with . . . a definite and firm conviction" that the bankruptcy court's finding of intent was "clear error."

Citing the Collier treatise, Judge Griffin said that Section 727(a)(2) "requires culpable, specific intent to trigger the denial of discharge." Citing the Supreme Court addressing Section 523(a)(6), he said a debt will be "nondischargeable only if there was 'a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.' In other words, 'actual intent' requires that the debtor intend "the consequences of an act, not simply the act itself." Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998). [Emphasis in original.]

To deny discharges, Judge Griffin summarized the standards to mean there must be "a factual finding that the debtor acted 'with intent to hinder' a trustee under § 727(a)(2)(B)" along with "evidence that the debtor acted with the specific intent to make it more difficult for the trustee to facilitate creditors' collection of debts from the estate."

Judge Griffin devoted the remainder of his opinion to explaining why "the bankruptcy court's findings on credibility and intent for two similar counts under § 727(a)(2) are irreconcilable."

For the election made before bankruptcy, the bankruptcy court found no specific intent because the bankruptcy court found that the debtors only intended for their state and local taxes to be paid. Judge Griffin said that the bankruptcy court correctly decided, as a matter of law, that intending to prefer one creditor over another is not intent to defraud. As authority, he cited 6 Collier on Bankruptcy ¶ 727.02[3][c] ("The intent to prefer creditors is not equivalent to the intent to hinder, delay or defraud creditors.").

On the other hand, the bankruptcy court had denied discharges arising from the election made after bankruptcy, based on a finding of intent to hinder, delay or defraud the trustee.

Comparing the two findings, Judge Griffin saw "no meaningful factual differences between the 2018 and 2019 tax elections to support this different finding."

Judge Griffin cited "the bankruptcy court's own reasoning and findings, that evidence [of specific intent] was lacking," when the bankruptcy court found that the debtors were "not intimately familiar" with a trustee's duties and the Bankruptcy Code's pattern of distributions. He therefore saw "no basis to conclude that the [the debtors] even knew, let alone intended, that by trying to make sure their 2020 taxes were paid they would be hindering the trustee."

Judge Griffin affirmed the district court and remanded with instruction for the bankruptcy court to grant the debtors their discharges.

Akron Court’s Directives on In Person Court Hearings

United States Bankruptcy Court
Northern District of Ohio
Eastern Division - Akron Court Location Only

NOTICE OF REVISED IN-PERSON HEARING PROCEDURES AND LIMITED OPTION FOR TELEPHONIC APPEARANCE FOR JUDGE ALAN M. KOSCHIK

On April 21, 2023, the undersigned Judge issued his Notice of Termination of COVID Emergency Hearing Procedures (the "COVID Emergency Termination Notice"), which ended all stages of this Court's COVID-19 era restrictions on in-person court attendance. The COVID Emergency Termination Notice reinstated the "hearing protocol that existed in this Court prior to the COVID-19 pandemic." The Court observed that Bankruptcy Rule 5001(b) required that "all trials and hearings shall be conducted in open court and, so far as convenient, in a regular court room." As a result, the Court directed that "telephonic appearance is no longer presumed." Therefore, beginning May 1, 2023, attorneys and *pro se* parties were required to obtain permission to participate in court hearings telephonically.

The Court observes that notwithstanding the COVID Emergency Termination Notice and the restoration of pre-COVID procedures, the COVID era habits of counsel and *pro se* litigants have remained entrenched and the pre-COVID court hearing protocols have not been fully restored. This has resulted in numerous situations in which some counsel attend hearings in person but are denied the opportunity to discuss matters in person, either before or after the hearing, with other attorneys who should be in the courtroom but instead appear telephonically. Debtors have appeared in person while their counsel, who claim to have lost contact with their clients, are on the telephone.

Moreover, telephonic communications are spotty, with some telephonic presentations by counsel difficult to understand. In this Court's view, after several years of experience, telephonic appearance is substandard, which underscores why it should be reserved for emergencies, including times when in-person attendance is impossible, or for when appearances concern routine matters that are unopposed or are essentially for audit purposes only where a parties' counsel merely wants to monitor the proceedings and not make a presentation. Even when an attorney merely intends to monitor a hearing, opportunities to meet, confer, or negotiate among parties to a multi-party bankruptcy case may be lost.

In addition, counsel have frequently appeared telephonically without advance Court permission, in violation the COVID Emergency Termination Notice, a circumstance made technically possible because the Court's AT&T bridge line telephone number and participant code have remained static. Counsel know what numbers to use and feel entitled to use them.

Because the habit of telephonic appearance has become, in the Court's view, a problem for both the prosecution of bankruptcy cases before it and the administration of justice, the Court will heighten its presumption of in-person court appearance and restrict the options for telephonic appearance.

The Court's new procedure will be effective on Monday, December 2, 2024. As has been the case since May 1, 2023 (as well as before the COVID restrictions began on March 23, 2020), attorneys, parties, and party representatives who wish to appear telephonically at court hearings in the Akron Bankruptcy Court must contact my courtroom deputy no later than 3:00 p.m. on the court day immediately prior to the hearing in question and request permission to do so. However, the Court is changing its platform for telephonic appearances. The AT&T bridge line will no longer be available. Going forward, telephonic appearances, when permitted, will be accessed by a different toll-free telephone number than before and will utilize *a unique participant code for each court docket*. As a result, unless the unique participant code is obtained from the courtroom deputy for a specific court docket, counsel will be unable to join by telephone. Instead, they will be required to appear in person or miss the hearing.

Sharing participant codes among counsel for court hearings is prohibited. Each counsel or *pro se* litigant is expected to appear in person unless they have obtained permission to appear telephonically. They should have possession of the relevant participation code only after obtaining such permission. Evading that restriction by sharing a participant code may result in sanctions imposed upon any or all of the persons involved.

If counsel or parties are unable to attend a particular court hearing date, but do not qualify for telephonic appearance, they are urged to consider obtaining an adjournment either for cause or with the consent of opposing counsel.

As has been the case since May 1, 2023, presentation of evidence, including live witness testimony, must be presented in person absent further order of the Court after motion and notice and opportunity for a hearing, and only if permitted by applicable statute or rule.

Pretrial conferences will continue to be conducted by telephone only.

These procedures will be effective on and after Monday, December 2, 2024.

Dated: November 26, 2024

Alan M. Koschik
United States Bankruptcy Judge

Updated Means Test

MEDIAN INCOME FOR OHIO FOR CASES FILED ON OR AFTER 11/1/24

1 Person	2 People	3 People	4 People
$61,148	**$77,214**	**$94,173**	**$116,462**

****Add $9,900 for each individual in excess of 4 people.**

NATIONAL STANDARD FOR FOOD, CLOTHING & OTHER ITEMS

Expense	One Person	Two People	Three People	Four People
Food	$458	$820	$977	$1143
Housekeeping Supplies	$44	$75	$83	$82
Apparel & Services	$87	$157	$187	$300
Personal care products & services	$48	$80	$87	$97
Miscellaneous	$171	$279	$343	$405
TOTAL	$808	$1411	$1677	$2027

More than four persons	Additional Amount Per Person
For each additional person, add to four-person total allowance:	**$386**

Expense	One Person	Two People	Three People	Four People
Food & Clothing (Apparel & Services)	$545	$977	$1164	$1443
5% of Food and Clothing	$27	$49	$58	$72

More than four persons	Additional Amount Per Person
Food & Clothing (Apparel & Services)	$275
5% of Food and Clothing	$14

LOCAL HOUSING & UTILITIES STANDARDS FOR OHIO (NON-MORTGAGE EXPENSE)

Family Size	1 Person	2 People	3 People	4 People	5 or more People
SUMMIT COUNTY	$558	$655	$691	$770	$783
PORTAGE COUNTY	$570	$670	$706	$787	$799
MEDINA COUNTY	$577	$678	$714	$796	$809

LOCAL HOUSING & UTILITIES STANDARDS FOR OHIO (MORTGAGE/RENT EXPENSES)

Family Size	1 Person	2 People	3 People	4 People	5 or more People
SUMMIT COUNTY	$989	$1162	$1224	$1365	$1387
PORTAGE COUNTY	$1054	$1237	$1304	$1454	$1478
MEDINA COUNTY	$1180	$1385	$1460	$1628	$1654

IRS NATIONAL STANDARDS FOR OUT-OF-POCKET HEALTH CARE

Out of Pocket Costs	
Under 65	$83
65 and Older	$158

LOCAL TRANSPORTATION EXPENSE STANDARDS

Public Transportation	One Car	Two Cars
$215	**$239**	**$478**

OWNERSHIP COSTS

One Car	Two Car
$619	**$1238**

****Lease vehicles only get the IRS ownership cost.**

Example: If your lease payment is $350 per month, you claim $619 on the means test with no other deductions. If your lease payment is $650 per month, you only claim $619 on the means test with no other deductions.

Personal Financial Management Course

THIS COURSE IS REQUIRED TO EARN YOUR DISCHARGE !

Online Chapter 13 Bankruptcy Course
Finally Financial Freedom!

** The Trustees' Education Network (TEN) – an affiliate of the National Association of Chapter 13 Trustees – has created an online financial management course for the benefit and financial education of Chapter 13 debtors. This course is approved by the United States Trustee Program. **

THIS COURSE IS FREE!

*****THIS COURSE IS ABLE TO BE COMPLETED PRIOR TO YOUR 341 HEARING WITH THE TRUSTEE*****

SIGN UP ONLINE AT WWW.13CLASS.COM

WHAT YOU WILL NEED TO SIGN UP

- Unique Trustee Identifier Number
  - **TEN13010**
- Bankruptcy Case Number
- Your full Name "exactly" as shown on bankruptcy petition
- A valid email address (each debtor will need a separate email address)
- Your bankruptcy Schedules A/B, D, and E/F for Lesson 1 and Schedules I and J for Lesson 3.

You must complete the entire course (all lessons and quizzes) to receive a Certificate of Completion from the Trustees' Education Network. Once you complete all coursework, the Trustees' Education Network will send a Certificate of Completion to you and to your Bankruptcy Court.

