Dated: December 13, 2016
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re		
Kenny L. Gibbons, and	)	**Case No. 16-11243**
April N. Gibbons,	)	
Debtors.	)	**Chapter 7**
KENNY L. GIBBONS and	)	
APRIL N. GIBBONS,	)	
Plaintiffs,	)	
v.	)	**Adv. Proc. No. 16-5113**
FIRST CITIZENS NATIONAL BANK,	)	
Defendant.	)	

MEMORANDUM OPINION RE COMPLAINT TO COMPEL TURNOVER OF CERTAIN PROPERTY FROM THE DEFENDANT FIRST CITIZENS NATIONAL BANK

At issue in this proceeding is the Debtors' Complaint to Compel Turnover of Certain Property from the Defendant First Citizens National Bank. The Debtors allege that, pursuant to 11 U.S.C. § 362(k)(1) and Federal Rule of Bankruptcy Procedure 9014, they are entitled to turnover of funds that the defendant withdrew from the Debtors' bank account post-petition

by automatic bank draft. The Defendant asserts that these automatic withdrawals did not violate the automatic stay, but were instead voluntary payments by the Debtors and are, thus, not subject to turnover. The Court conducted a trial in this proceeding on December 10, 2016.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(E). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

I. FACTS

The Debtors in this case, Kenny L. Gibbons and April N. Gibbons ("Debtors"), filed their chapter 7 bankruptcy petition on June 21, 2016. The Debtors listed First Citizens National Bank ("First Citizens") on Schedule D as a secured creditor with two claims: (1) a $7,422.04 claim secured by a "shed"; and (2) a $77,212.50 claim secured by a 2012 Kia Optima, 2007 Chevy Silverado, and 21' Beechcomber boat. On their Statement of Intention, the Debtors indicated that they intended to retain all of First Citizens' collateral and enter into reaffirmation agreements with the bank for both claims. The Debtors did not indicate that their intent to reaffirm the debts was only with respect to the secured portion of the claims; however, at the trial in this proceeding, Kenny Gibbons testified that his only intention with respect to the claim secured by the vehicles and the boat was to reaffirm the secured portion of the debt, which was approximately $38,550.00, and discharge the unsecured portion.

On August 12, 2014, the Debtors authorized First Citizens to withdraw payments for both debts from the Debtors' checking account by automatic transfer of funds. The monthly payment on the debt secured by the shed was $203.55. The payment on the debt secured by the two vehicles and the boat was $750.00 on the 1st and the 15th of every month. The

"Automatic Transfer Authorization" form contains the following clause immediately above the signature line:

> If no termination date is specified above, this authorization will remain in effect until terminated by any one of us. You may terminate this authorization by giving us 15 days written notice at the address stated below. Notice to any of us is notice to all of us.

(Tr. Ex. 1).

First Citizens received notice of the Debtors' chapter 7 bankruptcy shortly after the case was filed. Representatives from First Citizens reviewed the Debtors' petition and schedules and saw that the Debtors had indicated their intent to reaffirm both debts with the bank. In accordance with the bank's established procedures, First Citizens executed reaffirmation agreements for the full amount due on both debts and sent the agreements to the Debtors' attorney on June 23, 2016. First Citizens included a cover letter with the agreements that indicated "[b]oth loans are current at this time and remain on auto draft." (Tr. Ex. 2). First Citizens asked the Debtors' attorney to return the executed reaffirmation agreements to the bank by August 5, 2016.

Kenny Gibbons testified at the trial that he spoke with his loan officer at First Citizens after the chapter 7 case was filed. Gibbons stated that he told the loan officer that he and his wife were going to reaffirm both of First Citizens' debts.

Following the June 23, 2016 letter, First Citizens automatically drafted the payments for both debts out of the Debtors' checking account. The bank debited the loan payments on the following dates and in the following amounts pursuant to the pre-petition Automatic Transfer Authorization:

July 1, 2016	$750.00 (payment for debt secured by vehicles and boat)
July 15, 2016	$750.00 (payment for debt secured by vehicles and boat)
August 1, 2016	$750.00 (payment for debt secured by vehicles and boat)
August 15, 2016	$750.00 (payment for debt secured by vehicles and boat)
August 16, 2016	$203.55 (payment for debt secured by shed)

After drafting the $203.55 from the Debtors' account on August 16, 2016, First Citizens learned that the Debtors were only interested in reaffirming the debt secured by the shed and that they had only intended on reaffirming the approximate secured portion of the debt secured by the vehicles and the boat. First Citizens contacted the Debtors' attorney and informed her that the bank had a strict policy of either reaffirming all of the debt or none of the debt. Thus, the Debtors' desires with respect to the reaffirmations were not possible.

First Citizens followed up the phone call with a letter to the Debtors' attorney on August 24, 2016.

> Per our telephone conversation regarding the Reaffirmation Agreements on the debts with the above [referenced debtors].
>
> We are returning the shed reaffirmation agreement that you mailed to us. Again, per [our] policy of . . . not entering into Partial Debt Reaffirmation.
>
> Since our conversation we have also stopped the auto debit from the debtors account and have refunded the most recent payment of August 15, 2016.

(Tr. Ex. 3). First Citizens refunded $750.00 to the Debtors' checking account on August 24, 2016.

Following receipt of this letter, the Debtors' attorney asked First Citizens to refund all of the debits the bank had automatically drafted out of the Debtors' account since the chapter 7 case was filed. The Debtors' attorney asserted that the automatic drafts violated the 11 U.S.C. § 362 automatic stay. First Citizens indicated that it views post-petition payments made while reaffirmation agreements are being negotiated as voluntary payments. Thus, with the exception of the $750.00 refunded on August 24, 2016, the Bank refused to refund the post-petition payments to the Debtors.