*****Course satisfies legal requirements for debtors' Certificate of Completion and to gain a discharge of their bankruptcy case.***

****Other course providers may charge you a fee for this course.***

Klemkowski v. CitiMortgage Inc. (In re Klemkowski), 22-10257 (Bankr. D. Md. Oct. 30, 2024).

Entered: October 30th, 2024
Signed: October 30th, 2024

MICHELLE M. HARNER
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In re:	*	
Arlene Delores Klemkowski,	*	Case No. 22-10257-MMH
Debtor.	*	Chapter 13
* * * * * *	*	
Arlene Delores Klemkowski,	*	
Movant,	*	
v.	*	
CitiMortgage, Inc., et al.,	*	
Respondents.	*	
* * * * * *	*	* * * * * *

<u>MEMORANDUM OPINION</u>

An individual who is facing financial distress—often the potential loss of her home—and turns to chapter 13 of the Bankruptcy Code[1] for relief should be given a fair and just opportunity to rehabilitate her finances. She should not face artificial barriers or arbitrary decisions imposed by her prepetition creditors. Yet, in the pending matter, a debtor faced losing her home because

[1] 11 U.S.C. §§ 101 et seq. (the "Code"). The Court sets forth certain references and citations in the footnotes of this Opinion solely to allow for the provision of more (rather than less) information; the use of footnotes is not intended to minimize the importance of the materials or their relevance to the Court's holding.

her mortgage servicer refused to continue its prepetition practice of accepting electronic payments from the debtor, solely because she had filed a bankruptcy case.

A debtor in a chapter 13 case must comply with various obligations under the Code and successfully complete a three- to five-year repayment plan before she may receive her bankruptcy discharge. The process is not easy, and, for many individual debtors, it can be overwhelming. Yet, chapter 13 works, and it can provide much-needed relief to debtors and payments to creditors. But that potential relief can be delayed or denied altogether if the debtor, for example, misses her mortgage payment, misses time from work, or otherwise incurs unanticipated costs in the performance of her duties under the Code.

Where, as here, a creditor elects to change a debtor's rights or obligations under the parties' prepetition agreements, a debtor may be unable to easily adjust her performance under the agreement (or be unaware of the change) and inadvertently default. The debtor in this matter used an electronic payment portal offered by the servicer until her access was shut off upon the bankruptcy filing. She then defaulted under the agreement and had to defend a motion for relief from the automatic stay filed by the servicer. The stay motion was resolved by consent, but the servicer refused to reinstate the debtor's ability to make electronic payments. The debtor now asks this Court to compel the servicer to provide such access.

The Court finds the servicer's position troubling on several fronts. The servicer's decision to deny the debtor access to the online payment portal makes it more difficult and time-consuming for the debtor to make her payments and removes a commonly used payment method from the debtor's toolkit. Although policies underlying the Code and consumer protection laws would suggest we collectively find ways to make it easier for individual debtors to make their payments and comply with their obligations, the servicer's conduct moves the debtor and this case sharply in the opposite direction.

The Court is bound by the language of the Code and the parties' prepetition agreements. The debtor did have a prepetition contractual "right to use" the online portal that came into the bankruptcy estate through the debtor's legal and equitable interests in the parties' prepetition agreements. Moreover, the servicer's decision to unilaterally restrict this right by denying the debtor access to the online portal effectively terminated the relevant agreement and violated the automatic stay of section 362(a)(3) of the Code. Nevertheless, the debtor did not provide any support for an award of monetary damages under section 362(k) of the Code, and the Court finds no basis on the particular facts and posture of this matter to grant any such relief.

The conclusion that relief under section 362(k) of the Code is not available in this matter does not end the Court's inquiry. An action violating the automatic stay is void ab initio. The Court cannot allow a void action (or an ongoing violation of the statutory injunction) to go without remedy. The Court thus will continue the Motion to allow the parties an opportunity to further address an appropriate remedy under the facts of this case and the terms of this Opinion and the related Order.

I. Relevant Background

Ms. Arlene Delores Klemkowski, the above-captioned debtor (the "Debtor"), filed a petition for relief under chapter 13 of the Code on January 19, 2022. ECF 1. The Debtor also filed, and then amended, her proposed chapter 13 plan, which the Court confirmed on August 18, 2022. ECF 2, 28, 32. The Debtor has been making her payments to the Chapter 13 Trustee as required by the plan and has otherwise complied with her duties and obligations as a chapter 13 debtor under the Code.

The pending matter concerns the Debtor's Motion to Require Creditor to Accept Electronic Payment (the "Motion"). ECF 46. By the Motion, the Debtor asks the Court to require Citimortgage, Inc. and Cenlar FSB, as servicer (the "Servicer"), to accept the Debtor's monthly mortgage payments through the Servicer's website and online portal (referred to herein as the "online portal"). The Debtor argues that she routinely used the online portal to make her payments prior to the petition date and that the Servicer has not offered any valid reason for blocking her attempts to use this payment method during her bankruptcy case. The Servicer filed an opposition to the Motion, asserting that it is "impossible" to allow the Debtor to use the online portal because the Servicer's systems cannot, among other things, distinguish between borrowers who are in bankruptcy and those who are not. ECF 49. The Servicer also notes that it generally restricts access to the online portal for any borrower in default and that, from its perspective, use of the portal is a convenience and not a right.

The Court held a preliminary hearing in this matter on May 13, 2024. The Court then entered a Preliminary Order, which set deadlines for additional briefing and identification of supplemental evidence. ECF 64. The Court held a further evidentiary hearing on August 15, 2024 (the "August Hearing"). The parties have presented their evidence and arguments on the record at the hearings and have filed post-hearing briefs. The Court likewise has had a full opportunity to review the record and study the applicable law. This matter is now ripe for resolution.[2]

[2] The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334. The District Court has referred this case and this matter to this Court under 28 U.S.C. § 157(a) and Local Rule 402 of the United States District Court for the District of Maryland. This matter is a "core proceeding" under 28 U.S.C. § 157(b)(2). This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52, made applicable to this matter by Bankruptcy Rules 7052 and 9014. The Court details herein its factual findings necessary to resolve the disputed legal issues. *See, e.g.*, *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 583 U.S. 387, 396 (2018).

II. Findings of Fact and Conclusions of Law

Chapter 13 of the Code allows a debtor to restructure her financial obligations through a three- to five-year repayment plan.[3] In addition, a debtor may "cure and maintain" payments on her prepetition mortgage obligations during the term of the repayment plan.[4] In this district, that approach requires a debtor to make two separate monthly payments: (i) one to the Chapter 13 Trustee under the plan (the Trustee, in turn, makes payments to the mortgage lender on account of any prepetition arrearages); and (ii) one directly to the mortgage lender or servicer for the debtor's postpetition obligations under the mortgage. In this district, the debtor has the option to make her monthly payments to the Chapter 13 Trustee electronically through an online payment platform. The mode of payment for the debtor's postpetition obligations to the mortgage lender, however, is generally governed by the parties' prepetition agreements or by consent of the parties.

In this case, the Debtor has been making her payments to the Chapter 13 Trustee as required by her chapter 13 plan but has had difficulty making her postpetition mortgage payments to the Servicer. She alleges that her difficulty stems, in large part, from the Servicer's refusal to allow her to submit payments through the online portal. The Servicer argues that the Debtor has no right to use the online portal and that, in any event, the request is impossible to implement. The Court evaluates the parties' respective positions below, first by considering key aspects of the factual record and then, second, by evaluating those and other findings of fact in the context of applicable law.

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[3] *See, e.g.*, *Hurlburt v. Black*, 925 F.3d 154, 158 (4th Cir. 2019) ("Congress enacted the 1978 Bankruptcy Reform Act with the overarching goal of providing debtors with a 'fresh start.' H.R. Rep. No. 95-595, at 118 (1978). Among other changes, Congress significantly revamped Chapter 13 to better 'facilitate adjustments of the debts of individuals with regular income through flexible repayment plans funded primarily from future income.' 8 Collier on Bankr. (MB) ¶ 1322.01 (2018)."); *see also Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007) ("[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor'") (internal quotation marks omitted) (citing *Grogan v. Garner*, 498 U.S. 279 (1991)).

[4] 11 U.S.C. § 1322(b)(5).

A. Findings of Fact[5]

The Debtor testified in support of the relief requested by the Motion. The Court found the Debtor to be forthcoming in her answers and credible on the witness stand. The Debtor stated that she always made her monthly mortgage payments electronically, through an online portal, prior to her bankruptcy filing. *See, e.g.*, Tr. Aug. Hrg. 21–22.[6] The Debtor indicated that she used this electronic payment method even after the Servicer took over her loan. The Debtor explained that the Servicer made the online portal available to her to make her mortgage payments. The Debtor set up her account with the Servicer and continued her practice of making electronic payments. The Debtor's testimony suggested that she was surprised by the Servicer's change in permissible payment methods after she filed her bankruptcy case. The Servicer did not deny that the Debtor made, and it accepted, electronic payments prior to the bankruptcy case. *See, e.g.*, Tr. Aug. Hrg. 35, 76–78.

The Servicer's witness, Mr. Ray Crawford,[7] explained that it was the Servicer's policy to restrict debtors' access to the online portal upon their bankruptcy filing.[8] *See, e.g.*, Tr. Aug.

[5] The Court relies only on witness testimony specifically identified in this Opinion. Testimony not specified herein was either inadmissible, irrelevant, not helpful to the Court's evaluation of the issues, or not credible. In addition, to the extent that either party raised a relevancy objection to any part of the testimony included in this Opinion, the Court evaluated the objection under Federal Rule of Evidence 401 and found the testimony helpful to the Court's analysis of the issue and that any potential prejudice was significantly outweighed by the value of the testimony to the Court's consideration of this matter. *See* Notes of Advisory Committee on Proposed Rules to Fed. R. Evid. 401("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. George F. James, *Relevancy, Probability and the Law,* 29 CALIF. L. REV. 689, 696, n.15 (1941), in Selected Writings on Evidence and Trial 610, 615, n.15 (Fryer ed. 1957)."); *see also U.S. v. Tillmon*, 954 F.3d 628, 643 (4th Cir. 2019).

[6] All citations to "Tr. Aug. Hrg." refer to the transcript of the August Hearing, which is docketed at ECF 88.

[7] Mr. Crawford is a Senior Litigation Associate at Cenlar FSB.

[8] Mr. Crawford testified that several events may change the status of a borrower's account and access to the online portal. For example, if a borrower defaults, the Servicer may restrict the account. Tr. Aug. Hrg. 36. Moreover, once the borrower files for bankruptcy, the Servicer places a bankruptcy code on the borrower's account, which stops the platform from interacting with the borrower's/debtor's account; the debtor no longer has access to information online or an ability to pay online. *Id*. The Court notes that the Debtor's counsel objected to Mr. Crawford's testimony on these issues. *Id*. at 36–38. The Court sustained that objection in part but allowed the Servicer's counsel to lay the

Hrg. 36, 41–42, 44. He provided several reasons why the Servicer takes this approach, including wanting to provide debtors with accurate information regarding their accounts and to avoid potential violations of the automatic stay. *See, e.g.*, Tr. Aug. Hrg. 40–43. He stated that the current system cannot manage accounts for both borrowers who have, and those who have not, filed for bankruptcy. As a result, all notices and account information would go to debtor borrowers if the Servicer did not place a bankruptcy code on those accounts and remove them from the normal operation of the online portal. Tr. Aug. Hrg. 41–43.

The Court found Mr. Crawford to be professional and direct on the stand, and knowledgeable concerning his areas of responsibility at the Servicer. The Court notes, however, that Mr. Crawford is not a software engineer and does not work in the Servicer's information technology department.[9] Tr. Aug. Hrg. 66. Mr. Crawford was unable to testify regarding why the Servicer could not change its system or use a different system to accept electronic payments from debtors. The Court thus interprets Mr. Crawford's—and in turn, the Servicer's—position on "impossibility" to be a business preference and not a true statement concerning the development, refinement, or implementation of an online portal for borrowers who have filed bankruptcy.[10]

The two witnesses also had very different perspectives on the consequences of the Servicer's postpetition decision to change the Debtor's permissible payment methods.

The Debtor stated that not being able to use the online portal to submit her monthly mortgage payments created tangible and substantial hardships. She testified that there is not a

proper foundation, which was done. Mr. Crawford further explained that, once the "B" or "bankruptcy" code is placed on an account, only individuals in the Servicer's bankruptcy department may handle that account. *Id*. at 42–43.

[9] The Court notes that the Declaration of Jamison Young, attached to the Servicer's post-hearing brief, also addresses this issue. ECF 89-1. Mr. Young is identified as the Director of Contact Center Technology. *Id*. The Declaration primarily reinforces Mr. Crawford's testimony that the existing system cannot distinguish between nondebtor and debtor borrowers.

[10] The Court makes this observation only to clarify the kind of impossibility argued by the Servicer. The Court need not address this argument for purposes of this Opinion.

branch office close to where she lives, that she no longer has a car, and that she has had issues with mail being delivered as intended. Tr. Aug. Hrg. 23–26, 28–29. She also described negative experiences with telephonic payments. *Id*. For example, she described instances where she would be placed on hold for very long periods; she would be transferred among individuals to handle her payment; the individual with whom she was speaking would say that payment could not be accepted because she was in bankruptcy; and delayed confirmation of the payment being posted to her account. She also emphasized that the telephonic payment hours coincided with her work hours, requiring her to take time away from work or other responsibilities to try to make payments.

Mr. Crawford, on the other hand, said he believed that the Debtor had many alternative methods for submitting her payments in a timely manner. Tr. Aug. Hrg. 44. He also stated that the Servicer's policy and procedures, which directed debtors' calls and inquiries to employees familiar with bankruptcy protocols, were beneficial in that they helped debtors receive more accurate information regarding their account status. *Id*. at 45–47. Moreover, he explained the careful attention he and others at Cenlar provide to bankruptcy accounts to ensure compliance with the Code. *See generally id*. at. 41–44.

In addition to the parties' testimony, the Court reviewed the relevant documents. The original note governing the Debtor's mortgage loan is dated April 27, 2005, and is with Capital Mortgage Finance Corp., as lender (the "Note"). ECF 81-42, at 8. Under Section 3 of the Note, the Debtor agreed that she would make her "monthly payments at 810 Glen Eagles Court Suite 302, Towson, Maryland 21286, or *at a different place if required by the Note Holder*." *Id*. (emphasis added). The related Deed of Trust further provided that "if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security

Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, [or the like]; or (d) Electronic Funds Transfer." *Id*. at 15. The record contains no allegation or evidence that the Debtor paid by check or similar instrument or had any such instrument returned for insufficient funds.

The Servicer also produced a document containing terms and conditions for use of its online portal (the "Online Access Agreement"). ECF 89-2. Section 5 of the Online Access Agreement indicates that the Servicer "may terminate or suspend access to your loan online without notice if (a) you violate any of these Terms and Conditions or any other agreement you have with us, your lender or mortgage loan servicer, or the provider of any account from which you make payments . . . ." *Id*. Likewise, Section 17 provides that the Servicer "may at anytime suspend, terminate or make modifications, changes, or alterations to online access to [Debtor's] loan and any of the related services…without prior notice."[11] *Id.*

The Servicer did not offer the Online Access Agreement as evidence at the August Hearing, though Mr. Crawford did discuss the general terms of a borrower's use of the online portal during his testimony. The Servicer asserts that the exhibit (attached to a post-hearing brief) is offered to rebut certain issues raised at the August Hearing and is a public document available on a website. The Debtor objected to the admission or use of the Online Access Agreement, given its late submission in this matter. ECF 91, 93. The Court acknowledges the Debtor's concern but overrules the objection based on, among other things, the utility of the document, the lack of prejudice to the Debtor, its consistency with the parties' testimony at the August Hearing, and other grounds set forth by the Servicer.[12] *See, e.g.*, Tr. Aug. Hrg. 21–22, 35.

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[11] The potential import of this language is discussed below in Part. II.B.

[12] As referenced above, the Servicer attached a Declaration of Jamison Young to its post-hearing brief to support, among other things, the terms of the Online Access Agreement. ECF 89-1, 89-2. The Servicer's post-hearing brief, the Declaration, and the Online Access Agreement were submitted, according to the Servicer, to address certain issues

The foregoing facts show an original set of loan documents that have changed hands and that were changed over time by the parties' course of conduct. Specifically, the "place of payment" term was either waived or modified by the parties through, for example, the Debtor making, and the Servicer accepting, her monthly mortgage payments through the online portal. In addition, Mr. Crawford's testimony and the Online Access Agreement show that the Servicer offered and the Debtor accepted use of the online portal. The parties' respective rights under their prepetition agreements are explored further below.

B. Legal Analysis

The objective in every bankruptcy case is to balance the rights of the debtor and her creditors in a way that fosters the debtor's fresh financial start and maximizes returns to her creditors. In a chapter 13 case, the Code contains several provisions to facilitate this outcome, including the automatic stay of section 362, the confirmation provisions of section 1325,[13] and the discharge provision of section 1328.[14] The Debtor has confirmed her chapter 13 plan, and the automatic stay of section 362(a) remains in place—except as otherwise provided by the Code or Court order—during the Debtor's performance of her plan. The Servicer's conduct at issue in this matter occurred as of the petition date and has continued since that time.

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not raised until the August Hearing. The Court does not agree fully with that understanding of the record. Nevertheless, the Court did allow both parties to submit additional information in support of their respective positions through post-hearing briefing, and the Online Access Agreement is publicly available at the website provided by the Servicer. ECF 92, at 3 (citing website and case law). For the most part, the Online Access Agreement and Mr. Crawford's testimony are consistent; the primary difference is the level of detail provided by the agreement. *See, e.g.*, Tr. Aug. Hrg. 40–41, 80–81 (explaining, among other things, that he did not recall all terms but noting how a customer signs up, can use the portal, and when her ability to use is affected). Moreover, the general terms of the Online Access Agreement appear consistent with the Debtor's testimony. *See, e.g.*, Tr. Aug. Hrg. 21–22.

[13] The confirmation provisions of the Code are primarily set forth in sections 1141, 1191, 1225, and 1325, depending on the chapter governing the debtor's bankruptcy case. Likewise, in a chapter 7 liquidation, the distribution protections for creditors are found primarily in section 726, which is incorporated as "the best interests of creditors test" in the confirmation provisions of chapters 11 (including subchapter V), 12, and 13.

[14] *See, e.g.*, 11 U.S.C. §§ 727, 1141, 1192, 1228.

1. Generally Applicable Code Sections

The Debtor's primary argument in the Motion relies on section 105 of the Code. That section provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The scope of section 105(a) is the subject of considerable debate, but all courts acknowledge that the section "'does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.'" *Law v. Siegel*, 571 U.S. 415, 421 (2014). According to the Debtor, the Court has the power under section 105 to compel the Servicer to grant the Debtor postpetition access to the online portal.

The Court is mindful of its equitable powers under section 105 of the Code and the equitable nature of many matters and proceedings in a bankruptcy case. The Court does not, however, read the language of section 105 as granting carte blanche authority to just "do the right thing." Rather, the Court believes that its actions must be tethered to the Code in some way; those actions must be "necessary or appropriate to carry out the provisions of the" Code. The Court thus must start "'where we always do: with the language of the statute.'" *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023) (citations omitted).

The Court asked counsel for both parties to consider the language of the Code and to identify any potentially relevant sections beyond section 105(a). The parties discussed several Code sections during the hearings and their subsequent briefing. The Debtor suggested in general terms that the Servicer's conduct violated the automatic stay of section 362(a) of the Code, which the Court interprets as a reference primarily to section 362(a)(3).[15] That section provides that the

[15] The Debtor's original Motion did not raise a potential stay violation. "Although the Debtors did not specifically request a finding that the Creditor's [action] was violation of the stay, the Court has the power to raise the issue sua sponte without a motion from a party in interest. *In re Jorge*, 568 B.R. 25, 37 (Bankr. N.D. Ohio 2017); *see also Walker v. Got'cha Towing & Recovery, LLC (In re Walker),* 551 B.R. 679, 692–93 (Bankr. M.D. Ga. 2016); *222*

filing of a bankruptcy case "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." 11 U.S.C. § 362(a). The latter phrase—"exercise control over *property of the estate*"—is a gating issue in this matter, which the Court addresses before turning to a potential violation of the automatic stay. 11 U.S.C. §§ 362(a)(3) (emphasis added), 541(a).