The Debtors maintained possession of all of First Citizens' collateral during the entire time the parties were in the process of deciding whether the debts would be reaffirmed. First Citizens' Senior Vice President Stan Avis testified that, pursuant to the terms of the Automatic Transfer Authorization, the Debtors could have asked the bank to stop the automatic withdrawals at any time. The Debtors never did this.

Following collapse of the reaffirmation process, the Debtors voluntarily surrendered all of the collateral to First Citizens. Most, if not all, of the collateral has now been sold.

II. ANALYSIS

Section 362(a)(6) of the Bankruptcy Code provides that

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—
>
> . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. § 362(a)(6). As the bankruptcy court recognized in *O'Neal v. Beneficial of Tennessee* (*In re O'Neal*), 165 B.R. 859, 862 (Bankr. M.D. Tenn. 1994),

> Given the broad language of Section 362(a)(6), i.e. stay of any act to collect, and given the fact that Congress itemized the only exceptions to the otherwise broad language, this Court concludes that the transaction by a creditor of post-petition money received pursuant to a pre-petition automatic withdrawal-loan repayment arrangement to pay a pre-petition debt owed to that creditor is a violation of the automatic stay ***unless*** there is clear evidence that, post-petition, the debtor actually demonstrated his or her willingness to voluntarily have post-petition earnings applied to a dischargeable pre-petition debt.

(emphasis added) (internal citations omitted). Section 524(f) of the Bankruptcy Code allows debtors to "voluntarily repay[ ] any debt." 11 U.S.C. § 524(f). If a debtor "makes some positive indication that [he] intends to voluntarily assume his pre-petition debts," then the automatic draft of loan payments post-petition will not violate 11 U.S.C. § 362(a)(6). *O'Neal*, 165 at 862. *See also In re Hellums,* 772 F.2d 379, 381 (7th Cir. 1985) (citing 11 U.S.C. § 524(f) in concluding that because "[p]ost-petition wages are not property of the estate of a Chapter 7 bankrupt" under 11 U.S.C. § 541(a)(6), "[d]ebtors who file under that chapter can dispose of their post-petition earnings as they choose, including voluntary repayment of debts otherwise dischargeable in bankruptcy.").

In the proceeding before the Court, the Debtors indicated their desire to reaffirm their two debts with First Citizens on their statement of intention. They maintained possession of the shed, the vehicles and the boat from the filing of the petition until it became clear that the parties would not be able to come to an agreement on reaffirming the debts. The Debtors knew that the automatic withdrawals were coming out of their checking account. First Citizens informed their attorney of this fact in the letter First Citizens sent to the Debtors' attorney with the proposed reaffirmation agreements two days after the Debtors filed their bankruptcy case. Kenny Gibbons testified that he spoke with his loan officer at First Citizens and told him that he and his wife intended to reaffirm both debts with the bank. Further, the Automatic Transfer Authorization form, which was executed almost two years before the filing of the instant case, provided that the Debtors could terminate the agreement at any time. Despite this provision, neither the Debtors nor their attorney asked First Citizens to stop the automatic drafts at any time in the proceedings. Once it became clear that the debts would not be reaffirmed, First Citizens stopped the automatic withdrawals and refunded the last payment that was drafted out of the account to the Debtors.

The Court finds that the Debtors' stated intention to reaffirm the debts with First Citizens on their Statement of Intent coupled with their efforts to negotiate the terms of the reaffirmation agreements constitute "positive indications" that the post-petition payments were being made voluntarily. The Debtors and their attorney were unquestionably aware that the payments on both notes were being made by automatic withdrawals from the Debtors' checking account with First Citizens. There was no assertion that the Debtors or their attorney ever asked First Citizens to stop the automatic drafts until such time as it became clear the debts would not be reaffirmed. Based on these facts, the Court concludes that First Citizens' automatic withdrawals of the payments between July 1, 2016 and August 16, 2016, did not violate 11 U.S.C. § 362(a)(6). Accordingly, the Debtors are not entitled to turnover of the funds.

IV. CONCLUSION

For the foregoing reasons, the Debtors are not entitled to a refund of the post-petition payments made via automatic bank draft by First Citizens. As such, their Complaint to

Compel Turnover of Certain Property from the Defendant First Citizens National Bank must be denied. The Court will enter an order in accordance herewith.

Mailing list
Barbara A. Deere, attorney for Debtors/Plaintiffs
Mark D. Johnston, attorney for Defendant
First Citizens National Bank
Debtors/Plaintiffs
Michael T. Tabor, Chapter 7 Trustee

Dated: December 13, 2016
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
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FIRST CITIZENS NATIONAL BANK,	)	
Defendant.	)	

ORDER DENYING COMPLAINT TO COMPEL TURNOVER OF CERTAIN PROPERTY FROM THE DEFENDANT FIRST CITIZENS NATIONAL BANK

For the reasons set forth in the Court's Memorandum Opinion entered in accordance herewith, the Plaintiffs' Complaint to Compel Turnover of Certain Property from the Defendant First Citizens National Bank is **DENIED.**

IT IS SO ORDERED.

Mailing list
Barbara A. Deere, attorney for Debtors/Plaintiffs
Mark D. Johnston, attorney for Defendant
First Citizens National Bank
Debtors/Plaintiffs
Michael T. Tabor, Chapter 7 Trustee