2. Property of the Estate Under Section 541

To consider the application of section 362(a)(3) in this matter, the Court must first analyze whether the Debtor's rights under the Note and the Online Access Agreement are property of the bankruptcy estate. Section 541 of the Code defines property of the bankruptcy estate to include "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "'This definition is meant to be very broad and includes practically every conceivable interest that a debtor may have in property.'" *In re Gifford*, 634 B.R. 909, 913 (Bankr. M.D.N.C. 2021) (citations omitted); *see also In re Sexton*, 508 B.R. 646, 656–657 (Bankr. W.D. Va. 2014) (collecting cases).[16]

Liberty Assoc. v. Prescott Forbes Real Estate Corp. (In re 222 Liberty Assoc.), 110 B.R. 196, 200 (Bankr. E.D. Pa. 1990) (collecting cases)." *In re Carr*, No. 18-80386, 2019 WL 7840665, at *1 (Bankr. M.D.N.C. Nov. 18, 2019). In addition, the Court focuses on section 362(a)(3) because there is no evidence suggesting that the Servicer's conduct was an effort to collect a prepetition debt under section 362(a)(6), which would appear to be one of the only other relevant subsections of the stay.

[16] *See also, e.g.*, *In re Evans*, 527 B.R. 228, 234 (Bankr. E.D. Va. 2015) ("The question of what constitutes property of the estate is a question of federal law. *Bd. of Trade of Chi. v. Johnson,* 264 U.S. 1, 44 S.Ct. 232, 68 L.Ed. 533 (1924); *In re Drexel Burnham Lambert Grp. Inc.,* 120 B.R. 724 (Bankr.S.D.N.Y.1990). It includes both real and personal property interests of the Debtor. It includes all tangible and intangible interests in property and all causes of action. It applies to all property in the Debtor's possession as well as property held by third parties. It covers property wherever located. Section 541 of the Bankruptcy Code is intended to bring 'anything of value that ... debtors have in the estate.' H.R. Rep. 95–595, at 176 (1977)."). Moreover, "[b]ecause of the broad language in subsection (a) [of § 541], anything not specifically excluded under subsection (b) should be included as property of the estate." 5 COLLIER ON BANKRUPTCY § 541.01 (16th 2024). As such, courts have historically considered various intangible interests as property of the bankruptcy estate, even if non-bankruptcy law deems them merely "privileges" rather than property. *See, e.g.*, *In re Professional Sales Corp.*, 48 B.R. 651 (Bankr. N.D. Ill. 1985) (*vacated on other grounds*, 56 B.R. 753 (N.D. Ill.)). *See also In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015) (holding that business social media accounts are property of the bankruptcy estate).

It is a well-established principle that a debtor's prepetition agreements (as well as her rights under those agreements) generally become property of the bankruptcy estate under section 541 of the Code.[17] The transfer of the debtor's interests to the estate does not enlarge or diminish those interests. The property comes into the estate as it existed immediately prior to the petition date, and it vests *in toto*—the estate does not get only some of a debtor's interests in an agreement.[18]

Here, the Debtor's legal and equitable interests in the Note and the Online Access Agreement became property of the bankruptcy estate on the petition date under section 541(a) of the Code. Those interests became property of the estate notwithstanding any provision in the agreement "that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property." 11 U.S.C. § 541(c).

To determine whether the Debtor's ability to use the online portal was included in this transfer of property to the estate, the Court must consider the parties' prepetition agreements and applicable state law.[19] Although the online portal is property belonging to the Servicer, as

[17] *See, e.g.*, *In re Munoz*, 610 B.R. 907, 912 (Bankr. D.N.M. 2019) ("On filing a bankruptcy case, all the debtor's legal and equitable interests in property become property of the estate. § 541(a)(1). This includes the debtor's interests in executory contracts.") (citation omitted).

[18] 11 U.S.C. § 541(a), (c). Notably, there are exceptions in section 541 that keep property out of the estate, but those exceptions are not applicable here.

[19] *See generally Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."). The Note and related agreements are governed by Maryland law. ECF 81-2, at 20 (the Deed of Trust relating to the Note provides that the transaction is governed by the law of the jurisdiction where the Property is located). The Online Access Agreement states that it is governed by New Jersey law. ECF 89-2. "Because Maryland is, of course, the forum state, I must apply Maryland substantive law, including its choice of law rules, to determine which state's substantive law applies to the Agreement. . . . Notwithstanding this general rule, a contract's choice of law provision is unenforceable under Maryland [law] if the 'choice of law jurisdiction has no substantial relationship to the transaction, or there is a fundamental policy difference in the laws of another jurisdiction with a more substantial interest in the parties or the transaction.'" *Howard Bank v. Compu-Link Corp.*, 472 F. Supp. 3d 267, 273 (D. Md. 2020) (citations omitted). Here,

explained below, the Debtor has a contractual "right to use" that property.[20] Many courts have recognized such a contractual right to use as property of the bankruptcy estate under section 541(a) of the Code.[21]

The Debtor testified that she had the ability to use the online portal prior to the petition date,[22] that she could not access the portal after the petition date, and that use of the portal was valuable to her in performing her contractual obligations.[23] *See, e.g.*, Tr. Aug. Hrg. 21–22, 28–29.

although New Jersey's relationship to the transaction is nominal at best, as explained below, the Court could not discern any meaningful difference between Maryland and New Jersey law on the relevant issue.

[20] Courts generally recognize a "right to use" as part of the "bundle of sticks" (i.e., rights) associated with any tangible or intangible property. *See, e.g.*, *U.S. v. Cleveland*, 951 F. Supp. 1249, 1260 (E.D. La. 1997) ("In its broadest sense, a 'property' interest resides in the holder of any of the elements comprising the 'bundle of rights' essential to the use or disposition of tangible property or to the exercise or alienation of an intangible right.") (quoting *U.S. v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992); *see also T2 Techs., Inc. v. Windstream Commc'ns, Inc.*, No. 14-CV-03151-MSK-KLM, 2016 WL 9735763, at *8 (D. Colo. Sept. 26, 2016) ("A subscriber's ' right to use ' a given telephone number has been recognized by several courts as a right of control or interest in the telephone number sufficient to support a claim for conversion."); *Campo v. United States*, 157 Fed. Cl. 584, 605 n.15 (2021), *appeal docketed*, No. 24-2312 (Fed. Cir. Sept. 12, 2024) ("Property interests may be real and personal, tangible and intangible, possessory and nonpossessory.") (quoting *Florida Rock Indus., Inc.*, 18 F.3d 1560 (Fed. Cir. 1994)). Neither Maryland nor New Jersey appears to have case law directly on point, and neither party cited any such case law. Nevertheless, both states appear to recognize a "right to use" as part of the "bundle of sticks" associated with property rights generally. *See, e.g.*, *Stansbury v. MDR Dev., L.L.C.*, 161 Md. App. 594 (Md. Ct. Spec. App. 2005); *Burns v. Bechtel Corp*, 212 Md. App. 237, 247 n.5 (Md. Ct. Spec. App. 2013) (Maryland law); *Hartz Mt. Industries, Inc. v. City of Jersey City*, 22 N.J. Tax 84, 92 (N.J. Tax Ct. 2004) (noting that the "right to use real estate" is a stick in the bundle of rights of ownership) (New Jersey law). Moreover, both states treat contract rights as tangible or intangible rights of value. *See, e.g.*, *Ali v. CIT Tech. Fin. Servs.*, 188 Md. App. 269, 293 (Md. Ct. Spec. App. 2003) (explaining that "courts generally have held [§ 541] to include whatever contract rights the debtor holds when the bankruptcy petition is filed.") (citing *First Sec. Bank v. Creech*, 858 P.2d 958, 961 (Utah 1993)); *Conteh v. Conteh*, 392 Md. 436 (Md. 2006) (characterizing contractual rights as marital property); *Registrar & Transfer Co. v. Director, Div. of Taxation*, 166 N.J. Super. 75, 80–81 (N.J. Super. Ct. App. Div. 1979); *Nagim v. New Jersey Transit*, 369 N.J. Super. 103, 119 (Hudson County Ct. 2003).

[21] *See, e.g.*, *In re Fontainebleau Hotel Corp.*, 508 F.2d 1056, 1059 (5th Cir. 1975) (stating that "[the] right of use is surely the most important attribute of possession, and the [debtor] clearly had the right of use as to these telephone numbers at the time the petition in bankruptcy was filed."); *In re Connecticut Pizza, Inc.*, 193 B.R. 217, 227 (Bankr. D. Md. 1996) (explaining that "[a] debtor's right to use the telephone number constitutes a possessory interest," and is thus protected by the automatic stay provisions); *In re 48th Street Steakhouse, Inc.*, 61 B.R. 182, 187 (Bankr. S.D.N.Y. 1986) (noting that although one may not have a proprietary right in a phone number, they do have a possessory interest, which is considered estate property in bankruptcy).

[22] The evidence shows that the Debtor had the ability to use the online portal before the petition date, and that her ability to use the online portal did not change until after the petition date. Tr. Aug. Hrg. 22; *see also, e.g.*, Tr. Aug. Hrg. 41, 43, 72, 82–83. *There is no evidence in the record to suggest that the Servicer denied the Debtor access to the online portal prior to the petition date or gave the Debtor any kind of notice—whether through the online portal or otherwise—of such potential denial prior to the petition date*. The Court thus does not address the situation in which a debtor's access to an online portal may have been terminated well before the filing of a bankruptcy case.

[23] Thus, to the extent property must have some "value" to constitute property of the estate, the Court finds adequate evidence in the Debtor's testimony to support this conclusion. *See, e.g.*, Tr. Aug. Hrg. 28–29.

This testimony demonstrated both the conduct of the parties, which changed the "place of payment" under the Note,[24] and the Servicer's offer of the online portal to the Debtor, which she accepted by setting up her online account. *Id*.; *see also id*. at 40–41, 81–82. The Debtor's testimony on use of the online portal was uncontroverted, and the Court found her testimony regarding challenges in making postpetition payments through other means credible. The Servicer's witness and papers indicate that any such "right to use" is merely a privilege or convenience and not a legal right. The Servicer's witness and papers also articulate the policy of restricting a debtor's ability to use the online portal because of, among other financial conditions, a debtor's bankruptcy filing.[25] *See, e.g.*, Tr. Aug. Hrg. 41, 43, 72, 82–83.

On this evidentiary record, the Court concludes that the Debtor had a prepetition contractual right to use the online portal. That right existed under the parties' prepetition agreement, namely the Online Access Agreement. That right held value for the Debtor in the context of her transactions with the Servicer. Whether that right to use is characterized as a separate legal or equitable interest, or a right arising out of the Online Access Agreement, the result for

[24] As stated above, the Note is governed by Maryland law. ECF 81-2, at 20. Under Maryland law, parties may modify a written contract through course of conduct or under principles of estoppel. *See, e.g.*, *Morris & Ritchie Assocs. v. H&H Rock, LLC*, No. 1824, Sept. Term, 2016, 2018 WL 679878, at * (Md. Ct. Spec. App. 2003) ("Parties may modify a contract by mutual consent, which can be shown by the parties' conduct.") (citing *DirecTV, Inc. v. Mattingly*, 376 Md. 302, 318 (Md. 2003)); *see also Tatum v. Richter*, 280 Md. 332, 336 (Md. 1977) (found that where a car dealer's own action "induced" a buyer to accept an alternative car worked a modification to the original contract to include the alternative car); *Patriot Constr. v. Vk Elec. Servs.*, 257 Md. App. 245 (Md. App. Ct. 2023) (modification found after conduct by contractor indicated payment); *Leaf Co. v. Montgomery County*, 70 Md. App. 170 (Md. Ct. Spec. App. 1970) (modification based on principles of estoppel).

[25] The Declaration of Jamison Young further states, "Cenlar restricts access to the Online Portal when a loan falls into default or when a borrower files for bankruptcy. *When a debtor files for bankruptcy, specific coding is used to prevent the debtor from further access to online features*." ECF 89-1, at 2 (emphasis added); *see also* Tr. Aug. Hrg. 36, 42–43. The Servicer did not explain the different kinds of restrictions when a borrower's status changed. Based on the record, the term "restrict" in the context of a bankrupt debtor's access to the online portal means not being able to use the portal in any meaningful way—e.g., no online information and no online ability to make payments.

purposes of section 541 of the Code is the same. The Debtor's right to use the online portal and her interests in the Online Access Agreement came into the bankruptcy estate.[26]

3. The Automatic Stay Under Section 362(a)(3)

Turning next to the automatic stay, courts generally acknowledge that a debtor's prepetition agreements are protected by the automatic stay of section 362(a)(3).[27] In addition, the Supreme Court has explained the scope of that subsection as applied to a creditor's postpetition conduct as follows,

> Taking the provision's operative words in turn, the term "stay" is commonly used to describe an order that "suspend[s] judicial alteration of the status quo." *Nken* v. *Holder,* 556 U.S. 418, 429, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (brackets in original; internal quotation marks omitted). An "act" is "[s]omething done or performed ... ; a deed." Black's Law Dictionary 30 (11th ed. 2019); see also Webster's New International Dictionary 25 (2d ed. 1934) ("that which is done," "the exercise of power," "a deed"). To "exercise" in the sense relevant here means "to bring into play" or "make effective in action." Webster's Third New International Dictionary 795 (1993). And to "exercise" something like control is "to put in practice or carry out in action." Webster's New International Dictionary, at 892. The suggestion conveyed by the combination of these terms is that § 362(a)(3) halts any affirmative acts that would alter the status quo [of estate property] as of the time of the filing of a bankruptcy petition.

City of Chicago, Illinois v. Fulton, 592 U.S. 154, 158 (2021).

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[26] The Servicer's decision to deny the Debtor access to the online portal because of her bankruptcy filing is not sufficient to keep that right to use out of the bankruptcy estate. Rather, any such condition included in, or action taken under, the Online Access Agreement is invalid under section 541(c). 11 U.S.C. § 541(c). The Servicer's alleged right to terminate the Online Access Agreement at will is discussed further below.

[27] *See, e.g., In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17 BK 3283-LTS, 2022 WL 17413011, at *3 (D.P.R. Feb. 7, 2022) ("a debtor's '[c]ontract rights are among the property interests protected by [section 362(a)(3)].' Metropistas Ord., 494 F. Supp. 3d at 101. See also MMM Healthcare, Inc. v. Santiago (In re Santiago), 563 B.R. 457, 472 (Bankr. D.P.R. 2017); U.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.), 730 F.3d 88, 103 (2d Cir. 2013) ('[I]t is well-established ... that a debtor's contractual rights—including rights arising under post-petition contracts—are included in the property of his estate.') (quoting Slater v. Town of Albion (In re Albion Disposal, Inc.), 217 B.R. 394, 407-08 (W.D.N.Y. 1997)); 3 Collier on Bankruptcy ¶ 362.03[5][a] (Richard Levin & Henry J. Sommer eds., 16th ed. 2021) ('Executory contracts ... are considered a form of property of the estate. As property of the estate, the debtor's interests in such contracts ... are protected against termination or other interference that would have the effect of removing or hindering the debtor's rights in violation of section 362(a)(3).').").

The facts before the Court demonstrate affirmative action by the Servicer to change the status quo. Before the petition date, the Debtor could use the online portal to make her mortgage payments. After the petition date and because of the Servicer's action, the Debtor no longer had this right.[28] The Debtor's testimony further shows the impact on her and the estate by this change in the status quo.

The Court must consider, however, the "property" at issue and whether the Servicer's denial of the Debtor's access to the online portal under the parties' agreement is an exercise of control over that property. This is a difficult issue because, as noted above, the Servicer's action certainly changed the status quo of the parties' *performance* under the agreement. But did it also change the parties' rights in a way that terminated the agreement itself? *Compare In re UAL Corp.*, 391 B.R. 791, 806 (Bankr. N.D. Ill. 2008) ("Breaching a debtor's contract right does not take control of the right from the estate; the estate fully retains the right and may enforce it in an appropriate legal action.") *with In re Clearwater Nat. Res., LP*, 421 B.R. 392, 400–01 (Bankr. E.D. Ky. 2009) ("In the within matter, the [contract] is an asset of the estate, and the *force majeure*

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[28] *See In re DiPietro*, No. 17-CV-9423 (KMK), 2019 WL 457601, at *4 (S.D.N.Y. Feb. 5, 2019) (affirming the bankruptcy court's decision that the creditor's action of restraint of debtor's debit card and access to online account violated section 362(a)(3) and quoting with approval the bankruptcy court's statements that "'[t]he world has changed dramatically since' 1988, as online banking and debit card access 'have become primary over the course of the last 29 years.... The world is no longer amenable to waiting for payments while people go to the branch for money. It is no longer 1988.'"). Although *DiPietro* was decided before the Supreme Court's decision in *Fulton*, the court's analysis appears consistent with the Supreme Court's focus on affirmative action by the creditor to exercise control. As the court explained,

> The record clearly shows that Hudson Valley took actions to "exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Those actions — restraining DiPietro's online account privileges and debit card access — did in fact exercise control, as DiPietro was prevented from remotely accessing his account and was thus forced to repeatedly call Hudson Valley and visit its branches in person to remedy the problem.

DiPietro, 2019 WL 457601, at *5. The Court also acknowledges that some courts have held that a lender's termination of a debtor's online access to bank accounts does not violate the automatic stay of section 362(a). *See, e.g.*, *In re Spearman*, No. 16-30772, 2017 WL 943918, at *5 (Bankr. W.D. Ky. Mar. 9, 2017) (collecting cases). Most of these cases focus on whether such termination is an attempt to collect a debt and do not address whether the right at issue is property of the estate. The Court's determination herein is based on the particular facts of, and the law applicable to, this matter.

declaration constitutes an exercise of control over the contract so as to deprive the Plaintiff of its use and value.").[29]

The Court finds the facts of this matter akin to a contract termination, which did in fact remove the value of the contract from the bankruptcy estate. The testimony of both witnesses demonstrates the limited scope of the agreement at issue. Although related to the Note, the Online Access Agreement is an agreement between the Servicer and the Debtor. The Servicer expressly offered the use of its "sole and exclusive property" to the Debtor under that agreement, which the Debtor accepted by setting up her online account.[30] Based on the record, including the relevant testimony and contractual language, the Online Access Agreement is a stand-alone agreement that could be agreed upon, performed, and enforced separate from the Debtor's other agreements. The parties' testimony further demonstrates that the Servicer's restriction of the Debtor's access to the online portal prevented the Debtor from being able to use the portal and removed the value of the agreement itself from the estate.[31]

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[29] For a further discussion of "mere breaches of contract" that do not violate the stay and contract actions that do, see *In re Benz*, 368 B.R. 861, 865 (B.A.P. 9th Cir. 2007) ("'In addition, the holding of *Computer Communications* is clear: unilateral termination of a contract by a creditor requires relief from the automatic stay. The Court declines to expand the holding of *Computer Communications* to breaches of contract not tantamount to a termination.'") (citations omitted).

[30] *See, e.g.*, ECF 89-2, at 2, 21–22; Tr. Aug. Hrg. 21–22, 28–29, 40–41, 81–82.

[31] The primary, if not only, subject matter covered by the Online Access Agreement is the Debtor's use of the Servicer's property for purposes of making payments through the online portal. Both parties have rights and obligations under the agreement, and the agreement contains its own default and enforcement provisions. ECF 89-2, at 2, 17–21 (page numbers are to Exhibit page and not agreement page); *see also Block v. Seneca Mortg. Servicing*, 221 F. Supp. 3d 559, 572 (D.N.J. 2016) (explaining the broad definition of adequate consideration under New Jersey law); *Ford v. Genesis Fin. Sols., Inc.*, No. CV DLB-23-2156, 2024 WL 1340356, at *5 (D. Md. Mar. 28, 2024), *appeal docketed*, No. 24-1341 (4th Cir. Apr. 19, 2024) (explaining contract formation and adequate consideration under Maryland law). Contrary to the Servicer's position in its post-hearing brief, the Online Access Agreement is a contract between it and the Debtor. Focusing on the substance of the Online Access Agreement, all operative provisions speak to rights and obligations of the Servicer and the Debtor. Although the preamble states that the lender is offering the service, the language of the agreement itself belies that statement. The Online Access Agreement provides, among other things, how the Debtor can "accept" the agreement, how the Servicer will provide notices and disclosures to the Debtor under the agreement, and that limit the Servicer's liability to the Debtor under the agreement. *Id*. at 2, 11–15. It also is arguably governed by state law different from that governing the Note, and specifically states that the Debtor's loans are "separate agreements." *Id*. at 2, 4. The Online Access Agreement further grants the Servicer extensive rights to use the Debtor's information and provides that any information transmitted to the Servicer through the online portal (including emails and chats) "shall be deemed and remain property of [the Servicer]," and the Servicer "will be free

The Court acknowledges that "mere breaches of contract" generally do not violate the automatic stay of section 362(a). The facts before the Court demonstrate more than a mere breach.[32] The Servicer's decision to deny the Debtor access to her online account effectively terminated the operative purpose of the Online Access Agreement; it was "tantamount to a termination."[33] Moreover, the Servicer cannot rely on its ability to terminate the agreement at will. Courts routinely hold that counterparties need relief from the automatic stay before terminating an agreement based on an at-will or similar termination provision. *See, e.g.*, *In re Ernie Haire Ford, Inc.*, 403 B.R. 750, 760 (Bankr. M.D. Fla. 2009) ("The Auto Finance Companies' attempted cancellation of these contracts through the deactivation of the Ernie Haire Ford accounts is impermissible and invalid for another reason. Ernie Haire Ford's rights under these executory contracts are property of the bankruptcy estate, and, therefore, exercising a terminable-at-will provision is not permitted without relief from stay.").[34]

Considering the record in its entirety and based on the Servicer's affirmative action that removed the value of the Online Access Agreement from the Debtor and the estate, the Court determines that the Servicer violated the automatic stay of section 362(a)(3) of the Code.[35]

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to use, for any purpose, any ideas, concepts, know-how, or techniques provided by [the Debtor] to [the Servicer] through this Loan Portal." *Id*. at 15–16.

[32] The parties did not raise any breach of contract or enforceability issues with respect to the parties' agreement and thus the Court does not address any such issues herein.

[33] *See Benz*, 368 B.R. at 865 (noting different treatment accorded mere breaches versus actions tantamount to termination).

[34] *See also In re Nat'l Hydro-Vac Indus. Servs., L.L.C.*, 262 B.R. 781, 786–88 (Bankr. E.D. Ark. 2001) (same; collecting cases).

[35] *See In re Computer Commc'ns, Inc.*, 824 F.2d 725, 731 (9th Cir. 1987) ("The automatic stay of § 362 barred Codex from unilaterally terminating the Agreement. Even if Codex had some reason for terminating the Agreement as a matter of contract law, it violated bankruptcy law by failing to obtain relief from the automatic stay."); *see also In re Ernie Haire Ford, Inc.*, 403 B.R. 750, 760 (Bankr. M.D. Fla. 2009); *In re Clearwater Nat. Res., LP*, 421 B.R. 392, 400–01 (Bankr. E.D. Ky. 2009).

4. <u>Application of the Code to the Facts of this Matter</u>

The Court finds itself confronted with a difficult situation: conduct by a party that violates the automatic stay but that does not, on the record, cause demonstrated or discernable monetary damage to the Debtor.

The primary (but not exclusive) remedy for an individual debtor subjected to a stay violation is found in section 362(k) of the Code. That section provides that "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." 11 U.S.C. § 362(k)(1). First, the Court observes that the Debtor did not specifically seek monetary damages under section 362(k); she requested only injunctive relief.[36] Second, the Court cannot disregard evidence that the Debtor had other means to submit her mortgage payment and did so. The Court understands that the Debtor would like to make her payments through the online portal, and the Court accepts her testimony that such access would make it easier for her to comply with her payment obligations. The Debtor did not, however, establish that she was foreclosed from making her monthly mortgage payments, including through an ACH (Automated Clearing House) or other electronic transfer from her primary bank account to the Servicer. In fact, the record shows that the Debtor is making her payments.

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[36] In general, a debtor must show a willful violation of the stay that caused damages. A creditor's violation of the stay is willful if the creditor knew about the Plaintiff's bankruptcy case and intended the action taken against the debtor, the debtor's property, or property of the estate. *See, e.g.*, *James-Jenkins v. Sutton (In re James-Jenkins)*, No. 18-80074-HB, 2019 WL 354700, at *4 (Bankr. D.S.C. Jan. 24, 2019) ("A willful violation of the automatic stay occurs when a 'creditor knows of the pending bankruptcy petition and intentionally attempts to continue collection procedures in spite of it.'") (citations omitted); *In re Ojiegbe*, 512 B.R. 513, 520 (Bankr. D. Md. 2014) ("The Fourth Circuit Court of Appeals has stated that in the context of § 362(k)(1), willfulness does not require the specific intent to violate the automatic stay, only that the creditor knew of the stay and intentionally committed an act in violation of the stay.") (citations omitted). In calculating a damages award for a violation of the automatic stay, courts "traditionally view 'actual damages' as a broad umbrella term, including, but not limited to, lost time damages, out-of-pocket expenses, and emotional damages. *See In re Green Tree Servicing, LLC v. Taylor,* 369 B.R. 282, 288 (S.D.W. Va.2007) (emotional damages); *In re Hafer,* 2013 WL 5925167 at *7 (Bankr. E.D. Va. Nov. 5, 2013) (lost time damages); and *In re Ellett,* 2014 WL 4926006 at *4 (Bankr. S.D. Ind. Sept 30, 2014) (out-of-pocket damages)." *In re Ojiegbe*, 539 B.R. 474, 479 (Bankr. D. Md. 2015). The record before the Court is silent on these issues.

The Court does not reach this conclusion lightly; it acknowledges the practical hurdle for this Debtor created by the Servicer's action. The Court cannot, however, make a finding of monetary damages under section 362(k) on the record before it.[37] In so holding, the Court does not foreclose the possibility that in a matter with a different factual record, an award of monetary damages under section 362(k), if requested, might be warranted.

Similarly, the fact that the Debtor failed to establish monetary damages under section 362(k) of the Code does not excuse the Servicer's violation of the stay. In this matter, the Servicer's action that changed the status quo and violated the automatic stay is void ab initio.[38] Practically speaking, that result does little to provide relief to the Debtor or to address the ongoing nature of the Servicer's violation. The primary way to abate this violation is for the Servicer to restore the status quo and the Debtor's rights under the Online Access Agreement.[39] The Court cannot on the record before it, however, determine whether any such remedy is appropriate or warranted. As a result, and given the import of any such decision, the Court will provide the parties an opportunity to brief and be heard on those precise issues.[40]

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[37] *See In re DiPietro*, No. 17-CV-9423 (KMK), 2019 WL 457601, at *4 (S.D.N.Y. Feb. 5, 2019) (affirming the bankruptcy court's decision finding a violation of section 362(a)(3) but reversing the bankruptcy court's damages award based on an insufficient factual record).

[38] Courts in the Fourth Circuit have consistently held that violations of the automatic stay are void. *See, e.g.*, *In re Parast*, 612 B.R. 710, 716 (Bankr. D.S.C. 2020) ("Any action in violation of the stay is void *ab initio*."); *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990) ("This court will adhere to the general rule that violations of the stay are void."); *Ellison v. C.I.R.*, 385 B.R. 158, 164 (S.D. W.Va. 2008) ("In the view of this Court, the clear weight of authority favors treating violations of the automatic stay as void as a matter of law."); *In re Weatherford*, 413 B.R. 273 (Bankr. D.S.C. 2009) (collecting cases).

[39] The automatic stay is a statutory injunction that prohibits certain conduct as of the petition date. A court generally may enforce the automatic stay as it would an order of the Court. *See In re Miller*, 22 B.R. 479, 481 (D. Md. 1982) ("The automatic stay provisions are treated as specific and definite orders of the Court. In re Mealey, 16 B.R. 800, 802 (Bkrtcy. E.D. Pa. 1982); In re Norton, 15 B.R. 623 (Bkrtcy.E.D.Pa.1981). Therefore, a wilful violation of the automatic stay is contemptuous."); *see also In re Kwok*, No. 22-50073 (JAM), 2024 WL 4100371, at *11 (Bankr. D. Conn. June 14, 2024) (permanently enjoining asset dissipation that would violate stay); *In re MP PPH LLC*, 660 B.R. 410, 430 (Bankr. D.D.C. 2024) (explaining enforcement of stay and use of an injunction as an alternative to the stay). In addition, as noted above, section 105 of the Code allows the Court to act in furtherance of the provisions of the Code, including the automatic stay of section 362(a).

[40] The Court acknowledges that the parties provided some evidence concerning the injunctive relief requested by the Motion, but that evidence and the parties' related arguments are necessarily incomplete. Neither party contemplated the appropriate relief, if any, in the context of an ongoing stay violation. The Court finds it only fair that the Servicer

As suggested at the beginning of this Opinion, the Court finds the Servicer's conduct troubling and inconsistent with the general policies underlying the Code and consumer protection laws.[41] The Court is, however, mindful of the competing interests at stake, the language of the Code, and the factual record before it. It can and will address only the facts and issues presented to it regarding this Debtor in this case. This decision cannot address the underlying policy issue, namely whether and when borrowers in financial distress should lose access to online accounts and portals that they have become accustomed to using. To the extent that electronic payment methods (such as the online portal) facilitate greater access to credit or success in bankruptcy,[42] the system might benefit from a *per se* rule that mandates such access. But any such change must be implemented by Congress or an appropriate regulatory agency.

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have an opportunity to remedy this violation (for example by reinstating the status quo or otherwise providing similar access to the Debtor to facilitate electronic payments), or to present its position under case law governing ongoing stay violations and the Court's inherent powers to enforce a statutory injunction. *See, e.g.*, *In re Fina*, 550 Fed. Appx. 150, 154 (4th Cir. 2014) ("Section 105 authorizes a bankruptcy court to hold a party in civil contempt for violating an order of the court ...."); *see also U.S. v. Rylander*, 460 U.S. 752, 757 (1983) ("In a civil contempt proceeding such as this, of course, a defendant may assert a present inability to comply with the order in question.") (citations omitted); *South Carolina v. U.S.*, 907 F.3d 742, 765 (4th Cir. 2018) (citing *Rylander*, and noting that compliance must be actually impossible, "rather than merely difficult, inconvenient, or potentially impossible[.]"); *In re Chief Exec. Officers Clubs, Inc.*, 359 B.R. 527, 536 (Bankr. S.D.N.Y. 2007) ("The burden is on the disobedient party to demonstrate circumstances beyond its control, and that it took all reasonable steps, in good faith, to comply with the underlying order.").

[41] *See, e.g.*, *In re Martinez*, No. CIV.A. 1:06-CV-1130, 2007 WL 295406, at *3 (M.D. Pa. Jan. 29, 2007) ("Chapter 13 'is designed to encourage and make possible the payment, rather than the discharge of debts' and to 'enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period' free of harassment and other direct and indirect pressures.") (citation omitted); *In re Bellamy*, 132 B.R. 810, 813 (D. Conn. 1991), *aff'd,* 962 F.2d 176 (2d Cir. 1992) ("The Congressional intent of Chapter 13 was to enable an individual, under court supervision, to reorganize and repay his debts over a certain period of time under a structured rehabilitation plan."); ¶ 154-490 CFPB Substantially Strengthens Mortgage Borrower Consumer Protections (12 CFR 1024 and 1026).—part 1 of 3, Fed. Bank. L. Rep. P 154-490 ("Current comment 36(c)(1)(iii)-1 explains that a servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon. Current comment 36(c)(1)(iii)-2 also explains that it should not be difficult for most consumers to make conforming payments."); *see also Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007).

[42] The benefits of "success" in bankruptcy are not limited to debtors—an online payment portal could facilitate maintenance of payments, minimize payment defaults, and reduce costs for lenders/servicers as well as debtors.

III. Conclusion

The Debtor had a right to use the online portal prior to the petition date under the Online Access Agreement. That right to use and the agreement itself held value for the Debtor and the estate. The Debtor's estate included this agreement, which was protected by the automatic stay under section 362(a)(3) of the Code. The Debtor did not, however, establish that the Servicer's action caused harm entitling her to monetary damages under section 362(k) of the Code; indeed, she did not request any such relief. Moreover, the Servicer's action in violation of the stay is void, and any relief to address that fact and the ongoing nature of the stay violation must await further hearing in this matter. The Court will enter a separate Order consistent with this Memorandum Opinion.

cc: Debtor
Debtor's Counsel
Servicer's Counsel
Chapter 13 Trustee
U.S. Trustee

END OF MEMORANDUM OPINION

Miller v. Wylie (In re Wylie), 24-1321 (6th Cir. Oct. 23, 2024)

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0240p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

IN RE: JASON ROBERT WYLIE; LEAH S. WYLIE,
Debtors.

TIMOTHY J. MILLER, Trustee,
Plaintiff-Appellant,

v.

JASON ROBERT WYLIE; LEAH S. WYLIE,
Defendants-Appellees.

No. 24-1321

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 23-cv-10952—Mark A. Goldsmith, District Judge.

United States Bankruptcy Court for the Eastern District of Michigan at Detroit.
Nos. 20-bk-49216; 21-ap-04012—Thomas J. Tucker, Bankruptcy Judge.

Decided and Filed: October 23, 2024

Before: SILER, GRIFFIN, and MATHIS, Circuit Judges.

COUNSEL

ON BRIEF: Jeffrey H. Bigelman, OSIPOV BIGELMAN, P.C., Southfield, Michigan, for Appellant. Thomas R. Morris, MORRIS & MORRIS ATTORNEYS, P.L.L.C., Dexter, Michigan, for Appellees.

OPINION

GRIFFIN, Circuit Judge.

In this bankruptcy matter, the trustee sought to deny debtors Jason and Leah Wylie a discharge under 11 U.S.C. § 727, alleging that they transferred anticipated tax refunds from the bankruptcy estate by applying overpayments to future tax liabilities instead of receiving refunds. Following a bench trial, the bankruptcy court found that the Wylies transferred their anticipated 2019 tax refunds "with intent to hinder" the trustee and thus denied a discharge. The district court reversed, holding that the bankruptcy court's intent finding was clearly erroneous. We agree with the district court and remand for the bankruptcy court to enter a discharge.

I.

Financial troubles befell the Wylies in 2018, when Mr. Wylie's health problems forced him to stop working. As the couple contemplated filing for bankruptcy, they also delayed filing their 2018 and 2019 tax returns.

By March 2020, the Wylies' accountant had prepared their 2018 federal and state income tax returns, which showed substantial federal and state tax overpayments. Because of uncertainty about their 2019 tax liabilities, the Wylies "elected to apply their 2018 income tax overpayments to their 2019 tax liabilities, rather than receiving tax refunds." Making this election required no special paperwork—it simply involved writing the overpayment figure on the credit-forward line, instead of on the refund line, of the federal and state tax-return forms. The Wylies, through their accountant, filed their 2018 returns with that election.

Next, the accountant prepared the Wylies' 2019 returns, which showed similar overpayments. And just like the 2018 returns, the draft 2019 returns reflected a decision to apply the overpayments to the following year's tax liabilities. Mr. Wylie reviewed and approved those draft returns, authorizing the accountant to file them.

The next day, the Wylies filed their Chapter 7 petition for bankruptcy. And a few weeks after that, the Wylies' accountant filed the 2019 tax returns.

The bankruptcy trustee, plaintiff Timothy Miller, filed an adversary proceeding to deny the Wylies a discharge for several reasons under 11 U.S.C. § 727, and the parties ultimately went to trial on the first three counts of the trustee's First Amended Complaint. Count I alleged that the Wylies, by electing to apply their 2018 tax overpayments to their 2019 tax liabilities, transferred or concealed property, within one year before filing their bankruptcy petition, "with intent to hinder, delay, or defraud a creditor," under § 727(a)(2)(A). Count II alleged that the Wylies, by electing to apply their 2019 tax overpayments to their 2020 tax liabilities, transferred or concealed property after filing their bankruptcy petition, "with intent to hinder, delay, or defraud" the trustee, under § 727(a)(2)(B). And Count III alleged that the Wylies, by stating in a bankruptcy filing that the value of tax refunds owed to them was "Unknown," "knowingly and fraudulently . . . made a false oath or account," under § 727(a)(4)(A).

After a bench trial, the bankruptcy court dismissed Counts I and III but found in the trustee's favor on Count II, thus denying the Wylies a discharge under § 727(a)(2)(B). *Miller v. Wylie (In re Wylie)*, 649 B.R. 852, 856 (Bankr. E.D. Mich. 2023). The Wylies appealed that decision.[1] The district court, sitting as an intermediate court of appellate review, reversed the bankruptcy court's decision on Count II and held that the Wylies were entitled to a discharge. *Wylie v. Miller*, 657 B.R. 602, 603 (E.D. Mich. 2024). The trustee now appeals the district court's decision.

II.

This appeal concerns the Bankruptcy Code's prohibition of discharge on a finding that a debtor acted "with intent to hinder" the trustee. 11 U.S.C. § 727(a)(2). That section, in relevant part, provides:

> (a) The court shall grant the debtor a discharge, unless . . .
>
> > (2) the debtor, *with intent to hinder, delay, or defraud* a creditor or an officer of the estate charged with custody of property under this

[1]The trustee did not cross-appeal the dismissals of the other counts.

> title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; or
> >
> > (B) property of the estate, after the date of the filing of the petition.

Id. (emphasis added). Courts construe § 727 "liberally in favor of the debtor" because a total bar to discharge is an "extreme penalty" for an individual debtor. *See Wise v. Wise (In re Wise)*, 590 B.R. 401, 433 (Bankr. E.D. Mich. 2018) (citations omitted); *see also* 6 Collier on Bankruptcy ¶ 727.01[4] (Matthew Bender & Co. ed., 16th ed. 2024). Accordingly, "[t]he reasons for denial of a discharge must be real and substantial rather than technical and conjectural." 6 Collier on Bankruptcy ¶ 727.01[4] (citing *Com. Bank & Trust Co. v. Burgess (In re Burgess)*, 955 F.2d 134 (1st Cir. 1992)).

The sole issue on appeal concerns the bankruptcy court's finding that the Wylies transferred their anticipated 2019 tax refund "with intent to hinder" the trustee.[2] On appeal from the district court, we focus solely on the bankruptcy court's decision, not the district court's intermediate one. *Town Ctr. Flats, LLC v. ECP Com. II LLC (In re Town Ctr. Flats, LLC)*, 855 F.3d 721, 724 (6th Cir. 2017). We review the bankruptcy court's legal conclusions de novo, *id.*, and its factual findings—such as a finding of intent—for clear error, *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994). "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Mathews (In re Mathews)*, 209 B.R. 218, 219 (B.A.P. 6th Cir. 1997) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). We are left with such a definite and firm conviction here.

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[2]The parties do not dispute other relevant findings by the bankruptcy court, including that the Wylies' rights to receive federal and state tax refunds for 2018 and 2019 were the Wylies' "property," and that, by electing to apply their refunds to future tax liabilities, the Wylies "transferred" or "concealed" that property. 11 U.S.C. § 727(a)(2).

A.

It is undisputed that § 727(a)(2) requires culpable, specific intent to trigger the denial of a discharge. Under that section, the party objecting to a debtor's discharge must prove, by a preponderance of the evidence, the debtor's "actual intent" to hinder, delay, or defraud. 6 Collier on Bankruptcy ¶ 727.02[3][a] ("Absent a specific intent to [hinder the trustee], a discharge should not be denied." (collecting cases)); *see also In re Adams*, 31 F.3d at 394. Although our court has not had occasion to expound on the requirement of specific intent in the § 727(a)(2) context, it is a familiar concept in bankruptcy.

The Supreme Court's decision in *Kawaauhau v. Geiger* is instructive. 523 U.S. 57 (1998). There, the Court analyzed a similar intent-based section of the Bankruptcy Code, § 523(a)(6), which prohibits discharge of certain debts resulting from "willful and malicious injury by the debtor." *Id.* at 60–61. At issue was whether that statutory language "cover[s] acts, done intentionally, that cause injury . . . or only acts done with the *actual intent* to cause injury." *Id.* at 61 (emphasis added) (footnote omitted). The Court adopted the latter interpretation; given § 523(a)(6)'s specific-intent requirement, it will render a debt nondischargeable only if there was "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* In other words, "actual intent" requires that the debtor intend "the *consequences* of an act, not simply the act itself." *Id.* at 61–62 (internal quotation marks omitted).

Because both § 523(a) and § 727 provide ways to restrict a debtor's discharge of debts, we have previously relied on the Supreme Court's guidance on § 523(a) to interpret § 727. *See In re Adams*, 31 F.3d at 394 (applying "the Supreme Court's reasoning" on the burden of proof for § 523(a) to § 727). And *Kawaauhau*'s explanation of § 523(a)'s actual-intent requirement maps on to § 727's as well. After all, it would be incongruous if § 727, which carries the "extreme penalty" of a complete denial of discharge of any debts, *In re Wise*, 590 B.R. at 433, required a lesser showing of intent than that required by § 523(a), which prohibits discharge of only certain ones, *see Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993) ("Completely denying a debtor his discharge [under § 727], as opposed to . . . declining to discharge an individual debt pursuant to § 523, is an extreme step and should not be taken lightly.").

Wise, a case that extensively analyzed the intent requirement in § 727(a)(2)(A), aptly articulated the intent requirement this way: "intent to hinder" a creditor means "to act improperly to make it more difficult for a creditor to collect a debt." 590 B.R. at 441 (internal quotation marks omitted). That interpretation appropriately focuses on whether the debtor specifically intended the *consequence* the statute is concerned with: hindering a creditor, *i.e.*, making it more difficult for a creditor to collect a debt.

Although *Wise*'s facts led it to focus on slightly different aspects of § 727(a)(2) than those at issue here, the statute's language renders any differences inconsequential, so we can apply a modified version of *Wise*'s interpretation. For instance, although *Wise* was concerned with pre-petition action under § 727(a)(2)(A), its interpretation logically applies to post-petition conduct under § 727(a)(2)(B) because those two subsections use the same intent language. *See* 11 U.S.C. § 727(a)(2). And although *Wise* addressed action taken against a creditor, we can extend its interpretation to actions taken against "an officer of the estate" (*i.e.*, a bankruptcy trustee). *See id.* After all, one of a bankruptcy trustee's primary objectives is to protect creditors. *See id.* § 704(a)(1) ("The trustee shall . . . collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest.").

In sum, to support a factual finding that the debtor acted "with intent to hinder" a trustee under § 727(a)(2)(B), there must be evidence that the debtor acted with the specific intent to make it more difficult for the trustee to facilitate creditors' collection of debts from the estate.

B.

With that understanding, we now review the bankruptcy court's intent findings here. Such findings involve weighing the debtors' "credibility and demeanor," so ordinarily we would defer to the bankruptcy court's assessment. *See In re Burgess*, 955 F.2d at 137 (quoting *Williamson v. Fireman's Fund Ins.*, 828 F.2d 249, 252 (4th Cir. 1987)). But here, the bankruptcy court's findings on credibility and intent for two similar counts under § 727(a)(2) are irreconcilable.

Start with Count I, which the bankruptcy court dismissed because the trustee "failed to prove" intent. Recall that Count I alleged, under § 727(a)(2)(A), that the Wylies transferred their 2018 tax overpayments "with intent to hinder, delay, or defraud a creditor . . . within one year before the date of the filing of the petition."

The bankruptcy court dismissed that count for lack of specific intent. Based on the testimonies of the Wylies and their accountant, all of which the bankruptcy court found "credible," the bankruptcy court found that the Wylies' intent "was not to hinder, delay, or defraud creditors." Rather, the bankruptcy court concluded that the Wylies' "sole" and "only intent in making their 2018 tax refund elections was to try to make sure that their taxing authority creditors"—the IRS and the state of Michigan—"would be paid in full for the 2019 taxes." True, that preference reflected the Wylies' intent to pay certain creditors (the taxing authorities) over others. But as the bankruptcy court correctly observed, "as a matter of law, a debtor's mere intent to prefer one creditor over other creditors cannot be deemed an intent 'to hinder, delay, or defraud' a creditor or creditors, within the meaning of § 727(a)(2)(A)." *See* 6 Collier on Bankruptcy ¶ 727.02[3][c] ("The intent to prefer creditors is not equivalent to the intent to hinder, delay or defraud creditors." (collecting cases)).

Now, consider Count II, on which the bankruptcy court based the denial of discharge. Recall that Count II alleged, under § 727(a)(2)(B), that the Wylies transferred their 2019 income tax overpayments "with intent to hinder, delay, or defraud" the trustee "after the date of the filing of the petition."

The bankruptcy court found that the Wylies "*did intend* to hinder the Trustee in making their 2019 Tax Refund Transfers," yet it identified no meaningful factual differences between the 2018 and 2019 tax elections to support this different finding. Inexplicably, it asserted that "the testimony of the Debtors themselves" supported its conclusion, even though that testimony points in the opposite direction. In the bankruptcy court's words:

> Jason Wylie and Leah Wylie both admitted in their trial testimony that the purpose of making their 2019 Tax Refund Transfers *was the same kind of purpose they had when they made their 2018 tax refund elections — to try to make sure that their 2020 taxes would be paid*. As the Court has discussed in Part III.C.1.b of this Opinion, this purpose is essentially a purpose to prefer the Debtors' two

> taxing authority creditors (the Internal Revenue Service and the State of Michigan) over their other creditors. That is, the Debtors wanted to [e]nsure that their taxing authority creditors were paid in full, for 2020 taxes, in preference to their other creditors, many or most of which could not be paid in full.

(Emphasis Added). Thus, according to the bankruptcy court's findings, the Wylies' "sole" and "only" intent when they made their 2019 tax refund elections "was the same kind of purpose they had when they made their 2018 tax refund elections — to try to make sure that their 2020 taxes would be paid." Given that finding, the Wylies did not make either of those elections "with intent to hinder, delay, or defraud" the trustee. 11 U.S.C. § 727(a)(2).

Despite finding that the "same kind of purpose" motivated both elections, the bankruptcy court inferred specific intent because making a "post-petition" transfer of property "with this purpose is wholly inconsistent with the duties of the Chapter 7 Trustee." The bankruptcy court reasoned that, given "the priority and distribution scheme of the Bankruptcy Code" and "the Trustee's duty under 11 U.S.C. § 704 to follow that scheme in administering the assets of the bankruptcy estate," the trustee "would not and could not give the Debtors' intended preferential treatment to these taxing authority creditors for 2020 taxes." Thus, the bankruptcy court concluded, the Wylies' intent to ensure their 2020 taxes were paid "was at war with" the trustee's duties, so the Wylies "had, at a minimum, an intent to *hinder* the Trustee."

But in drawing this inference, the bankruptcy court misconstrued the specific-intent requirement. It is not enough to show that the Wylies acted intending one thing (to ensure their taxes were paid), but that their action likely or even certainly would result in another consequence (hindering the trustee).[3] Section 727(a)(2) instead requires that the evidence show that the Wylies acted specifically intending to hinder the trustee. *Cf. Geiger,* 523 U.S. 61–62; *In re Wise*, 590 B.R. at 441. By the bankruptcy court's own reasoning and findings, that evidence was lacking.

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[3]Even so, the bankruptcy court's findings show that hinderance was not a certain result of the Wylies' action. The Wylies ultimately received their tax refunds, after filing their 2020 tax returns, and then "promptly paid them over to the Trustee." On that evidence, the bankruptcy court found that "although the Trustee *potentially might have been* hindered and delayed by the Debtors' 2019 Tax Refund Transfers, in reality the Trustee was not *actually* hindered or delayed."

And that lack of evidence was particularly clear given the bankruptcy court's assumption that the Wylies "were not intimately familiar with" the trustee's duties or the Bankruptcy Code's scheme of "distributions and priorities." So there is no basis to conclude that the Wylies even knew, let alone intended, that by trying to make sure their 2020 taxes were paid they would be hindering the trustee.

To be sure, the bankruptcy court *could have* based its decision on other evidence and arguments the trustee made to support an intent finding. For instance, "[a] continuing pattern of wrongful behavior" can support a finding of actual intent to hinder, 6 Collier on Bankruptcy ¶ 727.02[3][b], and the trustee presented evidence to that effect—including evidence of allegedly false statements in the Wylies' bankruptcy filings and allegedly fraudulent transfers of real estate from the Wylies to their relatives.

But the bankruptcy court explicitly rejected that evidence, finding it neither "persuasive [n]or very relevant in this particular case, which concerns only tax refunds." In perhaps the starkest example, the bankruptcy court considered and rejected the trustee's purported "smoking gun" evidence of intent—an email from the Wylies' accountant to Mr. Wylie about the draft 2018 tax returns. In that email, the accountant explained that he credited the overpayments toward future tax liabilities because, as the Wylies previously told the accountant, they "didn't want it refunded because creditors might go after it." As the bankruptcy court noted, that email, "[a]t first blush," seems to show the Wylies' intent to hinder creditors. But in the bankruptcy court's view, the email "merely shows the Debtors' intent to give preferential payment treatment to their taxing authority creditors," not intent to hinder.

In sum, the bankruptcy court's contradictory findings leave us "with the definite and firm conviction that a mistake has been committed." *In re Mathews*, 209 B.R. at 219 (quoting *Anderson*, 470 U.S. at 573).

III.

For these reasons, we affirm the district court and remand to the bankruptcy court for an entry of discharge.